COURT OF APPEAL FILE NO. CA43367

COURT OF APPEAL

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' FACTUM

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INDEX

CHRONOLOGY

Date	Event
1962	Trinity Junior College begins to offer post-secondary education as a BC Society.
1969	The *Trinity Junior College Act* is passed by the BC legislature, mandating Trinity Junior College to offer post-secondary education "with an underlying philosophy and viewpoint that is Christian".
1985	*Trinity Western College Act Amendment Act* is passed, making Trinity Western College a university and changing its name to Trinity Western University ("**TWU**").
2010	The Law Society of British Columbia ("**Law Society**") adopts the National Requirement ("**National Requirement**"), by which the Federation of Law Societies of Canada ("**Federation**") assesses new law school programs to ensure their graduates are competent.
June 12, 2012	TWU submits a proposal ("**Proposal**") for its *Juris Doctor* common law degree program ("**JD Program**") to the Federation and Minister of Advanced Education ("**Minister**"), and advises the Law Society of the same.
Sept. 27, 2013	In anticipation of TWU's law school (the "**School of Law**") being approved, the Benchers create Rule 2-27(4.1), allowing them to declare that a common law faculty of law is "not approved" for the purposes of determining the "academic qualification" of individual applicants.
December 2013	The Federation and the Minister approve the JD Program.
April 11, 2014	Benchers defeat resolution declaring the School of Law "not approved" under Rule 2-27(4.1). Law Society announces that the

	TWU School of Law is approved and graduates are eligible for acceptance.
April 23, 2014	Benchers notify members of a Special General Meeting ("**SGM**") of members to vote on a resolution that TWU "is not an approved faculty of law" ("**SGM Resolution**") and include advocacy letter from proponent of the SGM Resolution, but refuse TWU the same opportunity.
June 10, 2014	Members pass the SGM Resolution.
Sept. 26, 2014	Benchers again defeat resolution to not approve TWU. Benchers pass resolution to call a referendum of members that will be "binding" on the Benchers. TWU again requests an opportunity to send a short statement to the members, but the Law Society refuses.
Oct. 30, 2014	Members pass referendum resolution to declare that TWU "is not an approved faculty of law for the purpose of the Law Society's admissions program."
Oct. 31, 2014	Without any substantive discussion, the Benchers implement referendum results by passing a resolution that "pursuant to ... Rule 2-27(4.1)", TWU's "School of Law is not an approved faculty of law."
Dec. 11, 2014	Minister revokes consent for the School of Law based solely on the Law Society's decision to reject academic qualifications of TWU graduates.

OPENING STATEMENT

The Law Society's decision to reject TWU graduates places an impermissible burden on members of a particular religious group and, in effect, prevents them from expressing freely their religious beliefs and associating to put them into practice.

Under the *LPA*, the Benchers set academic requirements for admission to the bar. In deciding whether to reject TWU graduates, they must use the proper analytical framework, including a correct assessment of *Charter* rights. In April of 2014, the Benchers properly voted to accept graduates because there was no legal justification to refuse them. They reversed themselves based solely on a membership vote.

It cannot be in the public interest to both accept and reject TWU graduates. If, as agreed by the Law Society, the Benchers' April 2014 decision was in the public interest, later rejecting TWU graduates cannot be required by the public interest. The Benchers succumbed to political pressure or, in the words of Dickson C.J.C. in *Big M Drug Mart*, the "tyranny of the majority" (para. 96).

The Law Society is *bound* by the *Charter*. TWU is *protected* by the *Charter*. The Benchers must uphold and protect the rights and freedoms of the TWU community as fully as possible in light of the statutory objective of ensuring the competence and professionalism of lawyers. They cannot absolve themselves of their statutory duty by deferring to the membership. They are obligated by the *LPA* and the *Charter* not to implement a membership vote that fails to recognize the credentials of TWU graduates or to accommodate the rights of the TWU community as fully as possible.

Accommodating the rights of the TWU religious community cannot impermissibly impair "equal access." TWU does nothing illegal and opening a Christian law school cannot reduce access to the profession. Rejecting TWU graduates because the Law Society disapproves of its Covenant is contrary to Supreme Court of Canada jurisprudence. "A truly free society is one that can accommodate a variety of beliefs and *codes of conduct*" (*R. v. Big M Drug Mart*, at para. 94). "The diversity of Canadian society is reflected in the religious organizations that mark the societal landscape and *this diversity of views must be respected*" (*TWU v. BCCT*, at para. 33).

PART 1 - STATEMENT OF FACTS

A. THE PARTIES

1. TWU is a privately funded, religious, post-secondary university, founded in 1962 as a Christian liberal arts college by the Evangelical Free Church of America (**"EFCA**"). TWU became a degree granting institution in 1979 and has offered graduate degrees since 1985. TWU retains strong institutional links with the EFCA and its Canadian affiliate, the Evangelical Free Church of Canada ("**EFCC**"). The Executive Director of the EFCC and president of the EFCA are TWU board members and TWU has the same statement of faith as the EFCC.

Joint Appeal Book, Volume 1 ("**JAB #1**"), pp. 13-14, paras. 8-14; pp. 45-58;
JAB #10, p. 3626, paras. 39-41;
Trinity Western University v. The Law Society of British Columbia,
2015 BCSC 2326 ["***RFJ***"], Appeal Record ("**AR**"), p. 417, at paras. 2-4

2. TWU is an educational arm of the church, dedicated to fulfilling an evangelical Christian mission. TWU's primary purpose is to serve the needs of evangelicals, a minority religious subculture in Canada that is approximately 11-12% of the population. As expressed in its Mission Statement, TWU seeks to "develop godly Christian leaders" with "thoroughly Christian minds".

JAB #1, p. 22, para. 53; pp. 23-24, paras. 56, 58; p. 186;
JAB #10, pp. 3625-3626, paras. 36-38; pp. 3648-3654;
RFJ, AR, p. 417, para. 2; p. 422, para. 24

3. TWU's Christian mission is central to its identity and is legislated by s. 3(2) of its enabling statute, which mandates it to offer educational programs "with an underlying philosophy and viewpoint that is Christian". Education provided from a "Christian philosophy and viewpoint" includes the development of students' characters in a manner consistent with evangelical religious beliefs.

Trinity Western University Act, S.B.C. 1969, c. 44 (as amended)
JAB #1, p. 13, para. 9; p. 45; p. 52;
JAB #10, p. 3628, paras. 48-49

4. An important part of how TWU fulfills its evangelical Christian mission and educational mandate has been the implementation of a code of conduct now known as the Community Covenant ("**Covenant**"). When choosing TWU, students

understand that they are joining a religious educational community and are asked to sign the Covenant.

JAB #1, pp. 25-27, paras. 65-69; p. 226

5. Religious codes of conduct, such as the Covenant, are a key way that evangelical institutions define their identities and strengthen their communities. The Covenant is in keeping with codes of conduct generally adopted by other Christian universities, including those with law schools in the USA.

JAB #3, pp. 742-766; pp. 977-978, paras. 74-77; JAB # 4, pp. 1298-1316; JAB #9, pp. 2293-2994, para. 60; JAB #10, pp. 3562-3563, paras. 30-36; p. 3567, para. 54

6. The Covenant is a significant means by which TWU maintains its religious character, achieves its mission as an "arm of the church", and attracts students and faculty that share its evangelical faith. It facilitates the practice of religion in community and creates a safe and welcoming environment for evangelicals. It also promotes moral and spiritual growth within TWU's educational programs.

JAB #10, p. 3534, para. 58; pp. 3607-3608; pp. 3612-3613; p. 3674, para. 30; JAB #1, pp. 26-27, paras. 67-69; p. 226

7. The primary objection to the Covenant is based on one line that asks students to abstain from sexual intimacy outside of marriage between a man and a woman. This provision reflects core evangelical religious beliefs: that marriage is a covenantal union between complementary sexual partners, that the Bible is the final source of authority on matters of human sexuality, and that evangelical communities should cultivate their members' Christian faith and practice.

See for example Appellant's Factum, paras. 2, 173, 176; JAB #1, p. 25, para. 65; JAB #4, p. 1326, paras. 13-16; pp. 1329-1331, paras. 25-29; pp. 1341-1342, paras. 59-61; JAB #10, pp. 3627-3628; p. 3519, paras. 13-16; p. 3522-3524, paras. 25-29; pp. 3534-3535, paras. 59-61

8. TWU offers 42 undergraduate and 17 graduate degree programs, all of which are taught from an evangelical Christian perspective. These include professional programs in the fields of education, nursing, business, and counselling. All of

TWU's programs operate with the Minister's consent and with appropriate professional certifications.

JAB #1, pp. 11-12, para. 3; p. 15, paras. 21-24; pp. 23-24, para. 56

9. Brayden Volkenant ("**Brayden**"), graduated from TWU in 2012 "with great distinction". He is a committed evangelical Christian. For Brayden, TWU's community is one in which he is able to pursue his education and religious faith together with coreligionists. His plan was to earn his *Juris Doctor* degree from TWU. However, he has been compelled to pursue other options because the Law Society would not recognize his credentials as a TWU graduate. This frustrates and offends him.

JAB #1, p. 1-2, paras. 2, 6, 8; p. 4, paras. 20-21; p. 5, para. 23; p. 6, para. 29

10. The Law Society regulates the legal profession in BC pursuant to the *Legal Profession Act* (the "***LPA***"). Under the *LPA*, no one can practice law without being a member of the Law Society. No one may become a member without the approval of the Benchers.

See *LPA*, S.B.C. 1998, c.9, ss. 15, 19

B. THE SCHOOL OF LAW

11. Opening the School of Law has been part of TWU's long-term plan for over 20 years. Like all TWU programs, the JD Program will be of high academic quality. The JD Program is tailored to meet the need of evangelical Christian students to receive a legal education within their religious beliefs and community, distinguishing it from the 20 public law schools operating in Canada.

JAB #1, p. 17, paras. 30-31; p. 21, para. 48; JAB #3, pp. 978-979, paras. 78-80

12. TWU established a task force of judges, lawyers, and academics (2008) and a curriculum working group (2009) to help develop the Proposal. Before the Proposal was approved by its Senate and Board of Governors, TWU received input from a Law School Advisory Council (made up of lawyers, academics, and one judge), engaged in broad public consultation with various groups (including the Law Society), and obtained two independent quality assessments. On June 15, 2012, TWU submitted the Proposal to the Minister and the Federation.

JAB #3, pp. 961-962, paras. 16-21; p. 963, para. 23

13. The School of Law would add 60 students to a total class of about 2,500 in Canadian common-law law schools.

JAB #2, p.294;
Trinity Western University v. Nova Scotia Barristers' Society, 2015 NSSC 25 [***TWU v. NSBS***] at para. 247

14. The Federation's consent was required because all Canadian law societies adopted the National Requirement in 2010 giving the Federation authority to determine whether a degree program adequately prepared graduates for the practice of law. The Minister's consent was also required because only the Minister has the statutory authority to permit TWU to grant law degrees.

JAB #3, p. 965, para. 29; pp. 1010-1011;
Degree Authorization Act, S.B.C. 2002, c. 24, ss. 3-4

15. The Federation rigorously evaluated the Proposal. The Federation considered public submissions, many of which raised equality issues. In addition to review by the Program Approval Committee, it established a Special Advisory Committee, chaired by John Hunter, Q.C., which determined that the Covenant raised no "public interest reason" to exclude TWU's graduates.

JAB #3, pp. 965-968, paras. 30-35; pp. 969-970, paras. 40-44; pp. 1013-1014, 1072-1073

16. The Minister also undertook an exhaustive multi-step review of the Proposal, including a full quality assessment by the Degree Quality Assessment Board (even though TWU was ordinarily exempted from this). The assessment included a review by a five-person expert panel comprised of former law deans and an interim law dean, who also considered the Covenant. The board recommended the Minister approve.

JAB #3, pp. 971-973, paras. 47-54

17. In December 2013, following approximately 18 months of review, TWU received preliminary approval of its Proposal from the Federation (which was the only level of approval available) and consent from the Minister to offer the JD Program.

JAB #3, p. 970, para. 43; p. 973, para. 54

C. RULE 2-27

18. After the Minister's consent and Federation's approval for the JD Program, TWU's graduates could be admitted to the Law Society Admission Program ("**LSAP**"). Until September of 2013, an applicant only needed to have a bachelor of laws from a Canadian common law faculty to be academically qualified to gain admission to LSAP.

RFJ, AR, p. 424, at para. 31

19. In September of 2013, anticipating the Federation's approval, the Law Society changed its rules to add Rule 2-27(4.1) (now rule 2-54(3)), requiring applicants to obtain a degree from an "approved" faculty of law to satisfy the Law Society's academic qualification requirements. Under Rule 2-27(4.1), graduates' "academic qualifications" are automatically approved if the common law faculty receives the Federation's approval, *unless* the Benchers pass a resolution to the contrary. The Law Society has not created any criteria to guide such decisions.

RFJ, AR, p. 424, at para. 32

20. Rule 2-27 is similar to the rules adopted by a number of other Canadian law societies in the sense that Federation approval automatically satisfies academic requirements. TWU graduates will be accepted in Alberta, Saskatchewan, Manitoba, PEI, New Brunswick, and Yukon. (A number of other law societies are awaiting court decisions.)

JAB #3, pp. 973-975, paras. 56-64; p. 974, pp. 976-977, paras. 71-72;
JAB #4, pp. 1245-1265; pp. 1274-1276; pp. 1295-1297

D. THE APRIL MEETING

21. TWU graduates had acceptable "academic qualification" for LSAP based on the Federation's approval. On February 28, 2014, the Benchers circulated a notice of motion ("**April Motion**") under Rule 2-27(4.1) to declare the JD Program "not approved," and thereby reject TWU graduates, at their April 11, 2014 meeting ("**April Meeting**").

JAB #2, pp. 497-500

22. While TWU was permitted to make submissions to the Benchers before the April Meeting, the Law Society refused to provide any guidance on the criteria that

would be used in determining whether this motion would be adopted, despite TWU's request.

JAB #2, pp. 508-510

23. As a result, TWU's submissions covered all topics it guessed the Benchers might consider. TWU's submissions were not merely, as the Law Society says, limited to arguing that deference be given to the Federation's decision. TWU provided extensive arguments on why the April Motion should be defeated, including the applicability of *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [***TWU v. BCCT***] and that a rejection of TWU's graduates would breach ss. 2(a), 2(d) and 15 of the *Charter*. (While the Chief Justice declined to consider issues relating to *Charter* rights other than s. 2(a), they had clearly been raised before the Benchers.)

Appellant's Factum, para. 9;
JAB #3, pp. 809-810; JAB #9, pp. 3242-3247

24. Prior to the April Meeting, the Law Society investigated its disciplinary records, and made inquiries of the BC Human Rights Tribunal, the Deans of three BC law faculties, the Teacher Regulation Branch, and the College of Registered Nurses of BC to determine if TWU graduates engaged in discriminatory conduct. There was no such evidence. Despite this, the Law Society's President asked TWU on April 8, 2014 if it would amend the Covenant to remove the section referencing the sanctity of marriage between a man and a woman.

JAB #1, p. 281, para. 24; p. 282, para. 26;
JAB #2, pp. 514-516; JAB #3, pp. 767-770; p. 821

25. At the April Meeting, the only substantive concern discussed by the Benchers related to one aspect of the Covenant. No Bencher raised any concern with the quality of the JD Program or the competence of TWU graduates.

JAB #3, pp. 833-881

26. After extensive debate, the Benchers defeated the April Motion by a 20-7 vote. Almost all the Benchers voting against the April Motion referenced the applicability of *TWU v. BCCT* and found no public interest reason to reject TWU graduates.

JAB #1, p. 282, para. 28; JAB #3, pp. 833-881;
Petitioners' Written Argument, AR, pp. 205-212

27. Following the vote, President Lindsay publically stated that the Law Society had "decided to approve" the academic qualifications of TWU graduates.

RFJ, AR, p. 425, at para. 37

28. The Benchers' attention to academic qualifications was consistent with their mandate under ss. 20 and 21 of the *LPA* and Rule 2-27(4), which address the academic requirements for the admission of individual applicants.

RFJ, AR, p. 425, at para. 36

E. THE JUNE SGM

29. After the defeat of the April Motion, some members of the Law Society requisitioned the SGM in order to have the Law Society's members consider the SGM Resolution, which would direct the Benchers to reverse their decision. As legal authority, the SGM Resolution cited only s. 28 of the *LPA*, which pertains to promoting and improving practice standards for lawyers (not ss. 3, 4, 20, or 21 of the *LPA*, on which the Law Society now relies).

JAB #1, p. 283, para. 31; JAB #3, pp. 886-887

30. With its "Notice to the Profession" sent to all Law Society members on June 10, 2014, the Law Society included an advocacy letter from a proponent of the SGM Resolution. This letter described the Covenant as an "offensive and discriminatory policy" reflecting "discriminatory principles", and arguing the Benchers' decision to accept TWU's graduates "countenances intolerance."

RFJ, AR, pp. 426-427, at para. 40 (JAB #3, pp. 890-891)

31. Despite the partisan nature of this letter, the Benchers denied TWU's request to enclose its own letter with a Notice to the Profession.

RFJ, AR, p. 427, at para. 41 (JAB #1, p. 283, paras. 32-33)

32. The SGM Resolution passed at the SGM. Members were not required to be present during the speeches in order to vote.

RFJ, AR, p. 427, at para. 42 (JAB #1, p. 283, para. 36)

33. The Benchers considered how to respond to the SGM Resolution at a meeting on July 11, 2014 (the "**July Meeting**"). The three ideas proposed by the Benchers were to: (a) pass a resolution not to approve TWU academic qualifications

("**Motion 1**"); (b) hold a "binding" referendum of the membership ("**Motion 2**"); or (c) postpone further consideration pending guidance from the courts ("**Motion 3**").

JAB #10, pp. 3446-3447

34. The Law Society says the Benchers addressed substantive "*policy*" matters at the July Meeting. This is misleading. The Minutes from the July Meeting record the Benchers discussed "*strategic*" issues in responding to the SGM Resolution. There is no evidence policy issues were discussed.

Appellant's Factum, para. 21; JAB #10, p. 3447

F. THE SEPTEMBER MEETING

35. On July 11, 2014, the Benchers notified TWU that the three proposed motions would be voted on at the September 26, 2014 Benchers' meeting ("**September Meeting**"). Again, this notice failed to provide any guidance on the matters the Benchers would consider relevant in making their decision.

JAB #3, p. 903

36. On July 15, 2014, the Benchers received another legal opinion, advising that implementing the SGM Resolution would breach their statutory duties if the decision to defeat the April Motion was premised on a belief that *TWU v. BCCT* applied and there were no material changes in circumstances. The Benchers who defeated the April Motion made it clear they were legally required to apply *TWU v. BCCT*.

JAB #3, pp. 913-916; JAB #5, p. 1636;
Petitioners' Written Argument, AR, pp. 205-212

37. At the September Meeting, each of the three motions was discussed. Motion 2 explicitly stated that the results of the referendum "will be binding and will be implemented by the Benchers" if at least one-third of Law Society members voted, two-thirds of which supported the resolution.

JAB #10, p. 3464

38. The Benchers speaking in favour of Motion 2 at the September Meeting made frequent reference to practical "governance" concerns faced by the Benchers in light of the SGM Resolution. These included: maintaining the relationship between

the Benchers and the membership, enfranchising democratic participation, respecting the views of the membership and being seen to take action.

For example see JAB # 4, pp. 1471-1472, 1478;
JAB #5, pp. 1527-1528, 1539

39. Contrary to the suggestion that the Benchers' position "evolved" at the September Meeting on some principled legal or factual basis, the only intervening event between the April Meeting and September Meeting was the SGM Resolution. No Bencher who voted against the April Motion indicated that *TWU v. BCCT* no longer applied, that TWU graduates would not be prepared for practice, or that the applicable legal principles had changed since the April Meeting.

Appellant's Factum, para. 40;
Petitioners' Written Argument, AR, pp. 205-212

40. TWU urged the Benchers not to pass Motion 2 because implementing the referendum result was fettering, sub-delegation, and would breach their statutory duties.

JAB #3, pp. 904-912

41. Following the Benchers' discussion, Motion 1 (to reject TWU graduates) was defeated by a vote of 21-9. Motion 2 (to call a binding referendum) passed by a vote of 20-11. Motion 3 (to wait) was withdrawn.

JAB #1, p. 284; para. 41; JAB #3, pp. 925-928

42. The members were now in the driver's seat. TWU requested, and was again refused, an opportunity to include material with the Law Society's Notice to the Profession on the referendum in the same manner as it had with the SGM letter that advocated excluding TWU graduates.

JAB #1, pp. 284-285, paras. 42-43; JAB #3, pp. 929-930

43. Faced with this refusal, TWU sent a letter to lawyers with publicly available e-mail addresses (less than half of the membership), explaining why lawyers should vote against implementation of the SGM Resolution.

JAB #1, pp. 5-6, paras. 26-28; pp. 7-9

44. On October 30, 2014, the Law Society released the results of the referendum: 5,951 BC lawyers (74%) voted in favour of implementing the SGM Resolution and 2,088 (26%) voted against it.

JAB #1, pp. 285-286, para. 47

45. TWU immediately asked the Benchers to make further decisions regarding its prospective graduates based on proper constitutional and legal principles, rather than by popular vote of the members. TWU provided 11 affidavits of TWU alumni and various experts in evangelical and Christian theology concerning the importance of the Covenant to the TWU community and the harm that would result from the Benchers implementing the SGM Resolution. It was ignored.

JAB #1, p. 286, para. 49; JAB #3, pp. 938-940;
JAB #10, p. 3513, paras. 4-6; p. 3704

G. THE OCTOBER MEETING AND THE DECISION

46. At the October 31, 2014 meeting, the Benchers treated the September Motion as binding and voted 25-1, with four abstentions, to implement the SGM Resolution (the "**Decision**"). The Decision was made without any substantive debate or discussion. Bencher Crossin suggested TWU amend the Covenant.

JAB #1, pp. 286, paras. 50-51; JAB #3, p. 949;
RFJ, AR, p. 428, at para. 48

47. As a result of the Decision, the Minister revoked his consent for TWU to offer the JD Program on December 11, 2014.

JAB #4, pp. 1241-1243

48. TWU filed a judicial review of the Decision on December 18, 2014. The Law Society filed a Response on January 16, 2015, later amending it to raise a number of new issues, including the alleged impact of the Covenant on women's reproductive choices. This issue was not considered by the Benchers, and the record contains no evidence related to it.

Petition, AR, pp. 1-31;
Law Society Response to Petition, AR, pp. 40-41, 64-66;
RFJ, AR, p. 452, at para. 141

49. Chief Justice Hinkson released his Reasons for Judgment on December 10, 2015. He found that the Benchers wrongfully fettered their discretion, that the Decision

infringed the petitioners' *Charter* rights, and that TWU was denied procedural fairness. The Chief Justice ordered that the Decision be quashed and the results of the April Meeting be restored.

RFJ, AR, pp. 451-452, at para. 138; p. 454, at para. 148; p. 455, at paras. 151-152; p. 456, at para. 156

50. TWU made detailed submissions to the Chief Justice objecting to the admissibility of Tracy Tso's affidavit, which appends affidavits from another proceeding. This material was not before the Benchers. The admissibility of evidence on judicial review is generally limited to the record before the Benchers. The Law Society filed this evidence in support of its *ex post facto* justifications of the Decision, which unfairly requires TWU and Brayden to hit a moving target on judicial review. The Chief Justice did not find it necessary to rule on this. TWU still objects.

Petitioners' Written Argument, AR, pp. 110-118, 213-230;
Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations), 2014 BCSC 568 at paras. 25, 113-118, 132, 134, 140;
Sellathurai v. Canada, 2008 FCA 255 at paras. 46-47;
Phan v. Canada (Citizenship and Immigration), 2014 FC 1203 at paras. 24-25

PART 2 - ISSUES ON APPEAL

51. The Chief Justice was correct:

    a. in identifying the appropriate standards of review;
    b. in finding the Benchers sub-delegated their authority and improperly fettered their discretion; and
    c. in finding TWU was not treated fairly.

52. The Decision was outside of the Benchers' jurisdiction, was in breach of their statutory duties and, in any event, was incorrect and unreasonable.

53. The Chief Justice was correct in finding a breach of freedom of religion and that the Benchers failed to proportionately balance the *Charter* rights of TWU and Brayden with the relevant statutory objects. The Benchers also breached other *Charter* rights of TWU and Brayden.

PART 3 - ARGUMENT

A. INTRODUCTION

54. The rule of law animates judicial reviews of administrative action and ensures that administrative decision-makers act within their grant of authority: "all exercises of public authority must find their source in law."

Dunsmuir v. New Brunswick, 2008 SCC 9 [***Dunsmuir***] at para. 28

B. THE BENCHERS SUB-DELEGATED THEIR AUTHORITY AND FETTERED THEIR DISCRETION

55. Sub-delegation of a decision is only permitted when authorized by statute, either expressly or by necessary implication. Otherwise, the decision is *ultra vires*.

Brown, D., and Evans, J., *Judicial Review of Administrative Action in Canada* (Toronto: Carswell, 2015) (loose-leaf) 13-15, 13-16

56. A decision-maker must not fetter its discretion, or its decision will be set aside. Discretion is fettered when one does not genuinely exercise independent judgment.

RFJ, AR, p. 444, at para. 97

(i) Standard of Review

57. There may be different standards of review for different aspects of a decision.

Mouvement laïque québécois v. Saguenay (City), 2015 SCC 16 at para. 51 [***Saguenay***]

(a) Sub-delegation

58. Sub-delegation is a question of true jurisdiction, requiring a standard of correctness. True jurisdiction questions arise when a decision-maker is required to determine "whether its statutory grant of power gives it the authority to decide a particular matter" (*Dunsmuir*). If the decision-maker fails to interpret its grant of authority correctly, "its action will be found to be *ultra vires*" (*Dunsmuir*). The Benchers were required to correctly exercise their legal authority under the *LPA* in deciding whether to sub-delegate the Decision to the membership.

Dunsmuir, at para. 59;
WEN Residents Society v. Vancouver (City), 2014 BCSC 965 at para. 103;
RFJ, AR, p. 441, para. 101

(b) Fettering

59. As acknowledged by the Law Society, fettering is an abuse of discretion, not an issue of procedural fairness. However, this does not change the standard of review or the Chief Justice's conclusion on fettering. Fettering should be considered within the "general administrative approach" set out in *Dunsmuir*. Relying on *Dunsmuir*, the Chief Justice appropriately found that the standard of review analysis for the Decision is correctness.

Appellant's Factum, paras. 103, 105, 106;
RFJ, AR, p. 444, at para. 114, pp.437-439, paras. 80-85, 90

60. Even if the standard of review is reasonableness, the Court will not defer to a decision-maker that has restricted or disabled its discretion. It has been held post-*Dunsmuir* that a decision produced by discretion that has been fettered "cannot fall within the range of what is acceptable and defensible" and therefore "must *per se* be unreasonable" (*Stemijon*). In *Kanthasamy*, the decision-maker fettered by "improperly restricting her discretion", which produced an unreasonable decision. There is no reason to defer to the Benchers when they deferred to the members in making the Decision.

Stemijon Investments Ltd. v. Canada (Attorney General), 2011 FCA 299 at para. 24;
Kanthasamy v. Canada (Citizenship and Immigration), 2015 SCC 61 [***Kanthasamy***] at paras. 45, 60;
See also *RFJ*, AR, p. 440, para. 98; p. 444, para. 114

(ii) The Decision is a Product of Sub-delegation and Fettering

61. The Benchers illegally sub-delegated by basing the Decision solely on the will of the members. This is not statutorily authorized.

62. Sections 19, 20, and 21 of the *LPA* expressly authorize "the Benchers" to set academic requirements and admit persons to the practice of law, which is the question determined by the Decision. The Law Society's own Rule 2-27(4.1), which is binding on the Law Society and the Benchers under s. 11(3) of the *LPA*, explicitly states that a decision is to be made only by "the Benchers".

LPA, ss. 11(3), 13(1)

63. There is no express or necessarily implied authorization under the *LPA* allowing members to exclude graduates of a religious law school from entering the bar (unlike specific decisions members are authorized to make about Law Society governance (s. 12)). The only authorized manner in which a members' resolution can be *potentially* binding on the Benchers is through the referendum procedure in s. 13. All other members' resolutions are "not binding on the benchers" (s. 13(1)).

LPA, ss. 12, 13

64. The referendum did not meet the preconditions under s. 13 for the results to potentially be binding. No petition was brought to initiate the referendum after twelve months of non-implementation of a members' resolution. Section 13 does not contemplate the Benchers binding themselves to a membership vote in advance. The suggestion that the Benchers could somehow "expedite the referendum process" under s. 13 of the *LPA*, or hold a "binding referendum" outside s. 13, must be rejected.

Appellant's Factum, paras. 79, 85

65. The Law Society argues the decision to conduct a referendum is a reasonable interpretation of the *LPA* and says the "key issue" is that the Benchers "exercised their discretion by vetting the decision" to ensure either result was reasonable.

Appellant's Factum, paras. 84, 87, 88, 127 (see also paras. 83-84, 125, 145-146)

66. However, the issue here is *not* the Benchers' predetermination that either option could be reasonable. The issue is whether the Benchers actually made the Decision or whether it was made by the members. A Benchers' determination of authority to reject TWU graduates is distinct from actually exercising their authority to decide. The Benchers do not have a power to delegate simply because they have a power to decide. The Law Society is conflating the two issues. The powers of the members and the Benchers under the *LPA* are disparate.

67. In *Oil Sands Hotel*, it was illegal sub-delegation and fettering for a decision-maker to cancel gambling machine contracts in a community based on a democratic, non-binding referendum. The Court found there was no provision authorizing the decision-maker to delegate its powers "to any other body or to a portion of the

public. The fact that the delegation is founded on a democratic vote does not make it statutorily authorized or proper."

Oil Sands Hotel (1975) Ltd. v. Alberta (Gaming and Liquor Commission), 1999 ABQB 218 [***Oil Sands Hotel***] at para. 40

68. The Law Society argues that allowing others to take part in making a decision is "reasonable." It is not. The Court in *Oil Sands Hotel* found the decision-maker fettered and improperly sub-delegated because it "allowed other bodies and individuals to exercise the authority committed to it." It would be similarly incorrect to suggest that because a Minister has the power to admit a person into Canada, and she considered either decision to be "reasonable", she could abandon her judgment and allow a poll of her constituents to dictate her decision.

Appellant's Factum, paras. 79, 80, 83, 124;
Oil Sands Hotel, at para. 42

69. The Law Society, a statutory delegate, cannot decide whether it is reasonable to delegate its authority. Either the *LPA* authorizes it or it does not.

70. The Law Society appears to acknowledge that the Benchers ceded control over making the Decision to the members. It says the referendum was a way for the Benchers to be "responsive to the views of their membership" and was the best way of "resolving this issue."

Appellant's Factum, paras. 46, 73, 108, 112, 125

71. The notion that the Decision was made by the Benchers in consultation with the members is contrary to the facts. The Chief Justice rejected this argument, finding the Benchers asked the members to make their decision for them:

> The evidence is clear, both from the wording of the September Motion and from the nearly unanimous vote on the Decision (which was reached without substantive discussion despite the fact that it was a complete reversal of the Benchers' vote just six months prior), that the Benchers allowed the members to dictate the outcome of the matter.

RFJ, AR, pp. 446-447, paras. 119-120;
JAB #1, p. 286, paras. 50-51; JAB #3, pp. 949-950

72. The September Motion stated that the referendum "*will be binding* and *will be implemented*" (emphasis added). Binding one's decision to the will of others in advance is not merely involving or seeking "guidance" from members; it is sub-

delegation and fettering. As the Chief Justice found, the Benchers fettered their discretion when they "permitted a non-binding vote of the LSBC membership to supplant their judgment."

Appellant's Factum, para. 108;
RFJ, AR, p. 447, para. 120 (see also p. 444, para. 114); JAB #3, pp. 926-928

73. The Chief Justice also correctly found that the Benchers fettered "by binding themselves to a fixed blanket policy set by LSBC members" that the Covenant is unacceptable, regardless of the rights of TWU and its graduates.

RFJ, AR, p. 447, para. 120;
Appellant's Factum, paras. 5, 98

74. The Decision was unduly focused on one line of the Covenant. The members' and Benchers' fixation on it closed their minds to all other evidence and considerations that a future applicant of TWU's School of Law would be competent and fit for entry to the bar (as found at the April Meeting). This was the only conclusion supported by the evidence.

Lloyd v. British Columbia, 1971 CarswellBC 83 (C.A.) at para. 18;
TWU v. BCCT, at para. 43; *Kanthasamy*, at paras. 45, 60

C. PROCEDURAL FAIRNESS

75. The Law Society acted unfairly and denied TWU procedural fairness.

76. The Chief Justice correctly identified that the legislative and specific context determines the degree of fairness owed. Whether the Law Society complied with its duty of procedural fairness is reviewable on a standard of correctness.

RFJ, AR, p. 439-440, paras. 92, 94, 96; p. 447-448, paras. 123, 124;
Mission Institution v. Khela, 2014 SCC 24 [***Khela***] at para. 79

77. The Law Society says it is owed a "margin of deference" based on LeBel J.'s *obiter* in *Khela*. This is not a general rule. The comment arose from the specific statutory authority to act on "reasonable grounds."

Khela, at para. 89

78. The Benchers' process did not involve a "constantly shifting factual landscape" and the Decision was not a legislative "policy decision." The facts and law related to the Covenant did not change between April and October, 2014.

Appellant's Factum, para. 133

79. The Chief Justice correctly found that a high degree of fairness was owed because the Decision "had a direct impact on the petitioners' rights, privileges, and interests," including the right to practice one's profession and religion.

RFJ, AR, pp. 439-440, paras. 92-94; pp. 447-448, paras. 123-124

80. The Law Society says this finding was "questionable" and "not self-evident". On the contrary, the effect on TWU and its community is obvious and dramatic. The Decision denies admission to the bar simply because applicants are educated at a school with a religious Covenant. As the Minister revoked TWU's approval solely because of the Decision, no one is able to attend a TWU law school at all.

Appellant's Factum, paras. 130-131

81. A fair process allows "those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker."

Baker v. Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817 at 837 (para. 22);
RFJ, AR, p. 448, para. 124

82. The Law Society denied TWU procedural fairness in two ways. The first relates to the maxim "he who hears must decide". Individuals who have not heard evidence cannot influence the decision of decision-makers who have.

Mehr v. The Law Society of Upper Canada, [1955] SCR 344 at 351

83. If the members were the ultimate decision-maker, they should not have been permitted to vote on the SGM Resolution and referendum without hearing and considering the speeches at the SGM and TWU's submissions. There is no evidence the members were "fully informed of TWU's position," as submitted by the Law Society. Submissions were only available online and, as the Chief Justice found, it was unlikely many members read them. Indeed, unlike the Benchers, the members had no obligation to become properly informed.

Appellant's Factum, para. 136;
RFJ, AR, p. 427, para. 42; pp. 454-454, para. 150

84. TWU was denied a fair opportunity to make submissions. In its Notice to the Profession about the June SGM, the Law Society included the submissions of a proponent of the Resolution. Despite its requests, TWU was granted no comparable opportunity. TWU was also denied the opportunity to include

submissions with the referendum ballots. The Chief Justice's misstatement that the proponent's submission was included with the referendum ballots, rather than the Notice to the Profession, is not an overriding and palpable error. The unfairness persists as part of the overall process.

JAB #1, p. 283, paras. 32-33; pp. 284-285, paras. 42-43;
JAB #3, pp. 890-891, 929-930;
RFJ, AR, pp. 426-427, paras. 40-41; p. 455, para. 150

85. Second, the Benchers refused to articulate the public interest issues relevant to the decision, despite TWU's requests. Interested parties must be afforded notice of, and to make representations respecting, "evidence which affected the disposition of the case."

Kane v. University of British Columbia, 1980 CarswellBC 1 (S.C.C.) at para. 36

86. While TWU was able to make submissions to the Benchers, it did so without knowing the bases on which they could reject TWU's graduates. Indeed, the grounds are still changing. The Law Society now buttresses the Decision *ex post facto* by saying that TWU should be rejected because it allegedly discriminates against women, despite no Bencher ever mentioning this.

Appellant's Factum, paras. 5, 165, 172-173, 181;
JAB #2, pp. 508-510

87. Given the high level of fairness owed, it was incumbent on the Law Society to inform TWU of the case it had to meet. Had the Benchers done so, perhaps the peculiar referendum procedure and fluctuating rationales for the Decision could have been avoided.

D. ADMINISTRATIVE LAW

88. Even if the Benchers could base their decision on a referendum of members, s.13(4) of the *LPA* precludes them from implementing the result if it would "constitute a breach of their statutory duties." While the Chief Justice found that the Law Society had authority to reject TWU (addressed below), he did not consider any errors within the Law Society's jurisdiction raised by TWU.

(i) Standard of Review

89. The standard of review of the Decision is correctness. A presumption that the standard of review is reasonableness can be rebutted if (a) the jurisprudence has determined the standard of review (pre-*Dunsmuir* cases included) or, if that is not determinative (b) by a standard of review analysis.

Dunsmuir, at paras. 62, 64;
Catalyst Paper Corp. v. North Cowichan (District), 2012 SCC 2 at paras. 18, 23

90. The Chief Justice found that *TWU v. BCCT* determined the standard of review for this category of question, "dealing with the discretion of an administrative body to determine the public interest." Both cases concern self-governing professions making a decision about professional qualifications based on a "statement of principle" condemning TWU's "discriminatory admissions policy."

RFJ, AR, p. 439, para. 90;
TWU v. BCCT, at paras. 5, 6, 17, 52;
Law Society Response to Petition, AR, p. 72, paras. 253-254

91. Even if the Chief Justice was wrong, a *Dunsmuir* standard of review analysis yields a correctness outcome, as it did in *TWU v. BCCT*:

(a) Privative Clause. The *LPA* contains none.

(b) Purpose of the Law Society in the context of the *LPA*. The Decision was made under Rule 2-27(4.1), which was enacted under the *LPA*'s mandate to establish academic standards to ensure competent lawyers. The Rule serves *only* to define such "academic qualifications." No deference is warranted because, as the Law Society admits, the Decision had nothing to do with the ability of TWU graduates to competently practice law in BC.

LPA, ss. 3(b)-(c), 19-20;
Appellant's Factum, para. 160

(c) Expertise of the Law Society. The Benchers have expertise regulating the profession and in assessing individual qualifications for the practice of law. The Decision was based on human rights concerns, not academic or other qualifications (like *TWU v. BCCT*). The Benchers have no more expertise than the courts in the human rights, *Charter*, and labour mobility issues

implicated. Moreover, they are not owed deference on the Covenant since they deferred to the members.

Dr. Q v. College of Physicians and Surgeons of British Columbia, 2003 SCC 19 at para. 28; *Wright v.College and Association of Registered Nurses of Alberta (Appeals Committee)*, 2012 ABCA 267 at para. 34; *TWU v. BCCT*, at para. 18

(d) Nature of the Question. The Decision was adjudicative, affecting the specific rights, privileges, and interests of TWU and its graduates. They had vested rights that were ousted by the Decision. Correctness also applies because this issue is important to the legal system. If the Law Society is permitted to exclude TWU law graduates, there is no barrier to exclude or disbar lawyers who have attended institutions with similar codes of conduct.

Jones, D. & de Villars, A., *Principles of Administrative Law*, 3d ed. (Scarborough, Ontario: Thomson Canada Limited, 1999) at 85; *Dunsmuir*, at para. 60; Appellant's Factum, iii (Opening Statement)

92. Even if the standard is not correctness, the Decision is unreasonable. To be reasonable, a decision must be justifiable, transparent, and intelligible. Otherwise, it "will be unlawful" (*Khela*). The scope of acceptability in a reasonableness review "takes its colour from context" of the *LPA* (*Catalyst Paper*).

Khela, at para. 73; *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 18

(ii) The Scope and Limits of Rule 2-27 in the Context of the *LPA*

93. The Benchers' discretion is not unlimited; "there is no such thing as absolute and untrammelled 'discretion'." Action cannot be taken "on any ground or for any reason." Even if the Benchers could "accelerate" a s.13 referendum process, they were statutorily barred from implementing a motion that breached their duties.

Roncarelli v. Duplessis, [1959] S.C.R. 121 [***Roncarelli***] at 140

94. Rule 2-27(4.1) is about "academic qualification" of individual applicants. The Law Society admits this rule was enacted under ss. 20 and 21 of the *LPA*. Those sections give the Benchers the power to set "academic requirements" for *individuals*, not approve a school's "admissions policies." This is consonant with the relevant object of the *LPA*, that the Law Society uphold and protect the public

interest in the administration of justice to ensure the competence of *individuals* entering and at the bar (ss. 3(b)-(c)). The ordinary language and purpose of the *LPA* support this interpretation.

Appellant's Factum, paras. 4-5, 99

95. Rule 2-27(4.1), with its sole focus on academic qualifications, was binding on the membership and the Benchers under s. 11(3) of the *LPA*. The Decision was about expressing disapproval of the Covenant and the religious structure of the TWU community, not the academic qualifications of TWU's graduates.

96. Unlike the Minister under the *DAA*, the Benchers have no authority over universities more broadly. In these respects, the Benchers made jurisdictional errors, unlike the decision at the April Meeting. The Decision has no solid basis in law and the Benchers overstepped their statutory authority.

TWU v. NSBS, at paras. 174-175, 180;
Dunsmuir, at paras. 28, 59

97. Even if this was not a true jurisdictional error, it was unreasonable for the Law Society to base its decision on a "beneficial policy outcome" – such as "equal access to law schools" – at the expense of the text, context, and purpose of its home statute and its own rule.

Canada (Canadian Human Rights Commission) v. Canada), 2011 SCC 53 at para. 64

(iii) *TWU v. BCCT* Provides the Analytical Framework

98. The Chief Justice correctly held that the decision in *TWU v. BCCT* is dispositive of many of the issues in this case. He also correctly found that the Benchers' authority to reject TWU graduates is contingent on employing "the correct analytical framework," which was set out in *TWU v. BCCT*.

RFJ, AR, p. 436, para. 78; p. 443, para. 108

99. Like the Law Society, the BCCT relied on its public interest mandate to disapprove TWU's teacher program, stating that the Covenant's predecessor had the "effect of excluding" sexual minorities. The Law Society and BCCT had similar public interest mandates to provide standards for education and competence of their

members. The BCCT had broader discretion than the Law Society, since it also had statutory authority to approve programs, whereas the Law Society does not.

TWU v. BCCT, at paras. 2, 6, 9

100. The Court said the BCCT's focus on TWU's religious nature was "disturbing" and that there was no "conflict of rights" because the Covenant's effect is "not sufficient to establish discrimination as it is understood in our s. 15 jurisprudence." Like the Law Society, the BCCT failed to give weight to TWU's private character, which is protected by the *Human Rights Code* and does not infringe the *Charter*.

TWU v. BCCT, at paras. 25, 29, 32, 42

101. The BCCT could consider "discriminatory practices," but only if there were "specific", "concrete" proof those practices fostered discrimination in the classroom or negatively impacted the abilities of TWU graduates. In this case, there is no evidence TWU graduates would discriminate or be ill-prepared for practice.

TWU v. BCCT, at paras. 26, 32, 36, 38;
JAB #2, pp. 514-516;
JAB #3, pp. 767-770

102. The BCCT could not base its decision on a general "perception" of discrimination or that the BCCT "condones this discriminatory conduct." The Law Society's arguments that it cannot condone or give its imprimatur to TWU must also fail.

TWU v. BCCT, at paras. 12, 18, 32, 36, 38;
Law Society Response, AR, p. 68, para. 232; p. 72, para. 254; p. 77, para. 291;
Appellant's Factum, paras. 169-170, 174-175

(iv) The Public Interest

103. The Law Society's *ex post facto* contention that the Decision was made in the public interest is flawed. Neither the SGM Resolution nor the September Motion refers to the "public interest." At the October Meeting, there was no substantive discussion on why the public interest had changed or why rejection of TWU graduates was necessary. The Law Society still accepts that enrolling TWU graduates is not contrary to the public interest.

Appellant's Factum, paras. 45-47, 99, 143, 183

104. A decision-maker's ability to interpret the "public interest" is limited, since it is the legislature that establishes the policy, or objects, of the legislation. The

Legislature did not intend the Benchers to disqualify competent *individuals* from practicing law based on the religiously-based, non-academic conduct policies of their *law school*. Such policies have nothing to do with the *qualities of the applicant*, which is the purpose of ss. 20 and 21 of the *LPA* and Rule 2-27(4.1).

Lindsay v. Manitoba (Motor Transport), 1989 CarswellMan 324 (C.A.) at paras. 36, 39

105. In other words, the Benchers cannot disapprove TWU based merely on a perception of the "public interest," detached from the context of "academic qualifications." As stated by the BC Supreme Court: "[w]hen considering conduct unbecoming, the benchers' consideration of the public interest must, therefore, be limited to the public interest in the conduct or competence of a member of the profession". The Benchers have broad statutory authority under the *LPA*, but public interest considerations *must* be relevant to the decision before them, being academic qualifications under Rule 2-27(4.1) and ss. 20 and 21 of the *LPA*.

Appellant's Factum, para. 183;
Pierce v. Law Society (British Columbia), 1993 CarswellBC 1203 (S.C.) [***Pierce v. Law Society***] at paras. 48, 53

106. It has been recognized by the Federation and the Supreme Court of Canada that there are no public interest reasons to deny TWU graduates on the basis of a religious belief about marriage. The *Civil Marriage Act* specifically states that "diverse views on marriage" are "not against the public interest" and that "no person or organization shall be deprived of any benefit ... solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion...".

Civil Marriage Act, S.C. 2005, c. 33, Preamble and s. 3.1;
Ref. Re Same-Sex Marriage, 2004 SCC 79 at paras. 50-54;
TWU v. NSBS, at paras. 176, 179

(v) The Decision is Unreasonable and an Abuse of Discretion

107. The Decision is incorrect and unreasonable since it is flawed, arbitrary, non-transparent, unintelligible, and unjustifiable.

Khela, at paras. 67, 73

108. It is wrong to reject individuals based merely on their association with an institution or religious group. In *Roncarelli*, there was no legal justification to withhold a liquor

licence to an *individual* based on association with a legal religious *group*, since its beliefs "had no connection whatever with his obligations as the holder of a licence to sell alcoholic liquors". Historically, the Law Society has excluded individuals based solely on being non-citizens and communists. The Decision is another wrongful attempt to deny individuals by association, without regard to their individual competence.

TWU v. BCCT, at para. 33, 36, 43;
Roncarelli, at 141 (Rand J.), 183-184 (Abbott J.);
Andrews v. Law Society (British Columbia), 1989 CarswellBC 16 (S.C.C.) [***Andrews***] at paras. 60-62;
Martin v. Law Society of British Columbia, 1950 CarswellBC 168 (C.A.)

109. The Decision is arbitrary. TWU graduates are excluded, but graduates of other schools with policies like the Covenant are accepted by the Law Society.

JAB #2, p. 515; JAB #3, pp. 742-765; JAB #6, pp. 1931-1935

110. The Decision is not transparent or intelligible. Diametrically conflicting interpretations of a statute by a decision-maker are unreasonable *per se*. There was no legal justification or change in circumstance for the Benchers to vote twice in favour of accepting TWU graduates, and then reverse themselves without any discussion or reasons.

Altus Group Limited v Calgary (City), 2015 ABCA 86 at paras. 23, 27

111. The Decision lacked transparency as the members were requested to make the Decision without any assurance they understood and considered the context of the Rule, the *LPA*, the *Charter*, or TWU's submissions. This was a breach of the Benchers' statutory duties.

112. The Decision is not justifiable as it conflicts with the Law Society's agreement with the law societies that Federation approval is sufficient qualification to enter the bar. It is also contrary to the Law Society's legal obligations under labour mobility legislation and agreements with other law societies that require recognition of TWU graduates entering the bar in other provinces.

JAB #5, pp. 1643, 1779, 1827
Labour Mobility Act, S.B.C., 2009, c. 20, s. 3(4);
JAB #6, pp. 1940-1941 (ss. 2, 4), 1945 (s. 32); p 1973; pp. 2047-2052; p. 2181

113. The Decision constitutes unlawful discrimination under s. 14 of the *Human Rights Code* which prevents an occupational association from discriminating on the basis of religion. It also undermines TWU's protection under s. 41 of the *Human Rights Code*, a rights granting section that protects religious association.

Human Rights Code, RSBC 1996, c. 210
Caldwell v. Stuart, 1984 CarswellBC 477 (S.C.C.) at para. 37;
Vancouver Rape Relief Society v. Nixon, 2005 BCCA 601 at para. 84, leave to SCC refused, 31633 (Feb. 1, 2007);
TWU v. BCCT, at paras. 25, 28, 32 and 35

E. THE CHARTER

114. The proper approach to assessing the *Charter* issues is set out in the Supreme Court of Canada's decisions in *TWU v. BCCT*, *Doré* and *Loyola*:

(a) Would accepting TWU graduates engage the *Charter* and limit the rights of LGBTQ individuals or others?

Answer: No.

(b) Does the Decision breach the *Charter* rights of TWU and Brayden?

Answer: Yes. The Decision breaches freedom of religion, freedom of expression, freedom of association, and equality rights.

(c) In assessing the impact of the relevant *Charter* protections in context, was the Decision a proportionate balancing of *Charter* rights with the applicable statutory objectives?

Answer: No.

Loyola High School v. Quebec (Attorney General), 2015 SCC 12 [***Loyola***] at paras. 35, 38, 39;
Doré v. Barreau du Québec, 2012 SCC 12 [***Doré***] at paras. 7, 32, 43-45, 54-58

115. The Chief Justice correctly found that the law and evidence "conclusively establish" that freedom of religion was infringed. Respectfully, the Chief Justice was not correct in his *obiter dicta* that LGBTQ *Charter* rights were engaged such that there was a "collision" of *Charter* rights.

RFJ, AR, pp. 451-452, paras. 137-138; pp. 454-455, paras. 150-153

116. As recently clarified by the Court of Appeal, the first step in a *Doré* analysis is to determine whether a *Charter* right is infringed: "[t]he threshold issue of whether the

Charter right is infringed at all is a constitutional question to be assessed on a standard of correctness."

Ktunaxa Nation v. British Columbia, 2015 BCCA 352 at paras. 48-49

(i) Accepting TWU Graduates Would not Breach the *Charter* rights of LGBTQ Individuals or Others

117. The Law Society argues that the "equality rights of LGBTQ individuals and women" are engaged by the Covenant and the Law Society must balance them. It argues that the Covenant is a discriminatory admissions policy that deprives LGBTQ persons and women "equal access" to law school, the legal profession, and the judiciary. It further suggests that accepting or condoning TWU graduates would somehow breach the Law Society's s. 15 *Charter* obligations by sending the message it is acceptable to discriminate.

Appellant's Factum, paras. 172-177, 178, 181;
Law Society Response, AR, p. 74, paras. 270, 272

118. None of these arguments withstand scrutiny. They are made without defining "equal access" or explaining how rights are actually infringed by accepting TWU graduates.

119. LGBTQ persons' or women's legal rights are not infringed by either TWU, the Covenant or the defeat of the April Motion. There is no *Charter* right that demands or protects "equal access" to private, *Charter* exempt, religious law schools.

Appellant's Factum, para. 181

120. The *Charter* operates as a protective shield against government action. The *Charter* is not in itself "authorization for governmental action."

McKinney v. University of Guelph, 1990 CarswellOnt 1019 (S.C.C.) [***McKinney***] at para. 21

121. Section 15(1) of the *Charter* "is not a general guarantee of equality; it does not provide for equality between individuals or groups within society in a general or abstract sense, nor does it impose on individuals or groups an obligation to accord equal treatment on others." It was never intended to eliminate all distinctions.

Andrews, paras. 7, 16

122. The Supreme Court of Canada found in *TWU v. BCCT* that "properly defining the scope of the rights avoids a conflict [of rights] in this case." Equality and religious freedom were not in conflict "in reality" because "one must consider the true nature of the undertaking and the context in which this occurs." The context is that TWU is a private institution serving a specific religious subculture. LGBTQ persons' legal rights are not breached by the Covenant and thus no conflict of rights arises.

TWU v. BCCT, at paras. 29, 32, 34 (as well as paras. 25, 35)

(a) *The Charter does not Apply to TWU and the Covenant does not Breach Charter Rights*

123. TWU is not government, nor does it carry out a governmental activity. The *Charter* does not apply to it. The Law Society agrees, saying "TWU is not strictly bound by the *Charter*."

Appellant's Factum, paras. 172-173, 176

124. If the Covenant limits admission, as the Law Society alleges, clearly it can only limit admission *to TWU*, not *the legal profession*. Law societies, not law schools, are the sole gatekeepers of the legal profession. In any event, as found by the Federation's Special Advisory Committee, TWU's School of Law would only *expand* choices and there is no evidence it would "result in any fewer choices for LGBT students."

Appellant's Factum, paras. 173-175;
JAB #3, p.1069, para. 53

125. While the Covenant is said to dissuade certain groups from attending TWU, there is no evidence that TWU has ever expelled an LGBTQ student. Conversely, the Benchers had affidavits from three LGBTQ TWU alumni before the Decision was made, which showed that LGBTQ students sharing TWU's evangelical religious beliefs attend and flourish at TWU.

JAB #10, pp. 3660-3688

126. More importantly, the *Charter* does not apply to the Covenant, even indirectly, because TWU is a private institution. Joining TWU is a voluntary decision to be educated within a religious community. Joining the Law Society is *required* to practice law.

127. The Law Society's position improperly conflates its own activities with those of TWU and imposes *Charter* obligations on TWU. If the Law Society's position were correct, all regulated private activity could be subject to the *Charter* (contrary to s. 32(1)).

128. As stated in *McKinney*, the *Charter* is "not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing...". Applying the *Charter* to concerns arising from the Covenant, directly or indirectly, significantly interferes with TWU and the freedoms of those wishing to be part of TWU's community.

McKinney, at para. 31

129. In *Sagen*, the plaintiffs argued that VANOC was subject to and violated the *Charter* by offering men's, but not women's, ski jumping at the Olympics. VANOC's contract with the International Olympic Committee ("**IOC**"), a private party, meant that the IOC had sole control over the events offered.

Sagen v. Vancouver Organizing Committee for the 2010 & Paralympic Winter Games, 2009 BCCA 522 [***Sagen***], leave to appeal to S.C.C. refused, 33439 (Dec. 22, 2009)

130. The Court found that even if VANOC was subject to the *Charter*, it does not protect against a discriminatory policy of a private party not controlled by government.

Sagen, at paras. 41, 49-50

131. Likewise, the Covenant is not a policy choice that could be made or altered by the Law Society. This has already been determined by the Supreme Court of Canada:

> [T]he admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply.
>
> *TWU v. BCCT*, at para. 25

(b) Accepting TWU Graduates does not Infringe Equality Rights

132. The Law Society has not articulated a sound justification for how the s. 15 *Charter* rights of the LGBTQ community would be engaged by a law society's acceptance of TWU graduates.

133. The text of section 15(1) has been carefully – and deliberately – limited to addressing inequalities arising out of discriminatory application *of the law*:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...

134. Section 15(1) protects against discriminatory treatment *by government*. It does not "impose on individuals or groups an obligation to accord equal treatment to others."

Andrews, at para. 7

135. The Decision is law. The Covenant is not. TWU, not the Law Society, is responsible for creating, funding and offering the JD Program. The Law Society is not treating LGBTQ individuals differently or unequally by recognizing TWU's graduates.

136. As in *Sagen* and *TWU v. BCCT*, accepting TWU graduates cannot mean that the Law Society infringes on the *Charter* by condoning religious beliefs or practices at TWU or sending the message that discrimination is acceptable. Conversely, rejecting graduates sends the message that the TWU community's *Charter* rights and *Human Rights Code* protection are meaningless.

137. *McKinney* concluded that the mandatory retirement policies of Ontario universities would violate s. 15 of the *Charter*, but the policies could remain because the university and its policies were not subject to the *Charter*. By the Law Society's reasoning, the government would have breached its *Charter* obligations every time it recognized, approved, or funded new degree programs at the Ontario universities so long as they maintained such discriminatory policies.

McKinney, at paras. 45, 55

138. The principle quoted by the Law Society from *Vriend* at para. 175 of their Factum does not apply. In *Vriend*, the Alberta government enacted under-inclusive legislation that offered human rights protection to various groups in society, but not members of the LGBTQ community. This "total exclusion from a legislative scheme" (as later characterized by Abella J. in *Quebec v. A*) was a *Charter* breach because it was a government omission *codified in law*. The Court in *Vriend*

specifically noted the discrimination complained of emanated from the law, not "the acts of King's College or any other private entity or person."

Quebec (Attorney General) v. A., 2013 SCC 5 at para. 361;
Vriend v. Alberta, [1998] 1 SCR 493 at 535 (para. 66)

139. The Law Society's suggestion at para. 177 from Abella J. in *Loyola*, that the Law Society has a legitimate interest in promoting and protecting equality, must be understood in context. Abella J.'s statement is supported by a quote referring to "the equality of all citizens *before the law*", which is not engaged by the Decision.

Loyola, at paras. 46-47 (emphasis added)

140. Unlike this appeal, the cases cited by the Law Society at para. 178 involve competing rights in the context of government services or breaches of human rights legislation. The Covenant does not breach the *Human Rights Code*.

(ii) The Decision Breaches the *Charter* Rights of TWU and Brayden

141. The Decision unjustifiably infringes the ss. 2(a), 2(b), 2(d) and 15(1) rights of TWU and members of its religious community, including Brayden, whose *Charter* rights must be interpreted generously. These issues were raised in TWU's submissions before the April Meeting and the Benchers were required to consider them.

Mounted Police Association of Ontario v. Canada (Attorney General),
2015 SCC 1 [***Mounted Police***] at para. 47;
JAB #3, pp. 772-820

(a) Section 2(a) – Religious Freedom

142. The Chief Justice, the Supreme Court of Canada, and courts in Ontario and Nova Scotia have found that a refusal to accept TWU graduates due to the Covenant breaches s. 2(a). The Law Society now admits the Decision has "an impact" on that right, but seeks to justify rejection because it says there are "legitimate questions" about the extent of that impact.

RFJ, AR, pp. 451-452, para. 138;
Appellant's Factum, paras. 163, 171

143. The Decision violates the religious freedom of Brayden, TWU and other members of TWU's community by (1) breaching state neutrality; and (2) interfering with sincerely held religious beliefs and practices.

State Neutrality

144. The Law Society must be neutral in matters of religion. The Law Society can neither favour *nor hinder* any particular religious belief and must "abstain from taking any position" on religion and religious beliefs, including those in the Covenant:

> When the state adheres to a belief, it is not merely expressing an opinion on the subject. It is creating a hierarchy of beliefs and casting doubt on the value of those it does not share. It is also ranking the individuals who hold such beliefs.

Saguenay, at paras. 72, 73

145. The Law Society is not neutral when it favours a state-held view of marriage and sexuality that ranks applicants to the bar related to those views and, in fact, only excludes private religious belief on those topics. The Decision devalues TWU's evangelical religious beliefs by suggesting they are illegitimate, detrimental, and unacceptable.

Saguenay, at paras. 83, 88, 134

146. The Court in *Saguenay* stressed that neutrality "does not mean the homogenization of private players" in the public sphere. "[A] neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity."

Saguenay, at para. 74

147. Before, after, and at the time the Decision was made, the Law Society expressly attempted to pressure, convince, and condemn the TWU community to abandon its religious practices on marriage in order to gain acceptance by the Law Society. This is a coercive burden on a religious community to disregard religious belief in order to fully participate in public life. The Law Society is not being "neutral", but penalizing the TWU community for retaining its religious character. Religious and non-religious beliefs were not kept on equal footing.

Law Society Response, AR, p. 72, paras. 253;
JAB #3, pp. 821-823; p. 949

Interference with Religious Beliefs and Practices

148. The test for an infringement of freedom of religion is found in *Amselem*, as restated in *S.L.*:

(a) Does the claimant hold a sincere belief having a nexus with religion?

(b) Does state action interfere and prevent the claimant from acting in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial?

Syndicat Northcrest v. Amselem, 2004 SCC 47 [***Amselem***] at para. 56;
S.L. v. Commission scolaire des Chênes, 2012 SCC 7 [***S.L.***] at para. 22-24

149. It is undisputed that TWU and its evangelical Christian community hold a sincere belief about abstaining from sexual intimacy outside of opposite-sex marriage, which is part of a larger set of religiously-based expectations for appropriate conduct within its religious community.

150. With respect to the second part of the test, any burden that is "capable of interfering with religious belief or practice" infringes s. 2(a).

Saguenay, at para. 85 (citing *Edwards Books*)

151. Attendance in schools such as TWU strengthens the evangelical community as adherents "are socialized by these institutions to be more committed to evangelical beliefs and values." The Law Society's assertion that evangelical beliefs "do not require their followers to study law" with the Covenant is irrelevant. The law does not require a practice or belief to be "required" to be protected (*Amselem*).

JAB #10, p. 3564, paras. 41-42;
Appellant's Factum, paras. 165, 168;
Amselem, at para. 56, as well as para. 49

152. Freedom of religion encompasses "both the absence of coercion and constraint, and the right to manifest beliefs and practices." "[C]oercion includes indirect forms of control which determine or *limit alternative courses of conduct available to others.*" In *Loyola*, a decision to reject Loyola's curriculum interfered with "the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith."

Loyola, at paras. 58 (citing *Big M Drug Mart*, emphasis added), 61

153. The freedom of religion guaranteed in the *Charter* "is not merely a right to hold religious opinions but also an individual right to establish communities of faith," the autonomous existence of which is "indispensable for pluralism in a democratic society" (*Mounted Police*). In *Loyola*, the Supreme Court affirmed that:

> Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions.

Mounted Police, at para. 64;
Loyola, at paras. 60 and 91

154. The Supreme Court of Canada found that "there is no denying" that the BCCT's decision placed a burden on TWU and its community; if TWU did not abandon its code of conduct, its teacher program could not be certified and its students could not become teachers. When individuals are excluded from the bar because of their association with TWU, they are denied "the right of full participation in society."

TWU v. BCCT, at paras. 32, 35

155. Section 2(a) protects religious minorities against the "tyranny of the majority." TWU and its community clearly need that protection from the Law Society and its membership in order to maintain their communal institution and traditions.

Loyola, at para. 58 (citing *Big M Drug Mart*)

156. The Law Society's actions to improperly pressure and convince TWU to change its religiously-based conduct policies interfere with the manner in which TWU and its community teach and learn in an evangelical Christian environment.

JAB #1, p. 26, para. 67;
JAB #10, pp. 3562-3567, paras. 34-54

157. The evidence before the Law Society demonstrates that the Decision interferes with the TWU community. Individuals (including some LGBTQ persons) attend TWU specifically because TWU and its community, through the Covenant:

(a) provide a supportive and safe learning environment to practice, develop, and remain faithful to their religious convictions;
(b) allow them to better pursue their educational and spiritual goals;
(c) respect their evangelical beliefs without being ridiculed for them; and

(d) assist sexual minority students to reconcile their sexuality and faith.

JAB #4, p. 1412, paras. 23-25; pp. 1449-50, para. 34;
JAB #10, p. 3663, paras. 18-19; p. 3672, para. 16; p. 3673, paras. 20-21;
pp. 3674-3675, paras. 30-33; p. 3676, para. 36; p. 3682, paras. 19-20

158. Citing the concurring opinion of a single justice of the US Supreme Court in *Christian Legal Society v. Martinez*, the Law Society says it can "refuse to condone or approve of religiously-based actions that have a discriminatory impact." In that case, a religious group effectively sought a "state subsidy" and public school channels of communication. TWU seeks neither.

Appellant's Factum, paras. 169-170;
Christian Legal Society v. Martinez, 130 S. Ct. 2971 at 2979, 2986, 2991

(c) Section 2(b) – Freedom of Expression

159. Section 2(b) protects the manifestation of opinions and beliefs "however unpopular, distasteful, or contrary to the mainstream." The freedoms to teach, share, or communicate religious beliefs "are unlimited, except by the discrete and narrow requirement that this not be conveyed through hate speech."

Saskatchewan (Human Rights Commission) v. Whatcott, 2013 SCC 11 at paras. 50, 97

160. The Decision, coupled with the Law Society's pressure to change the Covenant, interferes with TWU's ability to express the collective views of the religious community it serves. When the BCCT denied TWU accreditation of a teacher program solely on the basis of the Covenant, it placed a burden on TWU's community by preventing them from "expressing freely their religious beliefs…".

TWU v. BCCT, at para. 32

(d) Section 2(d) – Freedom of Association

161. The Supreme Court of Canada has taken a purposive, generous approach to s. 2(d) of the *Charter*, which encourages "individual self-fulfillment" and the "collective realization of human goals." It protects a "broad range of associational activity", including the right to form and participate in associations "without penalty or reprisal". Section 2(d) allows individuals to determine and control "the rules, mores and principles which govern the communities in which they live."

Mounted Police, at paras. 32, 35 (citing *Alberta Reference*), 46, 60, 66

162. The Decision interferes with the TWU community by penalizing it for retaining the Covenant, despite it being a "significant means" by which it governs its religious association and maintains its evangelical character. The Decision undermines the evangelical community's ability to form a religious educational community.

JAB #1, p. 26, para. 67;
JAB #10, p. 3564, paras. 40-41

163. The Decision also interferes with the goal of evangelical Christians to be educated within a Christian community. That cannot be achieved individually. The Supreme Court found that the actions of the BCCT prevented evangelicals from "associating to put [their religious beliefs] into practice". So has the Law Society.

TWU v. BCCT, at para. 32

164. The Decision seriously undermines the associational freedom of TWU graduates. They are considered unacceptable to enter the bar because they have associated with TWU. This "state-enforced isolation" is prohibited by s. 2(d).

Mounted Police, at para. 62

(e) Section 15(1) – Equality

165. The Decision breaches s. 15(1) if it: (a) makes a distinction based on enumerated or analogous grounds; and (b) this distinction creates a disadvantage. Disadvantage exists if the Decision fails to respond to the needs of evangelical Christians, instead imposing a burden on them or denying them a benefit in a manner that reinforces, perpetuates, or exacerbates disadvantage.

Kahkewistahaw First Nation v. Taypotat, 2015 SCC 30 at paras. 19-20

166. The Decision creates a distinction. Students like Brayden, who choose to study law in a private evangelical environment, are treated differently than their colleagues studying in public institutions. The distinction rests squarely on TWU students' affirmation of the religious values in the Covenant. That is not a proper reason to distinguish them from other applicants.

167. The distinction results in serious disadvantage for students like Brayden, who are refused membership in the Law Society because of their participation in TWU's religious community, despite their individual qualifications. A distinction that

disadvantages a person solely because of his or her association with a protected group "will rarely escape the charge of discrimination."

Andrews, at para. 19

168. The Supreme Court has already recognized that an unconstitutional disadvantage arises when TWU students are forced to choose between affirming their religious beliefs within the TWU community and obtaining a degree leading to professional certification. The Decision resurrects the burden rejected in *TWU v. BCCT* by forcing Brayden to choose between studying law with fellow evangelical Christians at TWU and practicing law in British Columbia.

TWU v. BCCT, at para. 32

169. To comply with s. 15(1), the Law Society must accommodate the unique needs of evangelicals to study in an environment conducive to their religious beliefs and practices. The Decision fails to recognize this need by making the price of attending an evangelical law school the inability to practice law.

See references cited at para. 157 above
TWU v. NSBS, at paras. 229-230

(iii) The Decision is not a Proportionate Balancing of *Charter* Rights

170. A decision that breaches the *Charter* is reasonable if the decision-maker has proportionately balanced the relevant *Charter* values with the statutory objectives. It is not, as suggested by the Law Society, a balance between competing rights.

Doré, at paras. 32, 55-57;
Appellant's Factum, para. 178

(a) The Statutory Objective

171. The first step in the proportionality analysis is to identify the relevant statutory objective under the *LPA*. That objective is professional competence.

Doré, at para. 55

172. The purpose of Bencher discretion under the *LPA* has been previously found "to enable the benchers to maintain high professional standards in the practice of law." This is reflected in the objects of the *LPA* to ensure the competence of lawyers (s. 3(b)) and establish standards for the competence of applicants to the

bar (s. 3(c)). Rule 2-27(4.1) defines "academic qualifications" and was enacted under ss. 20 and 21 of the *LPA* to set "academic requirements." The relevant objective under the *LPA* in the context of a decision under Rule 2-27(4.1) is therefore to ensure that applicants are competent to practice law.

Pierce v. Law Society, at para. 51;
LPA, ss. 3(b)-(c), 19(1)(a), 20(1)(b)

173. If upholding the rights and freedoms of all persons is the relevant objective under s. 3 of the *LPA*, it is only relevant if it affects "the administration of justice." Recognizing academic qualifications of TWU graduates does not undermine the administration of justice. Further, rejecting their actual rights and freedoms cannot achieve the objective of "upholding the rights and freedoms of all persons."

Appellant's Factum, s. 143

(b) <u>What is Proportionate?</u>

174. A proportionate balancing under *Doré* is "robust," one more akin to the minimal impairment test under *Oakes* than an ordinary reasonableness review, as the Law Society argues. This is why, in part, the Benchers cannot wash their collective hands of the Decision by simply declaring that either outcome is acceptable.

Loyola, at para. 40;
Appellant's Factum, paras. 150-151, 154-156

175. A proportionate balancing is "one that gives effect, *as fully as possible to the Charter protections at stake* given the particular statutory mandate." Such a balancing must ensure that *Charter* rights "are affected as little as reasonably possible", and "are *limited no more than is necessary* given the applicable statutory objectives."

Loyola, at paras. 4, 39, 40 (as well as 31, 114) (emphasis added)

(c) <u>The Decision was not Proportionate</u>

176. First, the Decision was not proportionate because unlike at the April Meeting, in October the Benchers did not consider and balance *Charter* rights.

177. A decision will be found to be disproportionate and wrongful if there was "no balancing" undertaken or "no weight" given to the *Charter* rights engaged by the

decision (*Loyola*). The Decision was made without any discussion and without any weight given to the rights asserted by TWU, despite it being a complete reversal of the April decision. This makes the Decision unreasonable.

Loyola, at para. 68; *TWU v. BCCT*, at para. 33;
The Law Society of British Columbia v. Zoraik, 2015 BCCA 137 at paras. 19, 38;
RFJ, AR, p. 455, para. 151;
JAB #3, pp. 771-820, 904-912; JAB #10, p. 3513, para. 5

178. Second, the Decision is disproportionate because *Charter* rights must be "limited no more than is necessary" to achieve the relevant statutory objective (*Loyola*). It is absurd to call the Decision "necessary". It cannot be *necessary* for the Law Society to infringe upon TWU and its community's *Charter* rights if the Benchers determined that "either outcome was reasonable." Even more disproportionate is that graduates of those law schools with similar codes of conduct to TWU are academically qualified to practice law in British Columbia.

Loyola, at para. 4; Appellant's Factum, para. 158

179. Similar to the state action in *Loyola*, the Decision does not further the *LPA*'s objectives and does not minimally impair the affected rights. Rejecting TWU graduates is not necessary to achieve the goal of developing competent lawyers fit to practice law or even preventing discrimination in the legal profession.

Loyola, at para. 6

180. Following the analytic framework of *TWU v. BCCT*, limits on *Charter* rights may be justifiable if there is "specific", "concrete" evidence that religious beliefs will have a detrimental effect on the quality of education or foster discrimination in the practice of law. That TWU asks students to abide by the Covenant, even if this comes at a "considerable personal cost", is not enough.

TWU v. BCCT, at paras. 25, 32, 35, 38

181. The Benchers' willingness to flip-flop after the referendum only evidences they were not giving effect "as fully as possible" to the rights of TWU's graduates. The Decision excludes their ability to practice law, which is a significant infringement, and gives no weight to the rights of those affected. There is no good reason why TWU graduates should pay the price of the Law Society's political stance.

Andrews, at paras. 99, 102

182. The Decision is also a serious infringement of TWU's institutional rights, and of its religious community. As the Court found in *Loyola*:

> Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.

Loyola, at para. 67

183. The Decision undermines the character of TWU by pressuring it to abandon the Covenant. It also disrupts the vitality of TWU's community. The evidence establishes that those belonging to religious communities like TWU have "greater strength and vitality because they are distinctive and demanding." To adopt the Supreme Court's holding in *Loyola*, the Decision does not "account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions."

Loyola, at paras. 60, 62, 67;
JAB #10, p. 3565, para. 45

184. The ramifications of the Decision are disproportionate to the benefits (if any) of excluding TWU graduates. The Decision could put all of TWU's programs and degrees in jeopardy, including the teacher program protected by *TWU v. BCCT*. If it is true that the state cannot condone or be seen to be associated with the policies of religious schools, churches, and other organizations, it could seriously undermine their ability to operate.

185. Third, the Decision is disproportionate because it does not even attempt to accommodate TWU and Brayden's rights. Even if there is a potential "collision" of rights in a public setting, the *Charter* requires "state institutions and actors to accommodate sincerely held religious beliefs insofar as possible" (*R. v. N.S.*). TWU graduates' "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society" (*TWU v. BCCT*).

R. v. N.S., 2012 SCC 72 [***R. v. N.S.***] at paras. 51, 52;
TWU v. BCCT, at para. 35

186. The Supreme Court of Canada has found that courtrooms are not "secular spaces where religious belief plays no role". Private law schools need not be either.

R. v. N.S., at paras. 51, 52

F. CONCLUSION

187. The Benchers had to consider "academic qualification" of future TWU graduates in making a decision under Rule 2-27(4.1). That is not what they, or Law Society members, did. Instead, they based the Decision on their disagreement with a now unpopular religious belief embedded in the Covenant, which has no impact on graduates' ability to practice law. In deferring to the members, the Benchers breached their statutory duties and failed to proportionately balance the breaches of the *Charter* rights of TWU graduates against the statutory objects.

PART 4 - NATURE OF ORDER SOUGHT

188. The respondents seek an Order:
    (a) dismissing this appeal; and
    (b) awarding costs of this appeal, including special costs, and in the court below.

Dated at the City of Abbotsford, Province of British Columbia, this March 4th of 2016.

Kevin L. Boonstra
Jonathan B. Maryniuk
Andrew D. Delmonico
Lawyers for the Respondents

APPENDIX: ENACTMENTS

TRINITY WESTERN UNIVERSITY ACT

[SBC 1969] CHAPTER 44 (as amended)

Society continued

3 (1) Trinity Western University heretofore incorporated under the *Societies Act* and the members from time to time of the Board of Governors are continued and hereby constituted a body corporate under the name "Trinity Western University."

(2) The objects of the University shall be to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian.

LEGAL PROFESSION ACT

[SBC 1998] CHAPTER 9

Object and duty of society

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

(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 the 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 lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

Law Society rules

11 (3) The rules are binding on the society, lawyers, law firms, the benchers, articled students, applicants and persons referred to in section 16 (2) (a) or 17 (1) (a).

Rules requiring membership approval

12 (1) The benchers must make rules respecting the following:

(a) the offices of president, first vice-president or second vice-president;

(b) the term of office of benchers;

(c) the removal of the president, first vice-president, second vice-president or a bencher;

(d) the electoral districts for the election of benchers;

(e) the eligibility to be elected and to serve as a bencher;

(f) the filling of vacancies among elected benchers;

(g) the general meetings of the society, including the annual general meeting;

(h) the appointment, duties and powers of the auditor of the society;

(i) life benchers;

(j) [Repealed 2012-16-6(a).]

(k) the qualifications to act as auditor of the society when an audit is required under this Act.

(2) The first rules made under subsection (1) after this Act comes into force must be consistent with the provisions of the *Legal Profession Act*, R.S.B.C. 1996, c. 255, relating to the same subject matter.

(3) The benchers may amend or rescind rules made under subsection (1) or enact new rules respecting the matters referred to in subsection (1), in accordance with an affirmative vote of 2/3 of those members voting at a general meeting or in a referendum respecting the proposed rule, or the amendment or rescission of a rule.

Implementing resolutions of general meeting

13 (1) A resolution of a general meeting of the society is not binding on the benchers except as provided in this section.

(2) A referendum of all members must be conducted on a resolution if

(a) it has not been substantially implemented by the benchers within 12 months following the general meeting at which it was adopted, and

(b) the executive director receives a petition signed by at least 5% of members in good standing of the society requesting a referendum on the resolution.

(3) Subject to subsection (4), the resolution is binding on the benchers if at least

(a) 1/3 of all members in good standing of the society vote in the referendum, and

(b) 2/3 of those voting vote in favour of the resolution.

(4) The benchers must not implement a resolution if to do so would constitute a breach of their statutory duties.

Applications for enrollment, call and admission, or reinstatement

19 (1) No person may be enrolled as an articled student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

(2) On receiving an application for enrollment, call and admission or reinstatement, the benchers may

(a) grant the application,

(b) grant the application subject to any conditions or limitations to which the applicant consents in writing, or

(c) order a hearing.

(3) If an applicant for reinstatement is a person referred to in section 15 (3) (a) or (b), the benchers must order a hearing.

(4) A hearing may be ordered, commenced or completed despite the applicant's withdrawal of the application.

(5) The benchers may vary conditions or limitations made under subsection (2) (b) if the applicant consents in writing to the variation.

Articled students

20 (1) The benchers may make rules to do any of the following:

(a) establish requirements, including academic requirements, and procedures for enrollment of articled students;

(b) set fees for enrollment;

(c) establish requirements for lawyers to serve as principals to articled students;

(d) limit the number of articled students who may be articled to a principal;

(e) stipulate the duties of principals and articled students;

(f) permit the investigation and consideration of the fitness of a lawyer to act as a principal to an articled student.

(2) The benchers may establish and maintain an educational program for articled students.

Admission, reinstatement and requalification

21 (1) The benchers may make rules to do any of the following:

(a) establish a credentials committee and delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee;

(b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court;

(c) set a fee for call and admission;

(d) establish requirements and procedures for the reinstatement of former members of the society;

(e) set a fee for reinstatement;

(f) establish conditions under which a member in good standing of the society who is not permitted to practise law, may apply to become a practising lawyer.

(2) The fee set under subsection (1) (c) must not exceed 1/6 of the practice fee set under section 23 (1) (a).

(3) The benchers may impose conditions or limitations on the practice of a lawyer who, for a cumulative period of 3 years of the 5 years preceding the imposition of the conditions, has not engaged in the practice of law.

Education

28 The benchers may take any steps they consider advisable to promote and improve the standard of practice by lawyers, including but not limited to the following:

(a) establishing and maintaining or otherwise supporting a system of legal education, including but not limited to the following programs:

(i) professional legal training;

(ii) continuing legal education;

(iii) remedial legal education;

(iv) loss prevention;

(b) granting scholarships, bursaries and loans to persons engaged in a program of legal education;

(c) providing funds of the society and other assistance to establish or maintain law libraries in British Columbia;

(d) providing for publication of court and other legal decisions and legal resource materials.

DEGREE AUTHORIZATION ACT

[SBC 2002] CHAPTER 24

Granting of degrees and use of "university" restricted

3 (1) A person must not directly or indirectly do the following things unless the person is authorized to do so by the minister under section 4:

(a) grant or confer a degree;

(b) provide a program leading to a degree to be conferred by a person inside or outside British Columbia;

(c) advertise a program offered in British Columbia leading to a degree to be conferred by a person inside or outside British Columbia;

(d) sell, offer for sale, or advertise for sale or provide by agreement for a fee, reward or other remuneration, a

diploma, certificate, document or other material that indicates or implies the granting or conferring of a degree.

(1.1) A person who is authorized by the minister to do the things referred to in subsection (1) may grant or confer an honorary degree to or on a person.

(2) A person must not directly or indirectly make use of the word "university" or any derivation or abbreviation of the word "university" to indicate that an educational program is available, from or through the person, unless the person is authorized to do so by the minister under section 4 or by an Act.

(3) Despite subsections (1) and (2), a person may directly or indirectly advertise or provide a program leading to a degree if

(a) the person provides the program under an agreement with another person who is given consent by the minister under section 4 to provide the program or is authorized by this section or another Act to grant or confer degrees, and

(b) the other person who has consent or authorization to provide the program grants or confers the degree to which the program leads.

(4) Despite subsections (1) and (2), a person who is registered with the Private Post-Secondary Education Commission on the date this Act receives First Reading in the Legislative Assembly and who is carrying out an activity described in subsection (1) or (2) on that date may continue to carry out the activity until the earlier of

(a) the date the person ceases to be registered with the Private Post-Secondary Education Commission,

(b) the date 5 years after this Act receives First Reading in the Legislative Assembly, and

(c) the date specified by the minister.

(5) Despite subsections (1) and (2), if, on the date this Act receives First Reading in the Legislative Assembly, an institution established

in Canada is designated under paragraph (f) of the definition of "post-secondary education" in section 1 of the *Private Post-Secondary Education Act*, and is carrying on an activity described in subsection (1) or (2), the institution or a person acting for it may continue to carry out the activity until the earlier of

(a) the date they cease to be so designated,

(b) the date 5 years after this Act receives First Reading in the Legislative Assembly, and

(c) the date specified by the minister.

(6) A degree granted or conferred as allowed by subsection (4) or (5) must not indicate that degree is granted or conferred in British Columbia.

(7) Despite subsections (1) and (2), Trinity Western University and the Seminary of Christ the King may continue to carry out an activity described in subsections (1) and (2).

(8) Subsections (4), (5), (6) and (7) do not authorize a person referred to in subsection (4), an institution referred to in subsection (5), Trinity Western University or the Seminary of Christ the King to confer or grant a degree, or provide a program leading to a degree, that the person, institution, university or seminary did not confer, grant or provide on the date this Act receives First Reading in the Legislative Assembly.

Consent of minister

4 (1) The minister may give an applicant consent to do things described in section 3 (1) or (2) if the minister is satisfied that the applicant has undergone a quality assessment process and been found to meet the criteria established under subsection (2) of this section.

(2) The minister must establish and publish the criteria that will apply for the purposes of giving or refusing consent, or attaching terms and conditions to consent, under this section.

(3) The minister may attach to a consent the terms and conditions that the minister considers appropriate to give effect to the criteria established and published under subsection (2), including a termination date after which the consent will cease to be effective unless renewed by the minister.

(4) The minister must not give consent unless that minister is satisfied that the person seeking the consent

(a) has given security to protect the interests of students, if security is prescribed respecting the person seeking consent, and

(b) has made adequate arrangements to protect the interests of students by ensuring

(i) that students have access to their transcripts, and

(ii) if requirements for transcript access are prescribed, that the arrangements comply with the requirements.

CIVIL MARRIAGE ACT

S.C. 2005, c. 33

Preamble

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;

Freedom of conscience and religion and expression of beliefs

3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

LABOUR MOBILITY ACT

[SBC 2009] CHAPTER 20

3(4) If a regulatory authority that is authorized to issue certification in British Columbia in relation to an occupation is provided with an application in relation to that occupation under subsection (1) (a), the regulatory authority

(a) must consider and determine the application in a manner consistent with the government's obligations under Chapter Seven of the Agreement,

(b) must issue any certification required by Chapter Seven of the Agreement, and

(c) may impose on any certification issued in response to the application any terms, conditions or requirements that the regulatory authority is authorized to impose on the certification in accordance with one or more of the following:

(i) Chapter Seven of the Agreement;

(ii) this Act or the governing Act, or any regulation, bylaw, rule, resolution or measure under this Act or the governing Act, to the extent that those terms, conditions or requirements are not inconsistent with the government's obligations under Chapter Seven of the Agreement.

LIST OF AUTHORITIES