COURT OF APPEAL FILE NO. CA43367

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ON APPEAL FROM the order of Chief Justice Hinkson of the Supreme Court of British Columbia pronounced on the 10th day of December, 2015

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(PETITIONERS)

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

RESPONDENTS' REPLY FACTUM

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A. INTRODUCTION

1. This factum replies to arguments made by a number of intervenors. Some of them fail to recognize that TWU is a private community, serving those who voluntarily choose to learn in an evangelical Christian environment. Outside of its own religious community, TWU does not impose itself or limit the actions of anyone.

2. TWU does nothing wrongful or illegal. The Covenant is protected by law. As the Supreme Court of Canada recognized, the TWU community is able to maintain the Covenant under its legislation and is protected by the *Charter* and *Human Rights Code* in doing so.

3. TWU does not have the obligations of the state. It does not require or ask the state to fund its law school or to condone the Covenant. Unlike the Law Society, TWU need not remain neutral in respect of religion to comply with the *Charter.* It would be very peculiar if religious organizations were required to be neutral on religion.

4. The Law Society is not entitled to marginalize or treat some beliefs or religious practices as less important than others, which is what the Decision does. Because TWU's School of Law graduates adhere to a belief and practice it together, they are rejected as lawyers. This is unjust and unlawful.

B. *TWU V. BCCT*

5. Some intervenors say the 2001 Supreme Court of Canada decision in *TWU v. BCCT* is outdated and can be distinguished. They are incorrect.

(i) *TWU v. BCCT* is not outdated

6. The LGBTQ Coalition says that "the protection of LGBTQ rights have [sic] changed since 2001", such that *TWU v. BCCT* is outdated (fn. 13, paras. 9, 15, 16, 29).

7. Subsequent cases have not affected the holding in *TWU v. BCCT.* In 2001, the equality protection for LGBTQ people under the *Charter* was well developed.

Subsequent cases largely apply the principles settled by earlier cases such as *Egan*, *Little Sisters*, and *Vriend*, which were considered in *TWU v. BCCT*.[1]

8. It is incorrect to say that *Whatcott* changed the law (LGBTQ Coalition, para. 15). Justice L'Heureux-Dubé's dissent in *TWU v. BCCT* noted that discriminating against a practice can be discrimination based on one's identity. Justice Rothstein in *Whatcott* noted that Justice L'Heureux-Dubé did not dissent "on this point".[2] The majority in *TWU v. BCCT* did not disagree, acknowledging that TWU's code of conduct creates "unfavourable differential treatment" for LGBTQ students and that many could only sign it "at a considerable personal cost".[3] The identity/practice point did not change the outcome of *TWU v. BCCT*.

9. This is not to say that distinguishing sexual identity and practice has been "firmly rejected" by *Whatcott*, as the LGBTQ Coalition argues (paras. 15-16). Justice Rothstein said "sexual orientation and sexual behavior ***can*** be differentiated for certain purposes".[4] Such a differentiation is more appropriate in a private religious community than perhaps anywhere else.[5]

10. The argument that the Covenant bifurcates identity and practice (LGBTQ Coalition, para. 15) fails to appreciate how the Covenant fosters religious community at TWU. The Covenant facilitates the integration of evangelical identity and practice for members of TWU's religious community, regardless of sexual orientation.[6]

11. As such, the "protection of LGBTQ rights" is not a reason to undermine or reject *TWU v. BCCT*. Conversely, the scope of religious freedom has been developed and more robustly defined since 2001. The Supreme Court of Canada confirmed

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[1] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU v. BCCT*] at paras. 26-27.
[2] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [*Whatcott*] at para 123.
[3] *TWU v. BCCT*, at paras. 23, 25, 34, 35.
[4] *Whatcott*, at para. 122 (emphasis added).
[5] *TWU v. BCCT*, at para. 34.
[6] JAB #4, pp. 1403-1405, paras. 30-34, 36; p. 1412, paras. 23-25; JAB #10, pp. 3563-3564, paras. 38-42; pp. 3612- 3613.

that sincerity of religious belief is subjective in *Amselem*. It clarified that the state must be neutral and not favour or hinder any particular religion in both *S.L.* and *Saguenay*. It also expressly recognized and expanded the collective aspects of s. 2(a) protection, confirming the right to maintain autonomous religious communities in *Hutterian Brethren* and *Mounted Police*. It held that if the state undermines the character and vitality of religious communities, it breaches s. 2(a). And it confirmed in *N.S.* and *Loyola* that the *Charter* requires administrative bodies to accommodate religion as much as possible.

(ii) The nature of the Covenant remains the same

12. The Canadian Secular Alliance/The British Columbia Humanist Society ("CSA/BCHS") attempt to distinguish *TWU v. BCCT* by saying the Decision, unlike *TWU v. BCCT*, concerns "the *mandatory Covenant's* limitation" of the freedom of non-evangelicals (para. 6). Contrary to this argument, and the mistaken finding of the Ontario Superior Court,[7] the mandatory nature of the Covenant is the same.

13. The BCCT rejected TWU and its graduates because of the "***requirement*** for students to sign a contract of 'Responsibilities of Membership in the Trinity Western University Community'", the effect that signing it had on LGBTQ students, and the perception it condoned discrimination.[8]

14. CSA/BCHS misunderstands *TWU v. BCCT*. It incorrectly argues (para. 5) that this case is different because the BCCT "imposed a requirement that TWU students attend a further course of study in a secular school." The "further course of study" was TWU's teacher education program that the BCCT rejected, leaving TWU students with no option *other than* attending a secular school. The Supreme Court of Canada found the BCCT's rejection failed to accommodate freedom of religion and placed an impermissible burden on members of a particular religious group.[9]

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[7] *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 [*TWU v. LSUC*] at para. 62.
[8] *TWU v. BCCT*, at paras. 4, 6 (emphasis added), 18, 34.
[9] *TWU* v. *BCCT,* at paras. 32 and 35.

C. RELIGIOUS FREEDOM

(i) TWU has corporate *Charter* rights

15. The CSA/BCHS cite *Loyola* to suggest that TWU, as an institution, is not entitled to s. 2(a) protection (paras. 19-20). *Loyola* does not stand for this point.

16. The majority in *Loyola* found it was unnecessary to set out a test for corporate protection under s. 2(a) since legal entities are necessary to "give effect to the constitutionally protected communal aspects" of religion and the government must consider the *Charter* rights of Loyola and the "religious freedom of the members of the Loyola community who seek to offer and wish to receive a Catholic education".[10] Protecting the community protects both the organization and the individuals that form it.

17. The concurring minority in *Loyola* more expressly recognized s. 2(a) rights for religious corporate entities. The CSA/BCHS's argument (para. 19) cuts off the portion of the quote where the minority makes clear that the *Charter* protects "*religious educational bodies* such as Loyola".[11]

18. *Loyola* follows *TWU v. BCCT*, which held that an impermissible burden was placed on TWU and its community.[12] The Law Society must respect both.

(ii) The Decision breaches s. 2(a)

19. The Advocates' Society says the Decision does not infringe s. 2(a) because it does not impair an individual's ability to act in accordance with their beliefs (para. 18). It, and other intervenors, promote a penurious view of the protection under s. 2(a).

20. Religious freedom may be interfered with in a number of ways. State action that "increases the cost" of religious beliefs or practices breaches the *Charter.*[13] This can include state measures that "impose costs on the religious practitioner in

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[10] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at paras. 33-34.
[11] *Loyola*, at para. 91 (emphasis added).
[12] *TWU v. BCCT*, at para. 32.
[13] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [*Amselem*] at para. 58.

terms of money, tradition or inconvenience"[14] or "indirect forms of control which determine or limit alternative courses of conduct available to others".[15]

21. The uncontested evidence is that the Covenant is part of a larger set of religiously-based expectations for appropriate conduct in an evangelical Christian community and part of how education is delivered in a Christian context at TWU.[16]

22. Like *TWU v. BCCT*, where there was "no denying" religious beliefs were impacted,[17] the Decision impairs the ability of the TWU community and its members to freely practice their beliefs. The Law Society denies them entry to the bar because they have chosen to act in accordance with those beliefs. This increases the costs of religion and "places a burden on members of a particular religious group ... [and prevents] them from expressing freely their religious beliefs and associating to put them into practice".[18]

23. There is also interference with TWU's religious community as a whole. The arguments of the CSA/BCHS and Advocates' Society completely ignore the protected collective dimension of religious freedom. At a minimum, freedom of religion encompasses the right "to establish communities of faith" and to be free from "measures which *undermine the character of lawful religious institutions* and *disrupt the vitality of religious communities* [as they] represent a profound interference with religious freedom".[19] The Supreme Court of Canada has recognized that the autonomous existence of religious communities is "'an issue at the very heart of protection' of freedom of religion."[20]

24. In *Loyola*, the state infringed s. 2(a) by: (a) interfering with how Catholicism was taught and learned in an institution formed for transmitting Catholicism, and (b)

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[14] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 95.
[15] *Loyola*, at para. 58 (citing *Big M Drug Mart*).
[16] See paras. 3-7 of the Respondents' Factum.
[17] *TWU v. BCCT*, at para. 32.
[18] *TWU v. BCCT*, at para. 32.
[19] *Loyola*, at para. 67 (emphasis added). *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*Mounted Police*] at para. 64.
[20] *Mounted Police*, at para. 64.

undermining "the liberty of the members of its community who have chosen to give effect to the collective dimensions of their religious beliefs" by participating in a religious school.[21]

25. The Decision, with its emphasis on requiring TWU to abandon the Covenant, interferes with the character and vitality of TWU's religious community. TWU's educational approach is to "educate the whole person, including students' characters" with a Christian ethos.[22] Justice Campbell of the Nova Scotia Supreme Court understood this:[23]

> The mandatory covenant is part of what makes TWU a distinctly Evangelical Christian institution. It is easy for outsiders to point out aspects of a faith and practises of that that do not seem that important. We don't get to make that call.

26. TWU should not be compelled to abolish or make its Covenant optional to appease the Law Society (CSA/BCHS, paras. 6, 20). This change will not magically make TWU graduates worthy of entering the bar. Attending TWU is already optional. The Law Society is not permitted to tinker with the codes of conduct that govern religious communities, except when there is specific evidence the code of conduct will make graduates unfit or ill-prepared for the profession.

27. Unless TWU amends or abandons its Covenant, there will be no law school for students to attend and therefore no ability to form a religious community to study law.[24] The ability to form and maintain a religious community is at stake. Not, as argued by the intervenors, an ability to avoid "exposure to the beliefs or practices of others" (CSA/BCHS, paras. 13, 15). Such arguments misunderstand both the nature of religious communities and the nature of the *Charter* infringement.

(iii) Education at TWU is not a secular activity

28. The CSA/BCHS says that studying and teaching at TWU's law school are not worthy of s. 2(a) protection, as this is "not a religious rite or practice, but a secular

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[21] *Loyola*, at paras. 61, 62.
[22] JAB #10, p. 3628, para. 48.
[23] *TWU v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [*TWU v. NSBS*] at para. 232.
[24] *TWU v. BCCT*, at paras. 32, 35.

activity", noting that TWU is "not a seminary" and that "s. 2(a) does not extend to every activity" (CSA/BCHA, paras. 17-18).

29. The religious institution in *Loyola* was not a seminary, but a high school. It was protected. Similarly, evangelicals believe they should carry their beliefs into education, among other areas of life, as part of the transmission of religious belief, spiritual formation, and the strengthening of the evangelical Christian community.[25] As accepted by Hinkson C.J., TWU's educational approach is to "educate the whole person, including students' characters" with a Christian ethos.[26] This is all uncontested evidence.

30. It is not the state or the Court's role to determine the parameters of religious belief and practice. The state is not "the arbiter of religious dogma", and judicial interpretations of religious precepts should be avoided.[27] It is not disputed by the Law Society that the Covenant is sincerely adopted by the TWU community and "reflects both historic patterns of evangelical practice and widely accepted contemporary evangelical theological convictions."[28]

31. The Supreme Court of Nova Scotia summarized the evidence, concluding that the sincere beliefs of evangelical Christians include "the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct":[29]

> When [Evangelical Christians] study law, whether at a Christian law school or elsewhere, they are studying law first as Christians. *Part of their religious faith involves being in the company of other Christians*, not only for the purpose of worship. They gain spiritual strength from communing in that way. They seek out opportunities to do that. Being part of institutions that are defined as Christian in character is not an insignificant part of who they are. *Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an expression of their religious faith.* That is a

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[25] JAB #10, pp. 3535-36, para. 61; p. 3628, paras. 47-49; pp.3563-67; pp.3607-08; pp. 3612-13. See also paras. 4-6 of the Respondents' Factum.
[26] *RFJ*, AR, p. 422, para. 25; JAB #10, p. 3628, para. 48.
[27] *Amselem*, at para. 50.
[28] JAB #10, p. 3534, para. 58.
[29] *TWU v. NSBS*, at para. 235.

> sincerely held [belief] and it is not for the court or for the NSBS to tell them that it just isn't that important.[30]

32. Studying in a religious community strengthens students' commitment to religious beliefs and helps them reach their fullest spiritual potential.[31] Environments with codes of conduct in a university setting contribute to "moral and spiritual growth."[32] In particular, the Covenant benefits TWU's community by providing "an atmosphere that is conducive to the integration of faith and learning."[33]

(iv) TWU is not compelling or coercing the behaviour of others

33. West Coast LEAF (para. 26), citing the Ontario Divisional Court,[34] and CSA/BCHS (paras. 8, 9, 11, 12) say the Covenant interferes with others' rights, compels belief, and is "coercing the behaviour of others", thereby contradicting the principles underlying s. 2(a) of the *Charter*.

34. The Law Society has statutory authority over applicants for admission. TWU graduates are clearly not coercing anyone. They are not impacting the rights of anyone else by choosing to attend TWU. There is no reason to limit the rights of TWU graduates.

35. Regarding TWU as an institution, the CSA/BCHS argument is internally inconsistent. CSA/BCHS acknowledges that s. 2(a) "is designed to protect individuals from *state* coercion or constraint...." (paras. 7 (emphasis added), 15). This is correct; yet the CSA/BCHS also argues that TWU is not protected because it is the one coercing/compelling others. This is incorrect and irrelevant to the *Charter* analysis. TWU is not the state.

36. Private religious communities must be able to set standards for membership and admission based on their own religious beliefs and practices. By deciding to join a

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[30] *TWU v. NSBS*, at para. 230 (emphasis added).
[31] JAB #10, p. 3564, paras. 41-42; p. 3565, para. 45; JAB #1, p. 25, para. 65.
[32] JAB #10, p. 3607.
[33] JAB #10, p. 3613.
[34] *TWU v. LSUC*, at para. 117 (see also para. 113).

religious body, a person voluntarily accepts the community's shared religious standards.

37. The Supreme Court of Canada rejected the notion that TWU's code of conduct alone interferes with the rights of others.[35] As such, it is wrong to say the infringement of religious freedom should attract "only an attenuated level" of protection (Advocates' Society, para. 19). TWU is a private religious school. Seeking *Charter* protection to uphold the Covenant within its own religious community does not infringe upon the rights of others in any way contrary to law.[36]

38. In fact, *if* the Law Society made the Decision because the Covenant violates equality rights, those equality rights should attract only an attenuated level of protection. This is because extending equality rights to those outside of the TWU community would necessarily erode the equality and religious freedom rights of TWU's faculty, students and graduates to define their own religious community. The Law Society cannot remedy discrimination by discriminating.

39. The Court of Appeal's decision in *Ktunaxa Nation* does not assist the CSA/BCHS's arguments (paras. 10-11). The Ktunaxa derived religious meaning from actions *outside of its community* and claimed that its religious beliefs must be protected by limiting the actions of others on their own property, including Glacier Resorts Ltd., who wanted to build on land not held by the Ktunaxa.[37] TWU is a private institution that does not set standards or impose itself on those outside its own community.

40. The Court of Appeal held that there was a sincere belief, but that the state action did not interfere with those beliefs,[38] distinguishing the case from *Loyola.* Of

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[35] *TWU v. BCCT*, at paras. 35-36.
[36] In *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825 and *Whatcott*, the hate speech in question was contrary to law.
[37] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 [*Ktunaxa Nation*] at paras. 1, 71, 73.
[38] *Ktunaxa Nation*, at paras. 57, 61, 73.

Loyola, the Court said "the only persons who had to comply with the Catholic teaching were those students who were voluntarily enrolled."[39]

41. Unlike the Ktunaxa, TWU is not asking those outside its community to comply with the Covenant. Like Loyola, those inside the religious community voluntarily adhere to distinct behavioural norms, which may be rejected by those outside the community.[40] People are asked to adhere to evangelical norms only insofar as they choose to make themselves "insiders" of the religious community. It would be very odd if non-Catholics, for example, could voluntarily join a Catholic organization and then use *Charter* values to compel the organization to change its beliefs or practices to avoid Catholic teachings and practices.

42. Further, TWU is not seeking to compel the Law Society to "accredit" its law school (CSA/BCHS, para. 21; Advocates' Society, para. 17; West Coast LEAF, paras. 26-27). The Minister of Advanced Education accredits TWU's law degree program. This judicial review arose because the Law Society acted unfairly and breached its legal and constitutional obligations when assessing the academic qualifications of future TWU graduates.

(v) No internal limits on s. 2(a)

43. The CSA/BCHS argues there are "internal limits" on the scope of s. 2(a), before the proportionality/section 1 justification stage (paras. 7-16).

44. The Supreme Court of Canada has consistently refused to formulate internal limits to s. 2. In *Whatcott*, the Court held (after examining the same *Big M Drug Mart* quote cited by CSA/BCHS, para. 9) that "the protection provided under s. 2(a) should extend broadly", including to hate speech.[41]

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[39] *Ktunaxa Nation*, at para. 72.
[40] JAB #10, pp. 3562-3563, paras. 30-36.
[41] *Whatcott*, at paras. 153-154.

45. The Court's approach has been to balance breached rights against statutory objectives under a section 1 proportionality analysis.[42] When claims of competing rights are raised, the Court must first determine whether there is a way to accommodate both rights to avoid a conflict.[43] The Court does not start by creating internal limits to the right itself.

D. *CHARTER* VALUES

46. Some intervenors suggest that a "*Charter* value" of equality creates a justification for the Law Society to reject TWU graduates (LGBTQ Coalition, paras. 23, 26, 29; Advocates' Society, paras. 12, 19, 21).

47. This misunderstands the nature of *Charter* values and their application in the administrative law context.

48. As explained by Abella J. in *Loyola*, *Charter* values are "those values that underpin each right and give it meaning." Their role is to "help determine the extent of any given infringement" of a right and "when limitations on that right are proportionate".[44] They do not assist in a decision-maker's interpretation of a statute or authorize government action[45] and are not intended to extend the application of the *Charter* to the private sphere. If this were not the case, it "would transform the *Charter* into a tool in the hands of the state to enforce moral conformity with approved values".[46]

49. Since TWU cannot be said to breach anyone's s. 15 rights, the *Charter* value of equality is not engaged and it is therefore unnecessary to determine the extent of that value.

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[42] *Ibid.* See also *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CarswellOnt 105 (S.C.C.) at para. 110.
[43] *R. v. N.S.*, 2012 SCC 72 at para. 52.
[44] *Loyola*, at para. 36.
[45] *R. v. Clarke*, 2014 SCC 28 at para. 16; *McKinney v. University of Guelph*, 1990 CarswellOnt 1019 (S.C.C.) [*McKinney*] at para. 21.
[46] *TWU v. NSBS*, at para. 222.

50. That is not to say equality concerns are irrelevant. *TWU v. BCCT* held that BCCT could consider equality concerns under its public interest jurisdiction when assessing the qualifications of graduates. The perception that the BCCT "condones this discriminatory conduct" was not enough.[47] Since the BCCT certified teachers, it could only restrict religious freedom with "specific", "concrete" evidence that training TWU graduates fosters discrimination in schools.[48]

51. In this way, weight can be given to both religious freedom under the *Charter* and equality under a self-regulating profession's public interest jurisdiction. However, it is still necessary to determine whether *Charter* rights are actually in conflict.[49] For the reasons set out in *TWU v. BCCT*, they are not in conflict in this case.

52. There is no evidence that accepting TWU graduates would foster discrimination in the legal profession. The Benchers considered this and looked for such evidence, but found none.[50] Despite this, the Decision gave no weight to religious freedom.

E. EQUALITY AND THE *CHARTER*

(i) Section 15 of the *Charter* is not engaged by "who is allowed" in to TWU

53. West Coast LEAF (para. 12) argues that the Respondents adopt a formal, rather than substantive, approach to equality in stating that the Covenant does not engage s. 15 of the *Charter*.

54. West Coast LEAF misunderstands the Respondents' Argument. The Respondents argue that section 15 *does not* apply to the Covenant, not *how* it should be applied.

55. The requirement to apply the "substantive equality" analysis *only* arises if s.15 applies to TWU. In order for s. 15 to be infringed, the Covenant's alleged effect in

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[47] *TWU v. BCCT*, at para. 18.
[48] *TWU v. BCCT*, at paras. 36, 38.
[49] *TWU v. BCCT*, at paras. 29, 32; *R. v. N.S.*, at para. 9.
[50] See the Respondents' Factum, para. 24 (JAB #1, p. 281, para. 24; JAB #2, pp. 514-516; JAB #3, pp. 767-770; p. 821).

preventing equal access must amount to "unequal treatment under the law".[51] This requires a "threshold analysis of whether the impugned distinctions can properly be categorized as failures to provide *equal benefit of the law*".[52] An action is "law" if it derives its authority to act from the Crown.[53]

56. This threshold cannot be met. None of the intervenors show how obtaining a law degree from a program entirely created, funded, and offered by TWU is an exercise of state power. Even statutory powers exercised by a public university do not engage the *Charter*.[54] Universities, not the Law Society, are responsible for creating the number of law school seats for potential law school students. Any benefit is derived from TWU's decision to offer a law school, not from law.[55]

57. The Supreme Court of Canada has already found that "the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence."[56] Admitting TWU graduates as articling students and lawyers would not deny anyone the equal benefit of the law. The reverse is true. The Decision treats TWU graduates unequally compared to other law students because of religion.[57]

58. Some intervenors say this case is about "who is allowed in" to access "scarce" educational opportunities at TWU (LGBTQ Coalition, para. 14). They say if TWU

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[51] *Auton v. British Columbia (Attorney General)*, 2004 SCC 78 at paras. 27-29, 38.
[52] *Sagen v. Vancouver Organizing Committee for the 2010 Olympic and Paralympic Winter Games*, 2009 BCCA 522 [*Sagen*] at para. 58 (emphasis added) (see also paras. 54-55).
[53] *Sagen*, at para. 62.
[54] *BC Civil Liberties Association v. University of Victoria*, 2016 BCCA 162 at para. 25.
[55] *Sagen*, at para. 56.
[56] *TWU v. BCCT*, at para. 25.
[57] The *Charter* protects against arbitrary state action. Paul Daly suggests that if a decision-maker "cannot advance cogent reasons for the refusal to structure, confine and check their discretion, reviewing courts should stand ready to condemn their decision-making processes as lacking justification, transparency and intelligibility" (Paul Daly, *Prescribing Greater Protection for Rights: Administrative Law and Section 1 of the Canadian Charter of Rights and Freedoms* (2014) 65 Supreme Court Law Review 247 at 284).

has a law school, some people who choose not to sign the Covenant will "face a disadvantage in gaining admission to the bar" (Advocates' Society, para. 30).

59. This argument is flawed. Rejecting a TWU law school does not change the number of law school choices for those not willing to attend TWU. As noted by the Federation, TWU can only "expand the choices for all students,"[58] since TWU students will not occupy a space elsewhere. Indeed, closing the doors of TWU would also close the doors to some of the very people some intervenors are interested in protecting, such as the LGBTQ students who attend TWU.[59]

(ii) The Law Society does not breach the *Charter* directly or indirectly by accepting TWU graduates

60. Several intervenors argue that the Law Society would breach the *Charter* if it accepted TWU graduates. They say that to do so would "sanction", "endorse", "condone", and be "complicit in TWU's discriminatory practices" (Advocates' Society, paras. 28-29; West Coast LEAF, para. 11; LGBTQ Coalition, para. 18). This "condoning" argument was made, and rejected, in *TWU v. BCCT*.[60]

61. The argument rests on the faulty premise that TWU "discriminates" in an unlawful sense. The context is a private religious university that is protected by s. 41 of the *Human Rights Code* and to which the *Charter* does not apply.[61]

62. Saying that the Law Society would breach the *Charter* by accepting TWU graduates is to imply that it acts unlawfully. It cannot be said that the lawful behaviour of TWU becomes "alchemically transmute[d]" into unlawful behaviour when the Law Society accepts a TWU graduate (Advocates' Society, para. 27).

63. In *Sagen*, the government did not breach the *Charter* and endorse holding ski jumping for only one gender.[62] The Crown in *Ktunaxa Nation* did not breach the *Charter* by approving the application of a private developer whose development

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[58] JAB #3, p.1069, para. 53.
[59] JAB #10, pp. 3660-3688.
[60] *TWU v. BCCT*, at paras. 18 and 25.
[61] *TWU v. BCCT*, at para. 25.
[62] *Sagen*, at para. 56.

activities on its own land were opposed by the Ktunaxa's beliefs. Likewise, the Law Society is not condoning, endorsing, or sanctioning TWU's religious beliefs or practices by accepting its graduates.

64. No one has articulated how it would breach the *Charter* for the Law Society to accept TWU law graduates, particularly when it already recognizes TWU undergraduates. The government has not breached the *Charter* in approving the nearly 60 other graduate and undergraduate degree programs currently offered by TWU,[63] all of which require adherence to the Covenant. State recognition of TWU and its graduates (only the latter of which falls within the Law Society's statutory mandate) does not transform private, non-*Charter* engaging, activities at TWU into public, *Charter*-engaging, activities of the state.

65. A failure to appreciate the unique context in which the Covenant is implemented is also evident in the argument of the LGBTQ Coalition, which relies on *Brockie*[64] and *Hall*[65] (LGBTQ Coalition, paras. 29-30; see also CSA/BCHS, para. 13). In those cases, illegal discrimination was found under provincial human rights legislation and the *Charter,* respectively. Further, the Court in *Brockie* found that to properly protect religious rights, Mr. Brockie could not be compelled to "print material of a nature which could reasonably be considered to be in direct conflict with the core elements of his religious beliefs."[66]

66. West Coast LEAF cites *Withler* for the proposition that government actors, such as the Law Society, cannot engage in indirect discrimination (para. 13). This is a correct statement of law, but misapplied if taken to suggest that the Law Society's acceptance of TWU graduates is "indirect discrimination." Such discrimination must still emanate from the law, rather than the actions of TWU.[67]

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[63] JAB #1, p. 15, para. 21.
[64] *Ontario (Human Rights Commission) v. Brockie*, [2002] O.J. No. 2375 [*Brockie*] at paras. 18-20.
[65] *Hall (Litigation Guardian of) v. Power*, [2002] O.J. No. 1803 at paras. 16, 24-32.
[66] *Brockie*, at para. 58
[67] *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 64.

67. In any event, there is no evidence to support West Coast LEAF's arguments regarding the alleged impact of the Covenant on women or any other enumerated groups (West Coast LEAF, paras. 6-7, 9-10). There is no evidence as to how TWU interprets or applies the provision of the Covenant that community members "treat all persons with respect ... from conception to death," other than as a general requirement to "treat all persons with dignity, respect and equality, regardless of personal differences."[68] Neither is there any evidence that, within the TWU community, this has ever applied to reproductive choices.[69] West Coast LEAF is speculating and stereotyping evangelical Christians.

68. There is also no evidence that a concern regarding a discriminatory impact of the Covenant on the basis of sex and marital status informed the decision made by the Benchers in October of 2014 (West Coast LEAF, paras. 17-18; Advocates' Society, para. 4). The Decision should not be validated by after-the-fact justifications raised by intervenors.

(iii) *Quebec v. A*

69. Several intervenors rely on the Supreme Court of Canada's decision in *Quebec v. A* to support the Decision.

70. *Quebec v. A* involved an equality challenge to legislation that gave benefits to some groups and not others. Unlike this case, the source of discrimination originated from a law.[70]

71. West Coast LEAF cites Justice Abella's statement that "state conduct" is discriminatory if it "...widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it..." (para. 16),[71] arguing that the

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[68] JAB #1, pp. 28-29, paras. 74-78.
[69] As noted by Hinkson C.J., there was no indication of any "statements made by or before the April 11, 2014 meeting concerning what have been described as abortion rights." He held it should not be "considered at first instance by me on the hearing of this petition." *RFJ,* AR, p. 452, para. 141.
[70] *Quebec (Attorney General) v. A*, 2013 SCC 5 [*Quebec v. A*] at para. 291 (Abella J.).
[71] *Quebec v. A*, at para. 332.

Law Society can be a party to disadvantage resulting from the Covenant, even though they did not create it (para. 16).

72. This misapprehends Justice Abella's comments. The *Charter* applies *to* government and cannot be applied *by* government to the conduct of private parties, directly or indirectly.[72] Section 15 does not impose "on individuals or groups an obligation to accord equal treatment to others".[73] Justice Abella said explicitly that "state conduct," not private conduct, should not widen the gap. The Law Society does not create law school seats. Its role is to determine whether to accept graduates.

73. Section 15 does not place an obligation on TWU to "accord equal treatment to others"; neither can the Law Society. The state has no constitutional obligation or authority to restrict TWU's creation of opportunities for the religious community it serves in order to potentially control their proportionate representation amongst Law Society members.

74. The Advocates' Society mistakenly relies on the statement from *Quebec v. A* that s. 15 is designed to assist equality-seeking groups in "gaining meaningful access to what is generally available" to argue that the Covenant offends the *Charter* (Advocates' Society, paras. 22-27). Unlike the government benefits at issue in *Quebec v. A*, which were intended to be generally available to all citizens, a TWU education is neither intended nor required to be made "generally available." TWU exists to serve the evangelical Christian community. The question is whether the religious foundations of TWU are sufficient to deny recognition of its graduates.

(iv) The "Separate but Equal" argument does not apply to a TWU education

75. West Coast LEAF and the LGBTQ Coalition assert that the Law Society's approval of TWU graduates would lead to a "separate but equal" approach to education that offends s. 15 (West Coast LEAF, para. 12; LGBTQ Coalition, para. 27). All of the cases cited in support of this argument arise in the context of challenges to

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[72] *McKinney*, at para. 21.
[73] *Andrews v. Law Society (British Columbia)*, 1989 CarswellBC 16 (S.C.C.) at para. 7.

discriminatory legislation, the discriminatory application of legislation, or a denial of government benefits, not a program offered by a private institution.

F. PROPORTIONALITY

(i) No Hierarchy of *Charter* Rights

76. The Supreme Court of Canada has confirmed that there is no "hierarchy of rights".[74] But some intervenors wish to create one, arguing that the right of freedom of religion must yield to the right of equality. The LGBTQ Coalition says that balancing those two rights "has largely been resolved in favour of equality by Courts" (paras. 29, 33). The Advocates' Society says that the Petitioners' religious freedom "does not generate sufficient gravitational force to overtake the equality concerns" (para. 21), despite notionally saying that they must "co-exist" (para. 17).

77. Rights "co-exist,"[75] and must be properly delineated, where possible, to be reconciled and avoid a conflict.[76]

78. The Court resolves any potential conflict by asking (1) are both *Charter* or other rights infringed?; if so, then (2) can both rights be accommodated?; if not, then (3) do the salutary effects of one right outweigh the deleterious effects of the other?[77] If there is a true conflict, "*Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights."[78]

79. The intervenors wish to rewrite these principles by skipping (1) and (2) and ignoring the Supreme Court finding that a "voluntary adoption of a code of conduct based on a person's own religious beliefs" does not engage s. 15 of the *Charter*.[79]

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[74] *Reference re Same-Sex Marriage*, 2004 SCC 79 [*Same-Sex Marriage Reference*] at para. 50.
[75] *TWU v. BCCT*, at para. 25; *Whatcott*, at para. 161.
[76] *TWU v. BCCT*, at paras. 29 and 32 ("What the BCCT was required to do was to determine whether the rights were in conflict in reality."); *Same-Sex Marriage* Reference, at para. 50.
[77] *R. v. N.S.*, at para. 9.
[78] *Dagenais v. Canadian Broadcasting Corp.*, 1994 CarswellOnt 112 at para. 75.
[79] *TWU v. BCCT*, at para. 25.

There was no conflict of rights in 2001 and there is not one now.[80] The *Charter* does not undermine the religious policies of a private institution, it protects them. The Supreme Court of Canada specifically noted that the BCCT's use of TWU's "discriminatory practices" to undermine religious belief and practice was an incorrect and "disturbing" focus on TWU's "sectarian nature."[81]

80. Even if the Covenant engages s. 15, which is denied, the Law Society is under a legal duty "to accommodate sincerely held religious beliefs insofar as possible".[82] The Decision gives no weight to religious freedom and fails to accommodate TWU graduates. A total ban on admitting TWU graduates is not proportionate.

(ii) Core national values

81. Some intervenors have cited *Bruker* and *Loyola* to argue that the Law Society must reject TWU graduates in order to promote a "core national value" (Advocates' Society, paras. 16-17, 20-21; LGBTQ Coalition, para. 33; West Coast LEAF, para. 25). If the Covenant were directly in conflict with a "core national value," then the Supreme Court of Canada's protection of its predecessor in 2001 would be a finding contrary to that same "core national value."

82. As noted, equality is not atop a *Charter* hierarchy. While Justice Abella in *Loyola* cites the Bouchard-Taylor report that says that "equality of all citizens before the law" is a core value,[83] equality does not mean the homogenization of private communities: "The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."[84]

83. The Benchers did not make the Decision to promote equality. They made the Decision solely based on a vote of the members. In any event, the Decision to reject TWU graduates does not promote equality before the law. When the state

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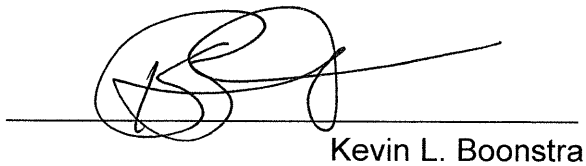
[80] *TWU v. BCCT*, at para. 29.
[81] *TWU v. BCCT*, at para. 42.
[82] *R. v. N.S.*, at para. 51.
[83] *Loyola*, at paras. 46-47; see also *Bruker v. Marcovitz*, 2007 SCC 54 at paras. 82-91.
[84] *Loyola*, at para. 43.

"marginalizes [a person's] religious community in some way ... it is denying her or his equal worth."[85] TWU graduates are treated unequally by the Law Society because of religion. Indeed, they are treated unequally as between religions, as graduates of other religious law schools with a similar code of conduct may enter the bar.[86]

84. The intervenors have not demonstrated how "national values" curtail the Petitioners' *Charter* rights. Certainly the core national value of "democracy" cannot be used as an unassailable justification for elected officials to infringe the *Charter*. The state has the onus to demonstrate that it is impairing the *Charter* right as little as possible.[87] The Law Society has not done so.

All of which is respectfully submitted.

Dated at the City of Abbotsford, Province of British Columbia, this May 6th of 2016.



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[85] *Loyola,* at para. 44, citing Richard Moon.
[86] JAB #2, p. 515; JAB #3, pp. 742-765; JAB #6, pp. 1931-1935.
[87] *Loyola*, at para. 4; *R. v. Oakes*, 1986 CarswellOnt 95 (S.C.C.) at para. 74.

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