SCC File No: 37318

IN THE SUPREME COURT OF CANADA

(ON APPEAL FROM THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS

REPLY FACTUM OF THE APPELLANT TO INTEVENOR FACTA

(*Pursuant to the Order of the Chief Justice, dated July 31, 2017*)

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I. Overview

1. There is a common theme in the facta of the intervenors supporting TWU: that the Court should not uphold the B.C. Law Society's Resolution because that may result in the state prohibiting any actions or endeavors by all religious groups, schools, charities, communities, institutions, or entities that exclude people who do not commit to the tenets of their faith, regardless of the circumstances.

2. With respect, that is not so.

3. First, most activities undertaken by private religious groups in the context of their private religious communities will not require state approval, as is required here. In the absence of state involvement, there can be no breach of the *Charter*.

4. The only legal issue in situations where no state approval is required would be whether those activities come within the human rights legislation, and the exemptions for granting a preference to members of a religious faith.

5. Second, and more importantly, even where state approval is required – and hence the *Charter* is implicated – a contextual analysis must be undertaken in each case to determine where the appropriate balance is to be struck between competing *Charter* rights and values.

6. The critical contextual consideration here is the legal system and the important role it plays in our democracy.

7. The B.C. Law Society's position is that, as law schools are the gatekeepers to the legal profession and the judiciary, conferring state approval of a law school that discriminates against LGBTQ people has a significant negative effect on the integrity, and hence credibility and acceptability, of our legal system – in the same way as if admission to a law school, or the bar itself, were based on gender or racial grounds.

8. Put differently, a law school is not an entirely private endeavor, in the same way as a church or religious primary school, given the important role of law schools in our legal system. That is why there is a need for the approval of the B.C. Law Society for law schools, and why that power must be exercised in the public interest.

9. Therefore, while the outcome in this case may be significant in terms of general principles it establishes or elaborates upon, it will not dictate the proper balance in other contexts that do not involve the imposition of barriers to the legal system, or with respect to decisions under other statutes that do not confer broad powers to regulate in light of the public interest. Each case must be considered in the particular context in which it arises.

10. As a final introductory comment, TWU and a number of the intervenors have addressed or referred to the process leading to the Resolution. It is respectfully submitted that how the Law Society came to make this decision – that is, through a referendum of its members – has no bearing on the legal issue of whether the appropriate balance has been struck under the *Charter*. The decision either strikes the appropriate balance in this unique context, in light of the statutory mandate and *Charter* obligations of the Law Society, or it does not.

II. The Need for a Contextual Approach

11. It is well-established that the *Charter* is to be interpreted and applied *contextually*, that is, in a manner that is focused on the specific circumstances in which *Charter* rights are asserted.[1] This approach applies both to the interpretation of the scope of a *Charter* right,[2] and the delineation of rights and freedoms where they appear to conflict.[3]

12. Context is also critical in determining justifiable limits on *Charter* rights. The great virtue of the *Doré* and the *Oakes* analyses is that they are able to determine whether a particular breach can be justified in a particular context,[4] rather than relying on inflexible and sweeping categories.

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[1] See e.g. *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 S.C.R. 1326 at 1355-56; *R. v. Wholesale Travel Group Inc.*, [1991] 3 S.C.R. 154 at 224-227.

[2] See e.g. *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 45; *R. v. Tessling*, 2004 SCC 67 at paras 17-18; *Health Services and Support - Facilities Subsector Bargaining Assn. v. British Columbia*, 2007 SCC 27 ("***BC Health Services***") at paras 30, 31, 33, 92; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at paras 43, 54.

[3] See e.g. *R. v. N.S.*, 2012 SCC 72 ("***R. v. N.S.***") at paras 36-47; *Reference re Same-Sex Marriage*, 2004 SCC 79 ("***SSM Reference***") at paras 50-51.

[4] See e.g. *Rocket v. Royal College of Dental Surgeons of Ontario*, [1990] 2 S.C.R. 232 at 246-47; *Thomson Newspapers Co. v. Canada (Attorney General)*, [1998] 1 S.C.R. 877 at paras 86-95; *BC Health Services*,

13. This nuanced, context-specific approach is particularly well suited to cases involving conflicting claims of religious freedom and equality rights.[5] As noted in *Bruker v. Marcovitz*:

> The right to have differences protected, however, does not mean that those differences are always hegemonic. Not all differences are compatible with Canada's fundamental values and, accordingly, not all barriers to their expression are arbitrary. Determining when the assertion of a right based on difference must yield to a more pressing public interest is a complex, nuanced, fact-specific exercise that defies bright- line application. It is, at the same time, a delicate necessity for protecting the evolutionary integrity of both multiculturalism and public confidence in its importance.[6]

14. This contextual exercise is not advanced by seeking to draw rigid comparisons with other cases decided in different circumstances, or to equate the approval of TWU's proposed law school with very different forms of state conduct arising in very different contexts.

15. A proposed law school seeking accreditation from a public body is not a Catholic primary or secondary school,[7] or a religious school otherwise protected by the Constitution.[8] TWU is not a charity,[9] an isolated religious colony,[10] an individual member of a particular faith,[11]

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supra, at paras 190-195, Deschamps J., dissenting. And see *Doré v. Barreau du Québec*, 2012 SCC 12 at paras 7, 48, 54-59; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at paras 36-43.

[5] See e.g. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 ("***BC College of Teachers***") at para 34, and at paras 94-95; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 at paras 74-75, 78-80; *SSM Reference*, *supra* at paras 50-51. See also *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 ("***S.L.***") at paras 1, 25, 37.

[6] *Bruker v. Marcovitz*, 2007 SCC 54 at para 2 [emphasis added].

[7] See Factum of the Canadian Conference of Catholic Bishops, dated August 30, 2017 ("**CCCB Factum**") at paras 14-15, 21.

[8] Factum of the Evangelical Fellowship of Canada and Christian Higher Education Canada, dated September 5, 2017 ("**EFC & CHEC Factum**") at para 27; CCCB Factum, *supra* at para 14.

[9] See Factum of the Canadian Council of Christian Charities, dated September 8, 2017 ("**CCCC Factum**"), at paras 20-22.

[10] See Factum of the National Coalition of Catholic School Trustees' Associations, dated September 5, 2017 ("**NCCSTA Factum**"), at paras 29-30.

[11] See e.g. Factum of the Christian Legal Fellowship, dated September 5, 2017 ("**CLF Factum**") at paras 8, 33-35.

a religious association of legal professionals,[12] a toothbrush importer,[13] a radio station,[14] or a secular day care centre banning ostentatious religious symbols.[15]

16. TWU is not seeking approval to operate a theological school or seminary. It is not a member of the clergy or another religious official charged with solemnizing marriages,[16] and there has been no interference with the choice of an ordained Minister by a church.[17]

17. The critical contextual factor in this case is that this issue arises in regards to the approval of a proposed law school. In particular, it involves an assessment of policies which govern entry to that proposed law school, rather than its religious beliefs or educational goals, and the impact of those policies on the equal access to the legal profession and judiciary, and therefore the public confidence in the legal system.

18. This context is materially different from the analogies relied on by the intervenors, and whether a proper balance was struck by the B.C. Law Society should therefore be assessed in terms of the unique context of the place of law schools within the administration of justice.

19. Nor is this case akin to *BC College of Teachers*, which a number of intervenors have relied on for the proposition that the Resolution at issue is no different than one barring all evangelical Christians, or others with religious beliefs, from legal practice.[18]

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[12] See CLF Factum, *supra* at para 24.

[13] See CCCC Factum, *supra* at para 5.

[14] See CCCC Factum, *supra* at para 22.

[15] See Factum of the International Coalition of Professors of Law, dated September 5, 2017 ("**ICPL Factum**") at para 19.

[16] See e.g. Factum of the Seventh-day Adventists Church in Canada, dated September 8, 2017 ("**Seventh-day Adventist Factum**"), at para 22; CCCB Factum, *supra* at para 28-32; CCCC Factum, *supra* at para 16-17; Factum of the Roman Catholic Archdiocese of Vancouver et al, dated September 7, 2017 ("**RCAV et al Factum**") at paras 34-35.

[17] See ICPL Factum, *supra* at paras 21-24, citing *Hosanna-Tabor Evangelical Lutheran Chur & Sch v EEOC*, 565 US 171 (2012).

[18] See e.g. Factum of the Association for Reformed Political Action (ARPA) Canada, dated September 1, 2017 ("**ARPA Factum**") at para 34; ICPL Factum, *supra* at para 27; CLF Factum, *supra* at para 8.

20. With respect, that position misconceives the nature of the *BC College of Teachers* case. The reason the majority of the Court in *BC College of Teachers* had difficulty seeing "how the same logic would not result in the denial of accreditation to members of a particular church", was because the *BC College of Teachers* case focused on the alleged harm arising from the religious beliefs of teachers.

21. That is, the BC College of Teachers took the position, without evidence, that the teachers would likely discriminate against students by virtue of having been trained at TWU.

22. The logic of that position would, as the majority worried, equally justify excluding members of a particular faith altogether from the teaching profession: if an individual's personal beliefs were sufficient to demonstrate a propensity to discriminate, it would not matter whether they held those beliefs by virtue of attending TWU or otherwise.

23. By contrast, the B.C. Law Society does not say that students taught from TWU's religious perspective, or holding similar religious beliefs, should be disqualified from admission to the bar. Rather, its focus is on the effect of the admissions policies of TWU as an institution, both in terms of its exclusionary impact on persons based on protected grounds of discrimination, and in terms of the impact that Law Society approval would have on the public interest in the administration of justice.

24. The context of this case is also materially different from other educational institutions,[19] which are not inextricably tied to the administration of justice and the public confidence in the legal profession and the judiciary.

25. The question before the Court is whether the decision to not approve a proposed law school that has a discriminatory admission policy reflects the appropriate balancing of *Charter* rights and values in this context.

26. While other cases may provide general guidance in terms of the appropriate analytical framework within which this case should be considered, the Law Society respectfully submits that they can provide no more than that.

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[19] See e.g. EFC & CHEC Factum, *supra* at para 25.

27. For the same reason, and contrary to the submissions of some intervenors,[20] the resolution of the proper balance in this context will not dictate the resolution in any other context; each particular circumstance in which a dispute is raised will have to be closely examined to determine the appropriate balance of rights in that context.

III. Private Conduct

28. A number of the intervenors rely on the fact that TWU is a private institution,[21] and on that basis assert that any consideration of *Charter* rights by the Law Societies (and the Court) must be limited to TWU's rights, or that TWU is otherwise immunized from state action which would impact the admissions policies of a proposed law school.

29. This seems to be based on the belief that there is a rigid dichotomy between "public" and "private" action for the purposes of *Charter* application, which this Court has rejected.[22]

30. While the *Charter* only directly regulates the laws, decisions, or conduct emanating from public actors, like the Law Society, those public actors are obligated to consider the impact of private action in exercising their public duties.

31. Indeed, this Court has held that the *Charter* may impact the rights and obligations of private actors in many different circumstances – whether in the context of common law disputes

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[20] See e.g. CCCB Factum, *supra* at para 2 ("any decision made by this Court…. will not only have a profound impact on TWU but on Catholic and other faith based religious education as well as Catholic health care and other faith based care facilities across the country"); CCCC Factum, *supra* at paras 2, 4 ("Such a position, if left unaddressed, will cause deleterious effects throughout the charitable sector and to Canadian society as a whole… the entire process of government approval, in its myriad areas of jurisdiction, would be recast with an imperative that every person, civic organization, and religious community and association must have correct thoughts, opinions, and practices, as determined by government."); CLF Factum, *supra* at para 11 ("To decide otherwise would mean the obliteration of institutional diversity; there could never be educational institutions designed to serve a specific group – be they based on language, gender, sexual orientation, or religion").

[21] See e.g. CCCC Factum, *supra* at paras 8-13; Seventh-day Adventist Factum, *supra* at para 30; RCAV et al Factum, *supra* at para 31; ARPA Factum, *supra* at para 21.

[22] See e.g. *Dunmore v. Ontario*, 2001 SCC 94 ("***Dunmore***") at paras 21-22, 26, 29, 34.

between private parties,[23] the application of statutes which regulate the conduct of private parties,[24] or administrative decisions which arise in otherwise private disputes.[25]

32. In each of these contexts, the conduct complained of is committed by private actors and the persons alleging harm are private parties. Nevertheless, the application of the *Charter* impacts their respective rights and obligations.

33. That is the key to understanding the *Vriend* decision, which arose out of the decision made by a religious college to terminate a teacher on the basis of his sexual orientation. The fact that the discriminatory harm was caused directly by a private institution did not absolve the state of its responsibility to protect individuals from discrimination on the basis of sexual orientation.

34. As the Court stated in *Vriend*: "(e)ven if the discrimination is experienced at the hands of private individuals, it is the state that denies protection from that discrimination". The Court described the adverse effects of the state failing to protect persons from discrimination in that context as "particularly invidious". [26]

35. Similarly, here, the Law Society could not render a decision which ignored the rights of either members of TWU's religious community or those who would be treated unequally by the approval of TWU. It was required to achieve a proper balance between these rights in the unique context of a proposed law school.

36. That is because, as the above cases demonstrate, the boundaries between private and public conduct "are marked, not by an *a priori* definition of what is 'private', but by the absence of statutory or other governmental intervention". As Professor Hogg has explained:

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[23] See e.g. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8; *Grant v. Torstar Corp.*, 2009 SCC 61.

[24] See e.g. *Vriend v. Alberta*, [1998] 1 S.C.R. 493 ("***Vriend***")*; Dunmore*, *supra; Ontario (Attorney General) v. Fraser,* 2011 SCC 20.

[25] See e.g. *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *U.F.C.W., Local 1518 v. KMart Canada*, [1999] 2 S.C.R. 1083.

[26] *Vriend*, *supra*, at para 103.

> Much "private" activity has been regulated by statute, or been joined by government, and if so the statutory or governmental presence will make the *Charter* applicable as well… Therefore, when it is said that the *Charter* does not apply to "private" action, the word "private" is really a term of art, denoting a residual category from which it is necessary to subtract those cases where the existence of a statute or the presence of government does make the *Charter* applicable. Without this understanding, the claim that the *Charter* does not apply to private action would be grossly misleading. [27]

37. Put differently, where the state chooses to regulate a given area, it must do so in compliance with the *Charter*, especially in the context of equality rights claims.[28]

38. In this case, the state comprehensively regulates the practice of law, through a delegation of self-governing authority to the law societies. The B.C. Law Society is given the power to consider both the admissions policies and educational program of a proposed law school in deciding whether to grant approval. This power must be exercised in light of the Law Society's statutory mandate, including the obligation to protect the rights and freedoms of all persons and to regulate the profession in the public interest.

39. As such, the Law Society must make its decisions in a manner which properly considers the *Charter* interests of those who will be impacted by the Law Society's decision to approve or not approve a proposed law school.

40. Thus, in light of the Law Society's specific statutory obligations and mandate, which requires the Law Society to decide whether to approve proposed law schools, it is legally irrelevant that TWU is not itself a state actor.

41. Again, it should be emphasized that each case must be considered in its own particular context, because cases of this nature cannot be resolved by bright line rules.

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[27] PW Hogg, *Constitutional Law of Canada,* 5th ed (Toronto: Carswell, 2017 (looseleaf), at §37.2(h), Book of authorities of LSBC at Tab 1.

[28] See generally *Dunmore*, *supra* at paras 26-29.

42. For instance, it does not seem to be disputed that the Law Society could discipline a member (i.e. a "private" person) that engages in discriminatory conduct, even if that conduct was motivated by religious beliefs.[29]

43. At the same time, there appears to be a consensus that the law societies could not refuse admission to a bar based purely on an individual's religious convictions, where those beliefs are not tied to harmful conduct.

44. What is required, therefore, is not rigid dichotomies between "private" and "public", but a careful consideration of the particular circumstances at issue in this appeal, to determine whether this particular decision in this particular context strikes a proper balance.

IV. Unlawful Discrimination

45. A number of intervenors assert that TWU's conduct is not *unlawful* discrimination,[30] and argue or imply that this necessarily exempts it from regulation by the B.C. Law Society.

46. With respect, that is not the legally correct way to consider the issue in this case. As stated before, whether the admission policy of TWU's proposed law school is discriminatory under human rights law is not a question that is before the Court.

47. The Law Society must consider the admissions policy through the prism of the *Charter* and its own statutory obligations. The issue to be decided in this appeal is whether the Law Society appropriately balanced the competing rights and values under the *Charter*.

48. By way of elaboration on this point, to the extent that the submissions are based on the assumption that the *Human Rights Code* does not apply to TWU,[31] the Law Society

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[29] See e.g. ARPA Factum, *supra* at para 19. This appears to be accepted by the Respondents as well: see Factum of the Respondents, dated July 14, 2017 ("**TWU Factum**"), at para 146.

[30] See e.g. ARPA Factum, *supra* at paras 29, 33; CCCB Factum, *supra* at para 38; CCCC Factum, *supra* at para 11; CLF Factum, *supra* at para 22; RCAV et al Factum, *supra* at para 31; Seventh-day Adventist Factum, *supra* at para 18.

[31] See e.g. CCCC Factum, *supra* at paras 11, 19, 25; CLF Factum, *supra* at paras 6, 22.

respectfully submits that, while such a conclusion is subject to debate,[32] it is in any event not relevant in this case.

49. That is because the question in this case is what the *Charter* requires in the context of this particular exercise of the Law Society's statutory mandate. The decision of the legislature to grant or not grant a particular exemption in a different statute governing private activity, and how far that exemption extends, is simply not relevant to the question of whether the Law Society has struck the appropriate balance under the *Charter* in this particular statutory context.

50. Again, the *Vriend* decision is instructive. Prior to that decision, it was "lawful" in Alberta to discriminate against LGBTQ persons in the context of employment. However, that was not the *end* of the analysis; it was its starting point.

51. The Court in *Vriend* found that the government's failure to protect LGBTQ students from discrimination by a private religious body was itself unlawful as contrary to the *Charter*. As a result of that decision, private conduct that was previously lawful became unlawful, by operation of the *Charter*.

52. Of course, the Law Society has no power to imprison, fine, or otherwise sanction an individual's private conduct, and does not purport to do so. In that sense, the Law Society cannot make conduct either lawful or unlawful, in general terms.

53. The Law Society does, however, have the power under its statute to not approve a proposed law school. Indeed, all parties agree that the Law Society has this power, in general terms, although they disagree on whether it was a justified exercise of that power in this instance.

54. And that is what is at issue in this case. The question is not whether TWU's conduct is lawful or unlawful, but rather what the *Charter* permits or requires in the unique context of a Law Society's decision to approve or not approve a proposed law school.

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[32] See e.g. the comments of Bencher Joe Arvay during the Benchers' April 2014 debate [Appellant's Appeal Book ("**AAB**"), Vol. VII, at 1148-1149] and the submission of certain UBC faculty and students sent to the B.C. Law Society [AAB, Vol. VIII, at 1333-37]. For a response, see TWU's submissions to the Federation of Law Societies of Canada [AAB, Vol. VI, at 1050-1052].

V. Religious Beliefs

55. A number of intervenors have argued that it is improper for the Law Society – and therefore improper for the Court – to examine TWU's religious beliefs or the severity of any infringement, arguing that this would amount to impermissibly seeking to "evaluate" the existence, strength, or importance of a religious belief.[33]

56. With respect, this argument either misunderstands the Law Society's argument or misunderstands the Court's jurisprudence.

57. The Law Society does not question TWU's assertion that evangelical Christians have a sincere religious belief in specific mores relating to sexuality and beliefs regarding marriage, nor that an individual's voluntary adherence to a Covenant may support that individual's religious convictions.

58. However, as set out in the Law Society's factum, it also accepts TWU's evidence that evangelical Christianity does not require isolation from those who act or believe differently from evangelical Christians. This fact is confirmed by other evidence, including that TWU is willing to accept those who have different religious beliefs, or no religious beliefs at all, and that TWU accepts that lawyers trained at TWU could not refuse to associate with LGBTQ persons in the course of legal practice.

59. And while this Court has been clear that it is for a claimant to determine his or her religious beliefs subjectively, it has been equally clear that it is for the Court to determine the scope and degree of any infringement objectively, based on the evidence:

> It follows that when considering an infringement of freedom of religion, the question is not whether the person sincerely believes that a religious practice or belief has been infringed, but whether a religious practice or belief exists that has been infringed. The subjective part of the analysis is limited to establishing that there is a sincere belief that has a nexus with religion, including the belief in an obligation to conform to a religious practice. As with any other right or freedom protected by the *Canadian Charter* and the *Quebec Charter*, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. <u>To decide otherwise would allow persons to</u>

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[33] See e.g. Seventh-day Adventist Factum, *supra* at paras 25-26; RCAV et al Factum, *supra* at para 28; EFC & CHEC Factum, *supra* at paras 11-13.

> conclude themselves that their rights had been infringed and thus to supplant the courts in this role. (…)
>
> According to the approach adopted by this Court in *Amselem*, an applicant must first establish the sincerity of his or her belief in a religious doctrine, practice or obligation. In this area, the courts do not search an applicant's soul or conscience and do not seek to become theologians. They ascertain whether there is a sincere subjective belief (paras. 42-43). The courts then determine whether the applicant has demonstrated significant infringement to that belief as a result of state action (paras. 58-60). This second part of the analysis must remain objective in nature.[34]

60. Therefore, it is important to determine precisely what sincere religious beliefs are asserted in order to properly evaluate whether religious freedom has been infringed.

61. At the balancing or proportionality stage of the analysis, it is also necessary to consider the extent or severity of the infringement, particularly where conduct motivated by religious beliefs may cause harm to the rights of others.[35] A law prohibiting a person from fulfilling a mandatory tenet of their faith, as they define it, will weigh more heavily in the balance than a minor impact on what the claimant considers a discretionary religious preference.

62. For instance, in *R. v. N.S.*, the Court stated that it must "evaluate the impact of failing to protect that sincere belief in the particular context", which includes asking how "important is the practice to the claimant". That is because "the strength of a claimant's religious belief may be relevant in balancing it against" other rights in a particular context.[36]

63. Thus, far from being impermissible, determining both the precise scope of a religious belief and the severity or degree of any infringement is necessary to engage in a contextual balancing of rights in this context.

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[34] *S.L.*, *supra* at paras 25, 49 [emphasis added].

[35] See *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at paras 89-99. See also *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras 60-63. Notably, the Court in *Amselem* observed that there is no distinction between mandatory and preferential or discretionary religious beliefs *"(f)or the purposes of determining if freedom of religion is triggered or whether there is a non-trivial interference therewith"* [at para 75 (emphasis added)]. As for balancing, the Court concluded that the infringement in that case was "substantial", "severe", and the religious freedom of the claimants was "significantly impaired", while the interest on the other side of the balance was "at best, minimal" [at paras 64, 74-77, 79, 81, 84-85].

[36] *R. v. N.S.*, *supra* at paras 36, 13.

VI. State Neutrality

64. Despite the focus of some intervenors, the Law Society respectfully submits that state neutrality is not a helpful lens through which to view the particular issues in this case.

65. The state's duty of religious neutrality has been defined by this Court as follows:

> state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.[37]

66. Some intervenors argue that this principle requires the approval of TWU's proposed law school by the BC Law Society, because to do otherwise would be to "hinder" religious beliefs.[38] Others may argue that approving TWU's proposed law school would actually undermine religious neutrality, because it would constitute "favouring" a particular religious group, by uniquely facilitating the ability of those believers to access law school.[39]

67. However, the Law Society is neither hindering nor favouring religious beliefs in the context of this decision. Indeed, contrary to the assertions of some intervenors,[40] the Law Society is taking no position in religious beliefs at all.

68. The decision to not approve TWU was not taken because of its religious nature. The B.C. Law Society has not demanded "secular worldviews of all whom they accredit", and it has not withheld approval "simply because of the religious character of the individual or groups seeking approval", as some intervenors have contended.[41] Nor did the Resolution involve

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[37] *S.L., supra* at para 32.

[38] See e.g. CCCB Factum, *supra* at paras 23-24; CLF Factum, *supra* at paras 25-27; NCCSTA Factum, *supra* at paras 20-26.

[39] See e.g Factum of the United Church of Canada, filed September 8, 2017, at paras 12-15.

[40] ICPL Factum, *supra* at para 5 ("the LSBC claims that it has a right to evaluate Trinity's *religious policies*…" [emphasis added]); CLF Factum, *supra* at para 25 ("the Law Societies have taken a public position on an *essentially religious matter…*" [emphasis added]); RCAV et al Factum, *supra* at para 4 ("The Law Societies instead engaged in preferring *one set of beliefs over another*…" [emphasis added].)

[41] See Seventh-day Adventist Factum, *supra* at para 9; NCCSTA Factum, *supra* at para 7. See also ARPA Factum, *supra* at paras 14, 32.

an "enquiry" into the religious beliefs of the institution.[42] It only required an appreciation of the *impact* of the Covenant: that it will effectively prohibit LGBTQ persons from attending TWU, and thus render them unequal as compared with everyone else in terms of access to law schools in British Columbia. This is apparent on the face of the Covenant,[43] and would be apparent regardless of what beliefs, if any, motivated the harmful and discriminatory conduct.

69. It also explains why a decision with respect to the approval of a proposed law school is unlike having a "religious test" or rules enforcing moral conformity for lawyers.[44] The reason is that the Resolution is not about the beliefs of individuals. Rather, it is about the conduct of an institution seeking the Law Society's approval, and whether the Law Society can refuse to approve TWU's proposed law school on the basis of that conduct, given its impact on persons denied and equal opportunity to access the legal system and the public interest in the administration of justice.

70. That is, there is a significant distinction between regulating harmful conduct, notwithstanding that it is *motivated by* religious beliefs, and imposing a disadvantage merely on the basis of religious beliefs or status.

71. The difference is helpfully illustrated by the recent United States Supreme Court decision, *Trinity Lutheran*, relied on by the International Coalition of Professors of Law.[45] The

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[42] CCCC Factum, *supra* at para 6; EFC & CHEC Factum, *supra* at para 13; Seventh-day Adventist Factum, *supra* at paras 19-20.

[43] The Respondents appear to accept that imposing the Covenant as a condition of admission would have an exclusionary or an "unfavourable differential" impact tied to sexual orientation: TWU Factum, *supra* at paras 62, 168, 174-175.

[44] See e.g. Seventh-day Adventist Factum, *supra* at paras 7-8 ("A religious test for those entering a publicly regulated profession is not permitted by the *Charter*"); CCCB Factum, *supra* at para 45 ("In their efforts to stamp out TWU's *belief in the religious institution of marriage*…"); CLF Factum, *supra* at paras 8, 33 ("If *religiously-informed beliefs* regarding marriage and sexuality are a legitimate basis on which to reject TWU's graduates, it would follow that any licensee could potentially be excluded from the profession based on personal beliefs or religious associations… The Decisions imperil the ability of all legal professionals to hold and manifest religious and conscientious beliefs that do not conform to prevailing viewpoints.")

[45] ICPL Factum, at para 16-17, citing *Trinity Lutheran Church v Comer*, 582 U. S. ____ (2017) ("***Trinity Lutheran***").

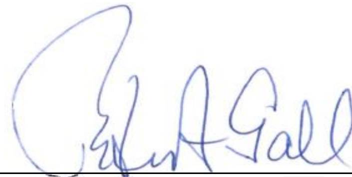
refusal of a public benefit (in that case, rubber playground surfacing) was not based on the conduct of the claimant or the harm to others that would come from supplying the church with rubber playground surface; rather, the religious nature of the institution was *itself* the basis for denying access to a benefit available to all others.[46]

72. In this case, the B.C. Law Society has not taken issue with the religious nature of the institution, but with the specific conduct – its discriminatory admission policy – which TWU says is motivated by religious belief. The B.C. Law Society has determined that the fact that the harmful conduct is motivated by certain religious beliefs is not a sufficient basis to approve the proposed law school. The Court will decide whether it has struck the appropriate balance of the competing *Charter* rights and values in this context.

73. For these reasons, the Law Society respectfully submits that the concept of "state neutrality" is unhelpful in this context. The Law Society's decision is simply not akin to the *Lords Day Act* or establishing public prayers in a municipal council, nor to denying a public benefit on the basis of the religious nature of the institution.

74. To the contrary, the Law Society is taking no position on religious beliefs at all; rather, it has decided not to approve a law school based upon its proposed conduct and the impact that conduct would have on LGBTQ persons and public confidence in the administration of justice.

Dated at the City of Vancouver, Province of British Columbia, this September 25, of 2017.



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Lawyer for Appellant

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[46] See *Trinity Lutheran*, *supra* at 1 ("The Department had a policy of *categorically disqualifying churches and other religious organizations* from receiving grants under its playground resurfacing program" [emphasis added]).

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