Court of Appeal File No: CA43367
Supreme Court File No. 149837
Vancouver Registry

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(PETITIONERS)

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

APPELLANT'S REPLY FACTUM

The Law Society Of British Columbia

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PART 1 – OVERVIEW

1. The Law Society has adopted no rules and made no decisions impacting the religious beliefs of its members or prospective members, their freedom to express those beliefs, or the ability to abide by codes of conduct guided by those beliefs.

2. Rather, the Law Society determined that TWU as an institution should not be approved, because the discriminatory rules of admission to the proposed law school would restrict equal access to the legal profession for LGBTQ people and women.

3. The membership of the Law Society believe strongly that it is contrary to the public interest in the administration of justice to allow a law school to discriminate against LGBTQ people and women in its admission policy.

4. This view was endorsed and adopted by the Benchers, by passing the Resolution.

5. The Law Society changed its earlier position on this matter, which in turn caused the Minister to change his position on the accreditation of the proposed law school. Without the Minister's accreditation, there will be no law school and hence no TWU law graduates seeking admission to the bar.

6. The issue in this appeal is whether, as TWU alleges, it is unconstitutional for a governmental actor – in this case, the Law Society, but it also applies to the Minister – to deny approval of its law school, solely because its discriminatory admission policy is motivated by religious beliefs.

7. In analyzing this issue, context is all-important. As the Supreme Court held in *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7, the "ultimate protection of any particular *Charter* right must be measured *in relation to other rights and with a view to the underlying context* in which the apparent conflict arises" [at para 25 (emphasis added)].

8. TWU is not seeking approval to engage in purely private activities, religious rites or practices, or church services. It is not seeking approval for a denominational school, or a divinity school. It is seeking approval for a law school.

9. As a necessary entry point to the legal profession, law schools play an integral role in the justice system by deciding who has the privilege of being members of the bench and bar.

10. This brings the approval of TWU's proposed law school squarely within the Law Society's statutory mandate to protect and promote the public interest in the administration of justice, which includes the protection and preservation of the rights and freedoms of everyone in our society.

11. TWU's proposed admission policy denies equal access for LGBTQ people and women who cannot accept TWU's restrictions on their bodily autonomy.[1] By approving TWU's proposed law school, the Law Society would be facilitating this discriminatory impact on historically disadvantaged groups.

12. The question remains whether this discriminatory effect is overridden by the religious and equality rights of the TWU community.

13. For the reasons more fully discussed in its factum, the Law Society respectfully submits that it is not.

14. Religious freedoms are not absolute. As explained in *S.L.*, religious rights must be considered in relation to other competing rights. Religious freedom does not require public bodies to "refrain from imposing any burdens on the practice of religion": "This is so because we live in a society of individuals which we must always take the rights of others into account" [*S.L.*, at para 31.]

15. When religious *beliefs* are manifested in *conduct* that negatively impact the rights of others, as here, public bodies such as the Law Society have the legal authority, and indeed obligation in certain circumstances, to prevent that from happening.

16. Indeed, the Law Society has both a statutory mandate, and a constitutional obligation, to protect and promote the rights of everyone in our society.

17. As reflected in the vote of the membership, the Law Society has decided that it cannot accept, and cannot be seen to accept, the unequal treatment of LGBTQ people and women at the very entry point to the legal profession.

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[1] TWU does not seem to deny this in its factum, but rather seems to suggest that no public body can lawfully prevent it from discriminating, because it is a private institution (see Respondents' Factum, at paras 117-131).

18. While TWU and members of its community are entitled to hold, express and follow their beliefs, TWU is not legally entitled to state approval of its law school, where it effectively excludes those who do not share those beliefs from participating in an integral part of our justice system – the training of future lawyers.

19. The Law Society understands that this position is not without controversy both in society at large and within the Bar, and that not everyone will agree with where the balance was struck in this case.

20. But it cannot be said that the Resolution was unreasonable. Similar resolutions have been passed by the Ontario and Nova Scotia law societies. And contrary to the submission of some intervenors, the American Bar Association has the same policy of not accrediting law schools that discriminate in their admission policies.[2] Even in those law societies that have approved TWU, many Benchers dissented from that conclusion.[3]

21. A law society might not have made this decision 30, 20, or even 10 years ago. But the views of society, and of the legal profession, as to what is necessary to achieve substantive equality for all persons, have evolved since then.

22. The Law Society's Resolution reflects an evolution in legal norms towards increasing legal protection for the equal rights of LGBTQ people and women, and our legal system's commitment to ensure that those rights are not only respected by the state, but protected from the harmful discriminatory impact inflicted by others.

23. The Law Society submits that the Resolution appropriately balances the applicable rights within the context of our legal system at this point in the evolution of the recognition of the rights of LGBTQ people and women in our legal system.

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[2] See Factum of Seventh-Day Adventist Church in Canada ("**SDACC**"), at para 10. See American Bar Association, "ABA Standards and Rules of Procedure for Approval of Law Schools" (2015-2016) ("**ABA Standards**"), Standards 205, 211.

[3] For instance, TWU was approved by the Law Society of New Brunswick as a result of the Benchers' tie vote of 12-12 on a resolution to rescind approval.

24. This constitutional issue must be conclusively determined before TWU can move forward with its proposed law school. If it is not adjudicated in this case, it will then have to be addressed in the context of the Ministry's accreditation decision. Respectfully, the courts should address this issue now, to give the parties legal certainty moving forward.

25. And to repeat, the issue is not whether TWU's law graduates or lawyers generally can hold certain religious beliefs relating to marriage and abortions, but rather whether a governmental actor – either the Law Society, the Minister, or both – can or should approve and facilitate a law school that acts on those beliefs by precluding admission to students who cannot comply with the requirements of those beliefs.

26. The Law Society reasonably concluded that it was not legally obligated to approve TWU's proposed law school, and that decision should be affirmed on appeal.

PART 2 – ISSUES IN REPLY

27. The Appellant will address the following issues, in reply to the arguments raised by the Respondents and Intervenors:

a. The Law Society properly considered the views of the membership regarding the appropriate balance between religious freedom and equality rights, in light of evolving legal norms;

b. The Law Society had the jurisdiction not to approve TWU's proposed law school on the grounds that its approval would create unequal and discriminatory access to the legal profession;

c. The Resolution achieves a reasonable balance of *Charter* rights and values.

PART 3 – ARGUMENT

A. The Importance of Listening to the Membership

The Evolution in Legal Protection for LGBTQ Persons

28. A brief history of legal protections for LGBTQ persons will put the Law Society's Resolution, and the claims of the intervenors and TWU, in its necessary context.

29. While legislation prohibiting certain private parties from discriminating on the basis of race and religion began appearing over 70 years ago, prohibitions on discrimination based on sexual orientation were a much later addition. Canada's first human rights

legislation, the Ontario *Racial Discrimination Act*, prohibited discrimination in limited circumstances and only on the basis of race or religion. Its first comprehensive human rights code, enacted in Saskatchewan in 1947, prohibited discrimination on the basis of race, creed, religion, colour or ethnic origin, and respecting a broader range of conduct.[4]

30. BC's first human rights legislation was enacted in 1956, and its first comprehensive human rights code was enacted in 1969. At that time, the *Code* only prohibited discrimination based on race, religion, colour, nationality, ancestry, or place of origin.

31. In fact, it was not until 1992 – nearly 50 years after the first human rights legislation started appearing in Canada – that sexual orientation was added to the prohibited grounds of discrimination in the BC *Code*.[5]

32. A similar evolution has taken place in the courts. It was only 20 years ago that, in *Egan v. Canada*, [1995] 2 SCR 513, the Supreme Court confirmed that the equal rights of LGBTQ persons were protected under the *Charter*, well-after the *Charter's* enactment.

33. A number of years after that, in *Vriend v. Alberta*, [1998] 1 SCR 493, the Court found that governments have a constitutional obligation to protect LGBTQ persons from the discriminatory conduct of (private sector) employers and service providers, in the same way as they protect persons discriminated against on the basis of race or religion.

34. As the *Vriend* decision shows, the reliance of TWU and some intervenors on the supposedly "private" nature of TWU – notwithstanding the very public nature of law schools as an integral part of the legal system – is not an adequate answer to the difficult *Charter* issues raised in this case. The question in *Vriend*, as here, was whether the public actor could permit private discrimination. While TWU states that the Resolution is law, it does not seem to accept that, as with the law in *Vriend*, the Resolution must therefore

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[4] W. Tarnopolsky & W. Pentney, *Discrimination and the Law* (Toronto: Carswell, looseleaf), c.2.2; and *University of Saskatchewan v. Saskatchewan (Human Rights Commission)*, [1976] S.J. No. 39 (QB).

[5] See generally Stan Lanyon, QC, "Conceptual Challenges in the Application of Discrimination Law in the Workplace" (2014) 3 Can J Hum Rts 75 at 77-78.

comply with the *Charter*, even if the discriminatory conduct sought to be protected emanates from private actors.[6]

35. Equal rights for LGBTQ couples with respect to state benefits were not found to be constitutionally required until 1999, in *M. v. H.*, [1999] 2 SCR 3, and it was not until 2003 that appellate courts confirmed that restricting marriage to opposite sex couples was discriminatory.[7] This was only formally recognized by Parliament 10 years ago.

36. The struggle for full legal equality for LGBTQ persons continues. It has only been over the past decade that governments began adding express protections for gender identity and gender expression to human rights codes.[8] Some jurisdictions, including British Columbia, still do not expressly include protections for gender identity in the human rights codes; but they will, in time.

37. These developments reflect a belated but clear shift in the social consciousness, towards the understanding that to discriminate against people based on their sexual orientation or gender identity is just as harmful as other forms of discrimination. The Supreme Court's 2013 decision in *Whatcott*,[9] adopting sentiments from L'Heureux-Dubé J's dissent in *BCCT*, signals this profound shift.

38. As these developments indicate, our legal norms – particularly regarding equality – necessarily evolve. The Law Society, representing the legal profession charged with protecting the rights and freedoms of all persons, must be at the forefront of and

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[6] See Respondents' Factum, at paras 135-140.

[7] See e.g. *Barbeau v. British Columbia (Attorney General)*, 2003 BCCA 251; *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 301, [2002] O.J. No. 2714 (C.A.).

[8] See Ontario Human Rights Commission, "Policy on preventing discrimination because of Gender Identity and Gender Expression" (2014) at 10-11; see also *Alberta Human Rights Act*, RSA 2000, c A-25.5, ss. 3-5, 7, 8; *Human Rights Act*, RSPEI 1988, c H-12, s.2; *Human Rights Act*, 2010, SNL 2010, c H-13.1, s. 9; *The Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s. 2(m.01)(xv).

[9] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para 123.

supportive of that evolution in public consciousness, and not a body for retrenching historical practices of discrimination and patterns of disadvantage.

39. No one today would accept that a law school could expressly prohibit women, racialized, or Jewish people from attending law school, even if these discriminatory practices were motivated by sincere religious beliefs. The Law Society must protect the rights of LGBTQ persons, and women's bodily autonomy, just as assiduously.

40. And that is what lies at the root of the Law Society's Resolution.

The Decision Making Process

41. This evolution in legal norms has important implications for the challenges to the Law Society's Resolution. TWU and some intervenors suggest – notwithstanding that a vote of the membership regarding Resolutions is expressly contemplated in the *LPA* – the process by which this Resolution was passed was unlawful.

42. Contrary to these submissions, once the Benchers considered the issue and determined that neither result would be contrary to their statutory or constitutional obligations, it was entirely reasonable to answer these controversial questions involving a difficult balancing of rights by holding a vote of the Law Society's membership.

43. Again, context is all-important; the Law Society is not a provincial Gaming and Liquor Commission prohibiting gambling machines based on a poll of constituents.[10] Rather, it a self-governing profession charged with upholding the rights and freedoms of all persons, and where those rights conflict, achieving a reasonable balance that is consistent with safeguarding the public interest in the administration of justice.

44. As a self-governing profession, the views of the membership are important, and the membership were deeply involved in this issue from the beginning. TWU's proposed law school has provoked unprecedented debate across the profession, a Special General Meeting initiated by the membership, a resolution at the Annual General Meeting,

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[10] See Respondents' Factum, at paras 67-68, citing *Oil Sands Hotel (1978) Ltd v. Alberta (Gaming and Liquor Commission)*, 1999 ABQB 218.

hundreds of letters and submissions to the Benchers from members, and wide-ranging debates, from the pages of the Globe and Mail to the firm watercooler.

45. This degree of membership participation and engagement was unprecedented, and appropriate for this unique and difficult issue, which implicates a number of values of fundamental importance to society and to the legal profession as a whole.

46. As the Benchers determined, where to draw the line in this context, between substantive equality of opportunity to participate in the legal system and the ability to exclude persons from law school as motivated by a sincere religious belief, is not amenable to a single "correct" legal answer.

47. It is ultimately a question about values: about where we are as a legal profession, how the legal profession can best fulfil its statutory mandate at this point in our legal and moral development, and what values it should be embracing at this point in history.

48. Involving the entire legal profession in that decision was a reasonable way to ensure that the Law Society stays connected to the broader community it serves, and the evolving norms of equality and liberty that must be protected and upheld.

49. As long as that decision is made reasonably, and achieves a reasonable outcome in light of the conflicting rights at play, as occurred here, it should be upheld.

B. The Statutory Power to Disapprove of TWU's Proposed Law School

The Decision Below

50. TWU and some intervenors have argued that the Law Society either does not have the statutory power to disapprove of TWU's law school for the purpose of admission to the Bar, or that the Court should read down that power to exclude its application to TWU.

51. Chief Justice Hinkson disagreed. He applied a correctness standard of review regarding the Law Society's statutory power to disapprove TWU's proposed law school, based on his view that *BCCT* had resolved the standard of review [at para 90].

52. On that standard, he concluded that "like the LSUC, the LSBC has a broad statutory authority that includes the object and duty to preserve and protect the rights and freedom of all persons" and that "a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the

LSBC and its duties and obligations under the *LPA*" [at para 108]. Therefore, he found that as long as the Law Society followed the appropriate procedure and the correct analytical framework, disapproving TWU was fully within its statutory mandate.

Standard of Review

53. The Law Society agrees with the conclusion of the Chief Justice that the Law Society was correct in concluding that it had the statutory power to disapprove of TWU's proposed law school because of its admission policy. However, and contrary to the submissions of TWU and a number of intervenors, the appropriate standard of review on this issue was reasonableness, not correctness.

54. In *BCCT*, the parties agreed that a correctness standard applied to whether the Teachers College could consider discriminatory conduct in deciding whether to approve TWU, because the issue went to the College's "jurisdiction" [*BCCT*, at para 14].

55. However, since the *BCCT* decision, it has become well established in the Supreme Court's jurisprudence that where an administrative decision-maker is interpreting and applying its home statute and rules passed thereunder, there is a strong presumption that a standard of reasonableness applies.[11]

56. Similarly, it is no longer enough to resolve the standard of review to note that the issue involves 'human rights',[12] given the Court's more recent jurisprudence – from *Doré* to *Loyola* – recognizing that the question of where to draw the balance between rights and statutory objectives is often best left to the administrative decision-maker.

57. While there is an exception to the reasonableness presumption for "true jurisdictional" questions, this category is very narrow, as the Court in *ATA* observed:

> Indeed, in view of recent jurisprudence, it may be that the time has come to reconsider whether, for purposes of judicial review, the category of true questions

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[11] See e.g. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 ("***ATA***") at para 39; *Mclean v. British Columbia (Securities Commission)*, 2013 SCC 67 at para 21.

[12] See Respondents' Factum, at para 91.

> of jurisdiction exists and is necessary to identifying the appropriate standard of review. However, in the absence of argument on the point in this case, it is sufficient in these reasons to say that, unless the situation is exceptional, and we have not seen such a situation since *Dunsmuir*, the interpretation by the tribunal of "its own statute or statutes closely connected to its function, with which it will have particular familiarity" should be presumed to be a question of statutory interpretation subject to deference on judicial review. [para. 34 (emphasis added)]

58. Notably, TWU does not allege that the Rule permitting the Law Society to disapprove of a law school for the purposes of admission to the bar is *ultra vires*, or that the Law Society is without the jurisdiction to disapprove law schools in general.

59. Rather, TWU only submits that the *reasons* of the Law Society for *applying* the rule in *this particular case* were not appropriate. This involves an interpretation of the Law Society's home statute, as well as the statutory mandate and obligations contained in it, which must guide the Law Society's exercise of its discretion in this case. That is a question uniquely within the statutory mandate and expertise of the Law Society, to which deference should be owed.

60. And, although coming to different conclusions on other points, both the Ontario and Nova Scotia courts adopted this modern approach to judicial review by holding that a reasonableness standard applied to the jurisdictional issue.[13] The Law Society respectfully submits that is the proper approach.

The Law Society's Jurisdiction

61. Whether a correctness or reasonableness standard of review applies, it is clear that the Law Society has the statutory power not to approve law schools based on discriminatory admissions policies, contrary to the submissions of TWU.

62. Section 3 of the *LPA* sets out the object and duty of the Law Society:

> It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

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[13] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 ("***TWU v. NSBS***") at paras 138, 154, 159, 165; *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 ("***TWU v. LSUC***") at paras 33-51.

> (a) preserving and protecting the rights and freedoms of all persons,
>
> (b) ensuring the independence, integrity, honour and competence of lawyers,
>
> (c) establishing standards and programs for education, professional responsibility and competence of lawyers and of applicants for call and admission,
>
> (d) regulating the practice of law, and
>
> (e) supporting and assisting lawyers, articled students and lawyer of other jurisdiction who are permitted to practice law in British Columbia in fulfilling their duties in the practice of law.

63. As can be seen, the object and duty of the Law Society goes well beyond ensuring the competency and fitness of lawyers for admission to the BC Bar, as submitted by TWU and some intervenors; rather, it is a broad, multi-faceted duty to uphold and protect the public interest in the administration of justice.[14]

64. The Law Society's specific authority to make rules to accomplish its statutory mandate in the context of enrolment and admissions is contained in sections 20 and 21 of the *LPA*. Those provisions state that the Benchers may make rules to "establish requirements, *including* academic requirements, and procedures for enrollment of articled students" and "establish requirements, *including* academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court."

65. Although the Respondents and an intervenor attempt to read the word "including" out of the *LPA*,[15] the use of this term makes clear that the legislature determined that

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[14] On the breadth of the Law Society's jurisdiction in defining and protecting the public interest, and its rationale, see e.g. *Pearlman* v. *Manitoba Law Society*, [1991] 2 SCR 869 at 886-888; *Law Society of BC v. Lawrie*, [1991] B.C.J. No. 2653 (CA) at 8-10 (QL); *McOuat v. Law Society of BC*, [1993] B.C.J. No. 807 (CA) at paras 10-13.

[15] For instance, the intervenor Christian Legal Fellowship ("**CLF**") purports to quote the *LPA* as providing the power to "establish academic requirements" (CLF Factum, at para 12), while the Respondents' twice describe ss. 20-21 as giving the Benchers the power to set "academic requirements" (Respondents' Factum, at paras 94, 172). That is not what the sections say; they provide the power to establish "requirements, *including* academic requirements" regarding enrollment and admission to the bar.

academic requirements are not the *only* relevant requirements for enrolment and admission.

66. Had the legislature intended to limit the Law Society's discretion to considering *academic* requirements *relating solely to an individual applicants fitness and competence to practice*, as TWU and some intervenors contend, it would have done so by using language to that effect. It certainly would not have used language which compels precisely the opposite inference: that the requirements to be established include, but are not limited to, academic requirements.

67. As Chief Justice Hinkson found, ss. 20-21 give the Law Society the power to disapprove of a proposed law school because of discriminatory admissions policies. That is because admission to law schools is the first step in the entry to the legal profession.

68. Just as in Ontario,[16] the Law Society has historically played an important role in the provision of legal education in BC.[17] This role necessarily includes ensuring that admissions to law schools in BC are consistent with the Law Society's statutory mandate.

69. In a speech on legal education, Chief Justice Brian Dickson observed that law schools are the 'gatekeepers' to the legal profession. He stated that if the ideal of equality of opportunity were to "be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession".[18]

70. Therefore, the Law Society's power to make rules and set requirements for admission to the Bar in a manner that meets its statutory mission to uphold and protect

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[16] *TWU v. LSUC*, *supra* at paras 21-30, 96-97.

[17] W. Wesley Pue, *Law School: History of Legal Education in British Columbia Legal Education* (Vancouver: Continuing Legal Education, 1995) at xxiii, 36-44, 172-173, 185-187, 193-195; Alfred Watts, QC, *History of the Legal Profession in BC*, 1869-1984 (Vancouver: Evergreen Press, 1984) at 55-57. See also e.g. *Legal Professions Act*, 1884, 47 Vict, c-18, ss. 32(2), 32(3); *Legal Professions Act*, RSBC, 1911, c-136, ss. 36(2).

[18] Rt. Hon. Brian Dickson, "Legal Education" (1986) 64:2 Can Bar Rev 374 at 375.

the public interest in the administration of justice necessarily includes addressing issues relating to access to a legal education, which is a pre-requisite to entry into the legal profession. This statutory objective is undermined if a law school discriminates against historically disadvantaged groups in its admissions policies.

71. The Law Society is not legally required to identify or enumerate in advance all of the grounds or bases which could lead to a decision not to approve of a law school.

72. That does not mean that the Law Society can refuse to approve a law school for any reason. The reason has to be connected to the Law Society's statutory mandate in section 3 of the *LPA*, which is the case here.[19]

73. Notably, TWU and some intervenors appear to accept that the Law Society has the power to prevent discrimination in the *practice* of law, even if that discrimination is motivated by religious beliefs. However, they suggest that the Law Society cannot also act to prevent discrimination in *access to* the practice of law in the first place.

74. This assumption may be premised on the flawed argument that because TWU's conduct is (allegedly) permitted by the BC *Human Rights Code*,[20] while discriminatory conduct by lawyers or law firms is not, TWU's desire to adopt a discriminatory admissions policy cannot be impacted by the decisions of any public body.

75. However, the legislature has delegated powers of self-governance to the legal profession. It has given the Law Society the power to make and apply rules respecting admission to the bar – which may include, but are not limited to, academic requirements

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[19] The statutory mandate of the Law Society, the broader object and purpose of the *LPA*, and the *Charter*, provide the standards guiding the Law Society's discretion that certain intervenors argue is lacking. See e.g. *Canada (AG) v. PHS Community Services Society*, 2011 SCC 44 at paras 117, 150-153; *C.U.P.E. v. Ontario (Minister of Labour)*, 2003 SCC 29 at paras 91-94; *Montréal v. Montreal Port Authority*, 2010 SCC 14 at paras 33, 42-47; *Halifax v. Canada (Public Works and Government Services)*, 2012 SCC 29 at para 43.

[20] See e.g. Respondents' Factum, at paras 100-101, 131; CLF Factum, at para 15.

– and has mandated that it exercise such powers in a manner which serves the public interest in the administration of justice and protects the rights and freedoms of all persons.

76. Accordingly, the legal profession must itself determine reasonably what it means to fulfil the mandate given to it by the legislature in this specific context.

77. Thus, on either a correctness or a reasonableness standard of review, it is clear that the Law Society has the statutory power to disapprove of a proposed law school on the basis of a discriminatory admissions policy.

C. No Denial of Procedural Fairness

78. Contrary to the Respondent's submission, TWU was well aware of the basis upon which the decision would be made. The focus of the entire legal establishment for the past three years has been on whether approving TWU would be in the public interest, given its admission policy which discriminates against individuals on the basis of protected grounds. TWU knew it had to respond to that objection to its proposed law school, which it did in its submissions to the Law Society.

D. A Reasonable Balancing of Charter Rights and Values

The Limited Relevance of TWU v. BCCT

79. Fifteen years ago, a majority of the Supreme Court of Canada held in *BCCT* that the appropriate line to draw in cases where religious freedom conflicts with equality is the line "between belief and conduct". The majority emphasized that "(t)he freedom to hold beliefs is broader than the freedom to act on them".[21]

80. That observation was made in the context of a refusal by the Teachers College to admit graduates of TWU's education program, based on the assumption, without concrete evidence, that those graduates would engage in discriminatory conduct as teachers.

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[21] *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 ("***BCCT***") at para 36.

81. Here, the Law Society makes no assumptions about the conduct of TWU's prospective law graduates. Rather, the Law Society focused is focused on whether it should approve a proposed law school that has a discriminatory admissions policy.

82. Thus, this case addresses a "fundamentally different question" than the issue focused on by the Court in *BCCT*:[22] the issue in this case is not, as in the *BCCT* case, whether it can be assumed that graduates of TWU would discriminate in practice based on their beliefs, but rather whether the Law Society must accept and thereby approve of the discriminatory conduct of TWU itself.

83. The Law Society respects the right of TWU and its religious community to hold beliefs about marriage and abortion. However, TWU is seeking the Law Society's approval to act upon these beliefs by denying access to the legal profession through its proposed law school to those who do not or cannot abide by those beliefs, and, in turn, providing greater opportunity for those who commit to abide by them, who will have available to them admission to all other law schools, as well as the preferred access to TWU's law school. When beliefs are converted to conduct in this way, the Law Society can act to prevent any resulting harm.

84. TWU also argues that "the Decision was unduly focused on one line of the Covenant", and that the Law Society's "fixation" on discrete aspects of the Covenant was inappropriate.[23]

85. To the contrary, the Law Society appropriately focused only on those aspects of the Covenant that create discriminatory barriers to admission to TWU's proposed law school, and therefore impact equal access to the legal profession and the judiciary. It is only those lines of the Covenant that have a discriminatory impact, and convert religious belief into discriminatory conduct engaging the Law Society's mandate.

86. While the vast majority of TWU's Covenant may discourage persons – for example, those who want to smoke, drink, or watch pornography, for instance – from attending

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[22] *TWU v. LSUC*, *supra* at paras 60-69.

[23] Respondents' Factum, at para 74.

TWU, none of these other rules discriminate on the basis of protected personal characteristics.[24]

87. With respect, it is exactly this "fixation" solely on the discriminatory aspects of the Covenant – and not the Covenant as a whole, or TWU's Statement of Faith, or the religious character of TWU in general – that definitively refutes the many submissions of the Intervenors suggesting that this case is about the Law Society's disapproval of religious belief systems, or evangelical Christian values, as such.[25]

88. Therefore, in denying approval to TWU's proposed law school on the basis that it did, the Law Society's Resolution impacts only the specific conduct of TWU that has a negative impact on the public interest in the administration of justice, and leaves its religious beliefs entirely intact. It has refused to approve of a law school in which (protected) belief is converted into (harmful) conduct by excluding persons from equal opportunity to access the legal profession.

The Obligation of Neutrality

89. TWU and some intervenors argue that the Resolution violates the principle of religious neutrality. This involves a misunderstanding of that principle, and the mistaken assumption that it requires public bodies not to act against harmful or discriminatory conduct if to do so would conflict with conduct permitted by certain religious beliefs.

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[24] For the same reason, it is no answer to observe that all law schools exclude some people, for instance, on the basis of merit: Factum of the Roman Catholic Archdiocese of Vancouver et al ("**RCADV**"), at paras 23-24.

[25] See e.g. Factum of The Evangelical Fellowship of Canada et al. ("**EFC**"), at paras 5, 13 (arguing that the Resolution excludes, intimidates, and stigmatizes those who "seek to educate or be educated in the law in an evangelical educational environment" and seeks to "exclude evangelicals as a group"); Respondents' Factum, at para 95 (describing the Resolution as about "expressing disapproval of the Covenant and the religious structure of the TWU community").

90. When the state enacts laws respecting abortion, physician assisted suicide, or any other issues that implicate moral judgment, it is not either supporting or denigrating religious beliefs regarding these matters. The state will, and must, make decisions on such matters. These decisions may correspond with, or may run contrary to, someone's religious beliefs. However, the principle of religious neutrality does not prevent public bodies from making decisions on matters upon which religious persons may have sincerely held beliefs. Professor Richard Moon put the point this way:

> Yet the neutrality requirement cannot be, and has not been, consistently enforced by the courts. The problem is not simply that religious beliefs involve claims about what is true and right, which must be viewed as a matter of judgment that is open to contest and revision within the sphere of community debate. The more fundamental difficulty with the requirement of state neutrality is that religious beliefs sometimes have public implications. State neutrality is possible only if religion can be treated as simply a private matter – separate from the civic concerns addressed by the state. Religious belief systems, however, often have something to say about the way we should treat others and about the kind of society we should work to create. Because religious beliefs sometimes address civic concerns and are often difficult to distinguish from non-religious beliefs, they cannot be fully excluded or insulated from political decision making. Religious adherents may seek to influence political action – to support state policies that advance their religious views about what is right and just. At the same time, the state may pursue public policies that are inconsistent with the practices or values of some religious belief systems.[26]

91. Thus, once TWU enters the public sphere – such as by seeking the approval of a public body to establish a law school, an integral part of the public justice system – its ability to act on religious beliefs in a way that harms others is necessarily circumscribed.

92. The Law Society has not taken a position on the moral or religious issues regarding same-sex marriage or abortion. It has not acted based on the truth or falsehood of anyone's religious beliefs, and the Resolution does not affirm or deny any persons right to hold any view of marriage or abortion. The Law Society has only decided in the Resolution that depriving people of equal access to law schools on discriminatory grounds is not something the Law Society will approve.

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[26] Richard Moon, "Freedom of Religion Under the *Charter of Rights*: The Limits of State Neutrality" (2012) 45 UBC L Rev 497 at 501.

The Resolution was Reasonable

93. With respect, many of the intervenors supporting TWU use overblown rhetoric[27] and draw false equivalencies in an effort to discredit the Law Society's decision to protect the rights and freedoms of LGBTQ persons and women.

94. This case does not involve a denominational primary or secondary school protected by section 93 of the *Constitution Act*, 1876; the Resolution does not resemble 19th century blasphemy laws; TWU is not a church being forced to perform or solemnize same-sex marriages; nor is the Law Society's Resolution remotely similar to "cultural genocide" or the tragedy of residential schools.[28] Drawing such analogies profoundly miss the point, and serves to distract rather than illuminate.

95. As described above, passing the Resolution reflects the reasonable conclusion that prohibiting LGBTQ people from equal access to the legal profession is no different from, and just as corrosive to, the fundamental values of our legal system as discrimination based on race or religion.

96. The American Bar Association ("**ABA**") has a policy that closely parallels the Law Society's. The ABA will accredit law schools with religious purposes, objectives and affiliations, as would the Law Society, with the exception that the schools may not "use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability".[29]

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[27] For instance, the Resolution is described as a "textbook case of state oppression", as setting a precedent for the "'rooting out' of 'non-conformists' from all professions", or like efforts "to eradicate competing ethical perspectives entirely". See Factum of Justice Centre for Constitutional Freedoms ("**JCCF**"), at paras 23, 25; CLF Factum, at para 15.

[28] See e.g., EFC Factum, paras 17-21; RCADV Factum, paras 29-32; SDACC Factum, at paras 14-18.

[29] ABA Standards, *supra* at Standard 205(c), 211(c).

97. Like the Resolution of the Law Society, the ABA's policy does not prevent a religious institution from teaching from a faith-based perspective, as long as in doing so, it does not exclude persons from attending on the basis of protected characteristics. This is a reasonable position that balances the interests of all parties.

98. TWU and some intervenors argue that the Resolution treats evangelical Christians in a discriminatory or unequal fashion. However, attending a specific university is not an analogous ground under s.15 of the *Charter*,[30] and evangelical Christians, including those who attended TWU as undergraduates, currently have equal access to the profession. This Resolution does not change that. Evangelical Christians are not excluded from accessing a single law school seat in Canada, and are welcomed to each law society.

99. Importantly, the rationale underlying the Resolution supports the conclusion that the Law Society would equally refuse to approve a proposed law school sought to exclude evangelical Christians, thereby depriving evangelical Christians of equal access to the profession on the basis of their religion.

100. In that scenario, as here, the fact that such exclusions may be motivated by sincere, constitutionally-protected religious beliefs (such as an adherence to another religion, or in no religion at all) would not trump the right of evangelical Christians to equal access to the legal profession; nor would the fact that evangelical Christians would be permitted to access *other* law schools somehow sanitize or excuse the harm caused by their exclusion from the proposed law school.

101. The position underlying the Resolution is therefore clear and consistent: the Law Society should not approve of any law school that discriminated in its admissions policies, thereby depriving a group of persons of equal access to the legal profession, whether on the basis of a common religious affiliation, sexual orientation, or gender.

102. However, TWU is not actually seeking equality for evangelical Christians, or to ensure their equal access to the legal profession. They have that already. Evangelical

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[30] This apparent assumption mars the arguments of the intervenor Association for Reformed Political Action ("**ARPA**"), at paras 17-21.

Christians are in no different position than many other people who may have strong religious beliefs and may not want to associate with those who do not share them, but nevertheless attend law schools which do not exclude anyone.[31]

103. Put another way, TWU is not asserting a right of *equality* of access, but a right to *exclude* others on discriminatory grounds. The Resolution reflects the Law Society's reasonable conclusion that to facilitate that conduct is not consistent with its statutory obligations, and the reasonable conclusion that the equal access of women and LGBTQ persons to the legal profession should be as rigorously protected as individuals who have a common ethnicity or religion.

Dated at the City of Vancouver, Province of British Columbia, this May 9th, of 2016.

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[31] As certain intervenors observe, without expressly recognizing the principle's broader application: "(e)xposure to opposing viewpoints and even minority stress is an unavoidable feature of living in a pluralistic society" (see EFC Factum, at para 11).

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