No. 149837
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

PETITIONERS

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA, THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, THE FAITH AND FREEDOM ALLIANCE, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, OUTLAWS UBC, OUTLAWS UVIC, OUTLAWS TRU AND QMUNITY

INTERVENERS

REPLY ARGUMENT OF TRINITY WESTERN UNIVERSITY AND BRAYDEN VOLKENANT

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A. INTRODUCTION

[**Note**: Paragraph notations without a specific reference relate to the Law Society's Written Argument ("LSBC Argument"), unless the context dictates otherwise.]

1. TWU does nothing wrongful or illegal. The Community Covenant is not contrary to law. In fact, the TWU community's ability to promulgate the Community Covenant is protected by the *Charter* and *Human Rights Code*. As such, there is no merit to the argument that TWU's School of Law or its graduates would "seriously undermine the integrity and foundation of the administration of justice" (para. 13). These arguments evince a wrongful and troubling disapproval of the religious beliefs and practices of the TWU community by the Law Society.

2. TWU does not have the obligations of the state under the *Charter* or otherwise. The Law Society is incorrect to suggest that it does or that TWU has any obligation to address an overall "scarcity" of law school seats in Canada (para. 207). If anything, TWU's School of Law will increase opportunities for everyone, given that students attending TWU will not occupy law school seats elsewhere.

3. Neither would a TWU Law School limit access to the profession for anyone. It will have no impact on the existing ability of those who are not comfortable being educated in an evangelical Christian environment to obtain a legal education or become lawyers. The Law Society's Decision denies access and opportunity; it does not expand them.

4. The Law Society concedes that TWU is "lawfully entitled to pursue and advocate for its religious beliefs" (para. 20) and that it has "no concern that graduates … would be incapable of practicing law" (para. 410). Despite that, it justifies its rejection of TWU graduates on its "disapproval" of the religious foundations of TWU (paras. 430 and 540) and its view that the TWU community's shared religious beliefs are "disrespectful", "derogatory", "harmful", and "contrary to the public interest" (paras. 401 and 482). Absent evidence that graduates would not be prepared for practice, the Law Society is not entitled to take such a position and has breached its statutory duties, including the duty of religious neutrality.

B. THE LAW SOCIETY

1. HISTORY OF THE LAW SOCIETY

5. In response to paragraphs 60 through 71, while the Law Society operated law schools in the beginning of the twentieth century, attending such schools was not mandatory to be called to the bar. One legal historian noted that, before the UBC law school, the Benchers "had no strong commitment to legal education".[1] Individuals were admitted by examination before the Law Society established law schools in Vancouver and Victoria; after they were established, individuals outside those areas passed Law Society examinations without attending those schools.[2]

6. A historical review of admission to the Law Society suggests that the Benchers' wide discretion to admit members, while intended to create a merit-based system, often resulted in excluding individuals based on irrelevant personal characteristics. In the early 1900's, the *Legal Profession Act* and Law Society rules had been amended, so that "the benchers had gone from being helpless, with no authority to admit women, to a position where admission was in their 'uncontrollable discretion'."[3] This uncontrollable discretion sometimes resulted in excluding individuals based on irrelevant personal characteristics.[4]

7. Lack of credentials can be used as a pretense to screen out otherwise qualified applicants. Professor Pue concluded that personal characteristics became insurmountable barriers to a legal career in British Columbia. "The Law Society has, at times, been overly diligent in its admissions screening. Too often the principles invoked have been tied to cultural exclusion ***rather than to knowledge, ability, or integrity***."[5] This is why decisions to admit people to the practice of law must be based on criteria strictly related to their individual qualifications, without consideration of their membership in an unpopular group.

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[1] W. Wesley Pue, *Law School*: *The Story of Legal Education in British Columbia* (Vancouver: Continuing Legal Education, 1995) [Pue] at p. 49.
[2] Alfred Watts, Q.C., *History of the Law Society: Credentials and Legal Education*, The Advocate (1970): 28 at pp. 29, 96.
[3] Joan Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" in *Essays in the History of Canadian Law* (Osgoode Society: 1995) [Brockman] at p. 522.
[4] Brockman, pp. 522-523, 534.
[5] Pue at p. 219, emphasis added.

2. NO LEGAL OBLIGATION TO ENSURE "EQUAL ACCESS" OR DIVERSITY IN THE LEGAL PROFESSION

8. Contrary to the assertion of the Law Society, there is no positive statutory duty or professional obligation to maximize diversity in the legal profession or ensure "equal access to the legal profession" and the judiciary (paras. 121, 383, 431, 505, 511, 518). This putative duty and obligation is cited as a "critical factor" supporting the Decision (para. 437). Under s. 15 of the *Charter* and the *Human Rights Code*, the Law Society's duty is to admit applicants to the practice of law, without regard to their irrelevant personal characteristics, including religion.

9. The *LPA* is silent regarding any duty of law schools to provide "equal access" to the profession, which makes sense given that law schools are not regulated under the *LPA*. The *LPA* does not even impose on the profession an obligation to achieve some model equilibrium of representative diversity. The Law Society has not cited a single supporting statutory provision or case in which such a duty is recognized.

10. Instead, the Law Society apparently locates this "duty" and "obligation" not in law, but from various secondary sources and academic commentaries (paras. 65, 73, 75, 76 (which does not reference "equal access")), a speech made by a former Supreme Court Chief Justice in a non-judicial capacity (paras. 79-81), and a policy report issued by its Equity and Diversity Advisory Committee (paras. 46-48 (which does not reference "equal access")). While equal representation and diversity are laudable aspirational goals, they cannot legitimately be used to undermine the *Charter* and human rights of TWU and its religious community. It cannot credibly be said that the Law Society would breach any legal duty or obligation simply by accepting TWU graduates who will be predominantly evangelical Christians. Indeed, the Law Society would be breaching "equal access" by denying TWU students for reasons unrelated to their personal qualifications.

11. Underlying the Law Society's argument is the assumption that law schools are just as responsible as law societies to act as gatekeepers of the legal profession. This is not accurate. Provincial governments have decided that the law societies of Canada, not the law schools, are the sole gatekeepers of the practice of law in British Columbia. One can be educated at one of many law schools, but can only enter the legal profession through admission by the Law Society. Thus, TWU has no ability to "impose[] unequal access to

the legal profession and the judiciary in British Columbia", as suggested by the Law Society (para. 383).

12. The question is not who enters TWU's law school, but whether they will be prepared for practice when they graduate. To demand that TWU change the character of its religious community to accommodate those who would not otherwise choose to be educated within an evangelical Christian environment is to undermine the religious nature and character of the community itself.

C. THE EVIDENCE

1. THE LAW SOCIETY SEEKS TO IMPERMISSIBLY EXPAND THE RECORD

13. The Law Society cites *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 [*ATA*], for the principle that courts should pay "respectful attention" to the reasons that "*could* be offered in support of a decision" where an administrative decision maker has not provided written reasons for its decision (paras. 185, 211, 379, 382).

14. The Law Society suggests the Court should consider not only the reasons for its Decision manifest on the record, but also any others that could possibly justify the Decision, even if at odds with the record. The Law Society goes further, saying this principle may require the court to supplement the record with extrinsic material, in order that the court may have before it the evidentiary basis to "appreciate the reasons that could be offered in support of a decision" (para. 185).

15. The Supreme Court of Canada in *ATA* and subsequent cases indicate only that courts may defer to the reasons that could have been offered by an administrative decision-maker which are not expressed as formal written reasons, but are nevertheless ***implied based on the record***.

16. In *ATA*, the issue was how a court can deal with an issue raised by a party before the court on judicial review, "which was never raised before the tribunal and where, ***as a consequence***, the tribunal provided no express reasons with respect to the disposition of

that issue".[6] In such an instance, the Court said deference to the reasons that could have been provided by the tribunal is appropriate, specifically because the tribunal was unable to consider the issue ***due to the party's failure to raise it***.[7]

17. The Law Society stands this principle on its head, by asking the court to (a) craft reasons that were neither expressed by the Benchers nor the rationale for the Decision as shown on the face of the record, and then (b) admit evidence after the fact to support these alternative reasons. This is improper and goes too far. The principle in *ATA* does not allow the Law Society to supplement the record with extrinsic evidence that the Benchers never saw or considered in order to protect a decision made contrary to their statutory and constitutional obligations.

18. The courts have cautioned parties not to rely on this principle as a "*carte blanche* to reformulate a tribunal's decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result".[8]

19. The Law Society also seeks to expand the record in this case by arguing that a "flexible approach" to the record has been adopted in the court's recent jurisprudence, which entitles parties to put before the court "all of the material which bears on the arguments" they are entitled to make (para. 186).

20. The Law Society relies on two cases in support of this "flexible approach": *SELI and Hartwig* (LSBC Argument, p. 44, fn. 131). Neither of these cases assist the Law Society. Both *SELI* and *Hartwig* dealt with the ability of a ***petitioner*** to bring forward evidence that ***was before the decision-maker***, not the ability of a statutory decision-maker to bring forward new evidence in support of its decision that it did not consider when making its decision.[9]

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[6] *ATA*, para. 1, emphasis added.
[7] *ATA*, para. 53.
[8] *ATA*, para. 54 (citing *Petro-Canada* (B.C.C.A.)).
[9] See *Hartwig*, para. 33 (the petitioner may "bring forward the evidence which was before the administrative decision-maker").

2. PUBLIC SUBMISSIONS

21. The Law Society has reproduced and relied on a number of public submissions (para. 134) and Bencher comments at the April and September meetings (paras. 138-146, 160-165) supporting the Decision.

22. These submissions and comments were before the Benchers at both the April and September Meetings, but they were expressly ***not accepted by the Benchers*** since they refused to pass two separate motions to reject TWU graduates. The Law Society cannot now credibly rely on these submissions to support the Decision they ***did*** make in October.

3. SPECULATION

23. Throughout its argument, the Law Society gives reasons why the Benchers and the members made the Decision. For example, the Law Society says that "an overwhelming majority of the members expressed the view" that approving TWU "would be contrary to the public interest" (para. 328) and "would seriously undermine the integrity and foundation of the administration of justice" (para. 13). It also states as fact the reasons why the Benchers finally voted against TWU (see paras. 5, 391, 515) and what their specific considerations were (para. 387, for example).

24. While it is clear from the record that the only objection to recognizing TWU graduates relates to the Community Covenant, there is no evidence that the membership considered the requirements of the *LPA*, Rule 2-27 or the appropriate criteria. It is more likely the majority of members simply disagreed with the religious principles on which TWU is founded. Other than by reference to the September motion to defer to the membership, the Benchers' rationale is undiscernible since, unlike prior meetings, no speeches were made and no reasons were given by them. It is telling that the Benchers, when making the Decision, did not express any change in their view of the applicable legal principles from the decision they made in April.

D. THE DECISION

1. STANDARD OF REVIEW

(a) CORRECTNESS

25. The Law Society says the applicable standard of review is reasonableness because the "exercise of discretion in this context defies a singular 'correct' or 'consistent' legal definition" (para. 243, 251) or "result" (para. 248) and "both approving TWU and refusing to accredit" were acceptable and "consistent with the Benchers' statutory mandate" (para. 243, as well as para. 165).

26. This argument cannot be reconciled with its other arguments that the Decision was "correct" (paras. 28, 267, 617), "necessary" (paras. 8, 626), and that approving TWU graduates is "inconsistent with the Law Society's statutory mandate" (para. 8).

(b) "CENTRAL IMPORTANCE TO THE LEGAL SYSTEM"

27. It is bewildering that the Law Society says that the issue in this case is not of central importance to the legal system (pages 56-59), particularly when it argues that law school "admission policies are of critical importance in the administration of our justice system" (para. 59) and that TWU's policy "seriously undermines the integrity and foundation of the administration of justice" (para. 13).

(c) *TWU v. BCCT* REMAINS RELEVANT TO THE STANDARD OF REVIEW

28. The Law Society says that *TWU v. BCCT* does not decide the standard of review because:

(a) *TWU v. BCCT* was based on a "'jurisdictional' concept of judicial review that… has long since lost its currency" (para. 228);

(b) A decision involving human rights principles or considerations does not affect the standard of review (para. 229); and

(c) The Nova Scotia Supreme Court distinguished *TWU v. BCCT* because the Supreme Court of Canada was "answering a different question", namely regarding "speculative assumptions regarding how teachers might behave in the classroom",

as opposed to the Nova Scotia Barristers Society ("NSBS"), which was "a statement of principle about discrimination" (para. 230).

29. In response to (a), the Court in *TWU v. BCCT* based its determination of a correctness standard of review on the "pragmatic and functional approach".[10] This is the same test that applies today under "the standard of review analysis," as it was renamed in *Dunsmuir*.[11]

30. In response to (b), the cases the Law Society cite (fn. 154) do not support the proposition it relies upon. They are judicial reviews of human rights tribunal decisions, where the tribunal's sole task is deciding human rights issues. They are no answer to the case law the Petitioners cite to the contrary (TWU Argument, para. 167, fn. 204).

31. In response to (c), the Nova Scotia Court misunderstood the nature of the question in *TWU v. BCCT*. The BCCT made its decision on a "statement of principle" comparable to the Law Society's justification for the Decision. TWU was "denied [by the BCCT] because Council still believes the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its [public interest] mandate…", since the Community Standards "has the effect of excluding persons whose sexual orientation is gay or lesbian".[12]

32. Similarly, the Law Society in this case says TWU's Community Covenant is "clearly discriminatory" (para. 6) and "contrary to the public interest" (para. 613) because it "exclude[s] various persons from participation in TWU's proposed educational program" (para. 120).

33. The BCCT argued that approving TWU would have "created a perception that the BCCT condones this discriminatory conduct".[13] The Law Society argues likewise, that the Decision was "a refusal to condone and facilitate discriminatory conduct" (para. 446). The rationales and justifications are the same.

34. It is not accurate to say that the BCCT made its decision solely on speculation regarding "how teachers might behave in the classroom" (para. 230). The Supreme Court of Canada said that this was the issue that the BCCT ***should*** have been concerned with and considered

[10] *TWU v. BCCT*, paras. 15-19.
[11] *Dunsmuir*, para. 63.
[12] *TWU v. BCCT*, paras. 5-6.
[13] *TWU v. BCCT*, para. 18.

on proper evidence: how graduates would act in the classroom. The BCCT's authority did not extend to disapproving TWU in order to make a statement of principle about discrimination, and neither does the Law Society's.

(d) "NO REASONABLE BODY"

35. Referencing *Catalyst Paper*, the Law Society argues the Court can only intervene if the Decision is so unreasonable or arbitrary that "'no reasonable body' could have arrived at the result" (paras. 260, 284).

36. The Law Society has not cited any cases suggesting this extraordinarily high standard applies outside the municipal bylaw context. The Supreme Court of Canada in *Catalyst Paper* noted that the case's "context is the adoption of ***municipal bylaws***" (para. 23, emphasis added). The LSBC Argument omits the word "bylaw" from the test in *Catalyst Paper*: "only ***if the bylaw*** is one no reasonable body informed by these factors could have taken ***will the bylaw be set aside***" (para. 24, emphasis added).

37. The Law Society's Decision is a resolution affecting a discrete religious community, not a municipal bylaw of general application, as noted by the Court in *Catalyst Paper* (para. 19).

38. The Law Society is also not a municipality. The Law Society argues that democratic bodies are entitled to a "higher level of deference" (para. 260, as well as paras. 379-381). On the contrary, municipalities are created "distinct and unique from administrative bodies"[14].

39. In any event, the Law Society is inconsistent on whether, in making the Decision, the Benchers' exercised "independent judgment" (para. 342) or simply "adopted the views of the membership" (para. 334). In fact, they did both. The Benchers exercised independent judgment in April and accepted TWU graduates, and then later adopted the views of the membership in October to reject those same graduates.

[14] *Nanaimo (City) v. Rascal Trucking Ltd*., 2000 SCC 13 at para. 30.

2. SUBDELEGATION AND FETTERING

40. The Law Society argues that there was no subdelegation or fettering because the Benchers considered "the view of the members" (paras. 14, 340) in making the Decision and that the referendum was "consultation with the membership" (para. 323, see also paras. 259, 334).

41. The evidence is that the Benchers asked the members to make the decision for them. As stated by Bencher Crossin at the September Meeting in support of the September Motion, "…from the point of view of my statutory duty and logic and our democratic process that the issue should be determined frankly, by the hearts and minds of the many and not the few" (para. 162). The Law Society's admission that they "relied" on and "adopted the views of the membership" is closer to the mark (paras. 14, 334).

42. The Benchers passed the September Motion whereby "The Resolution ***will be binding*** and ***will be implemented*** by the Benchers" if passed (para. 154, emphasis added). "Binding" one's decision to the will of another in advance, or having it be determined by the many (i.e., the membership), is not "consultation"; it is subdelegation and fettering.

43. It is inaccurate to state that the "October referendum followed a procedure expressly contemplated by the *Act*" (para. 339). Even section 13 of the *LPA* does not contemplate that the Benchers can bind themselves to a membership vote in advance of the vote. A binding referendum can only be initiated by the membership (after 12 months of Bencher inaction) (*LPA*, s. 13(2)) and it is never binding if its implementation will breach the Benchers' statutory duties (s.13(4)). The *LPA* is clear that the ***only*** way a members resolution is binding on the Benchers is if the procedure in s. 13 is followed (*LPA*, s. 13(2)).

3. PROCEDURAL FAIRNESS

44. The Law Society argues that (para. 372):

> TWU was aware of the basis for the decision and the "grounds upon which the decision would be made",[221] as well as the concerns of the Law Society, through the many submissions before the Benchers and posted online.

45. With respect, TWU could not be expected to divine the grounds upon which the Benchers were going to base their decision from voluminous submissions ***to the Law Society***, or on what basis the members decided how they did. Before the Law Society's April Meeting,

TWU asked the Law Society to provide a "statement of the 'public interest' issues that will be considered by the Benchers":

> Based on our experience to date, submissions made by the public may address irrelevant issues and those not germane to the matters under actual contemplation by the Benchers. In preparing to respond, TWU wishes to know and understand the 'public interest' issues that the Benchers consider most relevant to its consideration of the Motion.[15]

46. The Benchers refused to articulate the "public interest" issues they were going to consider. TWU could not be expected to know the basis upon which a decision to "not approve" TWU would be made. Indeed, ***the grounds of the decision are still changing***. The Law Society has only recently buttressed its decision *ex post facto* by saying that TWU should be rejected because of impacts on "marital status, gender and sex, and religion" (*inter alia* paras. 6, 9).

47. Contrary to para. 369, there is no evidence the membership was fully informed of TWU's position, particularly given the Law Society's refusal to include its position in mailings to the membership. TWU's "public appeals" (para. 367) were only to some lawyers with publically available contact information. Individuals who have not heard the evidence should not be allowed to induce and change the decision of decision-makers who have.[16]

48. Perhaps if the Benchers had articulated the relevant public interest grounds they intended to consider in advance of the initial decision in April, the peculiar procedure it later undertook and the ever changing rationales for the Decision could have been avoided.

4. THE PUBLIC INTEREST

49. The Law Society says that the statutory public interest considerations in making the Decision include "ensuring the independence, integrity, and honour of the profession" and "upholding the rights and freedoms of all persons" (paras. 302, as well as paras. 285-295, 303-304, 316). It says the Benchers' considerations in making a decision under Rule 2-27 are not restricted to academic qualifications of an applicant (paras. 301, 315).

50. This ignores that the public interest considerations ***must*** be read in the context of the decision being made, in this case one under Rule 2-27. *Pierce v. Law Society (British Columbia)* involved a discipline hearing "into the conduct or competence of a member" for

[15] Affidavit #1 of Earl Philips, Exhibit J at 221.
[16] *Mehr v. The Law Society of Upper Canada*, [1955] SCR 344 at 351.

"conduct unbecoming".[17] The Court held that the public interest considerations must be limited to the context of the decision: "[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***".[18]

51. The Law Society has not explained how public interest considerations of independence, integrity and honour of the profession, or the rights and freedoms of all persons, impact the academic qualifications of TWU applicants who will seek admission to the bar. At the very least, the relevant considerations must have something to do ***with the qualities of the applicant***, which is the whole purpose of Rule 2-27.

5. WHAT THE LAW SOCIETY SAYS THE DECISION DOES, WHAT IT ACTUALLY DOES, AND WHAT IT DOES NOT DO

52. The Law Society dedicates significant argument to re-characterizing the Decision in a manner that minimalizes and ignores the affected rights of TWU and its religious community. The Petitioners submit the Court should pay regard to the true nature and adverse effects of the Law Society's Decision on TWU and, more particularly, its graduates.

(a) NO DISTINCTION BETWEEN TWU'S RELIGIOUS CHARACTER AND THE COMMUNITY COVENANT

53. In paragraphs 385-387, the Law Society contends that its Decision to refuse TWU and its graduates was not based on TWU's religious character, but rather on the fact that the Community Covenant "imposes a discriminatory bar to access to TWU's proposed school of law" (para. 387). This ignores that the alleged "discriminatory bar" is the concrete embodiment of TWU's religious beliefs by which its members associate and collectively practice and express their religious identity. It is artificial to suggest that TWU's Christian character can be hived off and analyzed in isolation from the communal religious commitments expressed in the Community Covenant. As with the BCCT's focus on "discriminatory practices", this is in fact, a "disturbing" focus on TWU's "sectarian nature."[19]

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[17] *Pierce*, para. 47.
[18] *Pierce*, para. 48, emphasis added. See also para. 53.
[19] *TWU v. BCCT*, para. 42.

(b) THE DECISION DIRECTLY AND SIGNIFICANTLY AFFECTS TWU'S AUTONOMOUS EXISTENCE

54. At paragraphs 388-392, the Law Society disputes that TWU's "autonomous existence" has been affected by the Decision because TWU may "operate a law school, with or without a discriminatory admissions policy, and govern its proposed law school as autonomously as it pleases" notwithstanding the Decision (para. 389).

55. This is incorrect and disingenuous. As the Law Society acknowledges (para. 389, fn. 228), TWU is statutorily prohibited from granting law degrees without the consent of the Minister of Advanced Education under the *Degree Authorization Act* (the "*DAA*"), which consent was revoked because of the Decision. It is specious to suggest that TWU can have a law school in any meaningful sense since it cannot confer law degrees as a result of the Decision.

56. The Law Society's argument implies that the "autonomous existence" of private religious communities can only be protected insofar as they engage in activities utterly "untouched by the state" (para. 389). Autonomy is about independence, not isolation. It would create an impossible dilemma if private actors were considered to be acting outside their "autonomous existence" whenever they required state recognition to carry out activities the state has chosen to regulate.

57. The reason that "TWU is not seeking to be left alone to establish and run its Law School" (para. 389), is because it ***cannot*** do so "free from state regulation" (para. 392), as the Law Society suggests. The state has made this impossible by choosing to regulate the granting of degrees under the *DAA*, and access to the legal profession under the *LPA*. Operating a law school "free from state regulation" would result in a fineable offence under s. 7(5) of the *DAA*, and for TWU's graduates to hold themselves out as lawyers "free from state regulation" would result in an offence under s. 85 of the *LPA*. The effect of the Decision is, therefore, to make it impossible for TWU and its graduates to carry out these activities while simultaneously maintaining their autonomy in implementing and observing the Community Covenant.

(c) THE DECISION REGULATES AND IMPEDES RELIGIOUS BELIEF, PRACTICE, AND EXPRESSION

58. The Law Society asserts that the Decision does not impact the ability of TWU and its religious community "to hold or express beliefs" (para. 399). This argument evinces an unconstitutionally narrow and penurious understanding of religious freedom.

59. The Decision communicates that the religious beliefs embodied in the Community Covenant are wrong and not worthy of respect. The Law Society now expressly justifies the Decision by saying that these beliefs are "harmful and contrary to the public interest" (para. 401). This argument must be rejected. The Law Society has no answer to the Supreme Court of Canada's findings in *TWU v. BCCT* that there was "no denying" that the BCCT's Decision impacted the free expression of religious beliefs because it (a) required TWU to abandon its Community Standards [now the Community Covenant] as a precondition of offering a degree program; and (b) unacceptably hindered its graduates' ability to obtain professional certification (*TWU v. BCCT* at para. 32). Neither does the Law Society address the Supreme Court of Canada's clear direction that it "is in no position to be, nor should it become, the arbiter of religious dogma".[20]

60. Here, the Law Society's Decision (a) similarly requires TWU to abandon its Community Covenant as a condition to offering a degree program permitting access to the legal profession; and (b) not only impedes, but categorically denies, TWU graduates certification as practicing lawyers. Denying the validity of the religious beliefs of TWU's community and their embodiment in the Community Covenant is no answer.

(d) THE PETITIONERS DO NOT RELY ON A "SLIPPERY SLOPE" ARGUMENT

61. At paragraph 404, the Law Society concedes that it cannot screen out individuals "with unpopular or unorthodox, even discriminatory, beliefs". How then can it justify screening out an entire religious community because it shares the beliefs that the Law Society now says are objectionable?

62. The Law Society says that it has jurisdiction to make the Decision because (a) only "objectionable ***conduct***", not beliefs, impedes access to the legal profession (para. 404,

[20] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 50.

emphasis in original) and (b) institutions other than law schools are not "gateways to the legal profession" (para. 407).

63. In response to (a), the Law Society is focused on religious beliefs. In *TWU v. BCCT*, the Court stated that the "focus on the alleged discriminatory practices" is the same as focusing on "the sectarian nature of TWU".[21] It called this focus "disturbing".

64. If the Law Society admits it has no authority to reject applicants for admission based on their beliefs, it cannot reject all of them based on the sectarian nature of the institution from which they obtained their law degrees.

65. In response to (b), the Law Society's authority, as the gatekeeper to the legal profession, is over graduates based on their individual capabilities and qualities. Its only relationship with TWU is through the graduates it produces. This does not grant the Law Society control over aspects of the university that would otherwise be beyond its reach. To the extent that a law school is a "gateway to the profession", the concern should be whether the graduate will be sufficiently prepared to enter the profession.

(e) THE DECISION DENIES INDIVIDUALS ADMISSION TO THE BAR

66. The Law Society minimizes the impact of its Decision on prospective TWU graduates on two grounds: (a) it currently accepts graduates from TWU's undergraduate programs that attend a public law school (paras. 409-410); and (b) there are not yet any graduates from TWU (paras. 346, 411, 435, 540, 551). Both these rationales must be rejected.

67. With respect to (a), this is not a sound basis for justifying the exclusion of graduates from the School of Law. On the contrary, the fact that TWU alumni practice law in BC only underscores the irrationality of the position the Law Society is now taking vis-à-vis graduates of the School of Law.

68. The Community Covenant applies equally to all students of TWU, whether enrolled in the law program or any other degree program. Attending a public law school does not cure them of attending a "tainted" school (LSBC Amended Response to Petition, para. 183) that

[21] *TWU v. BCCT*, para. 42.

would justify making TWU undergraduates more worthy of entrance to the legal profession.

69. Second, the distinction between undergraduates and law graduates is unsustainable. Since post-secondary education is a necessary prerequisite to admission to law schools in Canada, the Law Society's argument necessarily requires that these institutions also be considered "gateways to the legal profession".[22] Access to law school is a necessary but insufficient condition of becoming a lawyer. Access to undergraduate seats is as necessary for admission to the legal profession as access to law school.

70. The Law Society's reasoning means that individuals able to sign the Community Covenant can also obtain disproportionate access to undergraduate seats at TWU, which in turn allows for disproportionate access to other law schools and thereby the legal profession. However, the Law Society applies no such barrier to access for individuals obtaining undergraduate degrees from TWU (or other similar schools), notwithstanding it could be said the Community Covenant allows for their increased access to Law School. This is because the Law Society quite clearly has no authority over universities, generally.

71. If it is not contrary to "the Law Society's statutory mandate and constitutional obligations" to accept graduates from undergraduate programs without reference to the fact they attended TWU, a different standard should not apply to graduates of the School of Law.

72. With respect to (b), the Law Society says that "[u]ntil there are graduates, the issue of the effect on TWU graduates does not arise" (para. 413). This is nonsensical. The Decision ensures that there will be no graduates and therefore no applicants to the bar with the requisite qualifications. The effect on the potential graduates is dramatic because it precludes them from attending a TWU School of Law, at all.

73. The fact that the Law Society decides to bar TWU graduates ***prospectively*** rather than ***retrospectively*** does not mean the Decision has no effect on them. It is absurd to suggest that Brayden and other TWU graduates must wait to seek redress of the Decision until they complete three years of legal education at TWU and graduate with a *Juris Doctor* degree that may not result in the ability to practice law in British Columbia. It would be

[22] Affidavit #1 of K. Jennings, Exhibit D at 164, Exhibit E at 212.

manifestly unjust for the Court to impose this requirement as a pre-condition to seeking judicial review of the Decision.

74. The Law Society also mischaracterizes the issue of whether TWU will receive consent of the Minister under the *DAA* as being "entirely speculative" (para. 412). This is particularly disingenuous given that the only thing currently standing in the way of TWU's ability to produce graduates is the Decision.

75. The Law Society's reasoning also undermines the basis upon which it justifies the Decision; namely, the assumed effect that the Community Covenant will have on TWU's "hypothetical future students" (para. 435). If, as the Law Society seems to suggest, it need not consider the interests of TWU's future graduates, how can it rest its entire Decision on the consideration of the (no less hypothetical) interests of future applicants to TWU that ***may or may not*** be adversely affected by the Community Covenant?

(f) THE DECISION UNDERMINES THE ABILITY OF MEMBERS OF A PARTICULAR RELIGIOUS COMMUNITY TO BECOME LAWYERS

76. At paragraphs 417-427, the Law Society says that its Decision has no impact on whether graduates of a religious law school can become lawyers or whether religious law schools can maintain codes of conduct.

77. However, as discussed above, the Decision clearly impacts whether TWU, the ***particular religious institution*** before this Court, may graduate lawyers that can be called to the bar. The Decision also plainly imposes a significant cost on, and therefore hinders the ability of TWU to sustain, the Community Covenant.

(g) WHAT THE DECISION DOES NOT DO

78. The Law Society justifies the Decision on the basis that law school seats are "scarce" and that the School of Law "would inhibit equal access to a legal education and therefore to the legal profession for certain historically disadvantaged groups" (para. 469, as well as para. 533) or restrict "the diversity of people and views involved in the justice system" (para. 538).

79. If law school seats are scarce, this is not something for which TWU is responsible. It is also not a basis upon which it makes any sense to preclude a new law school from opening.

80. The Decision is likely to exacerbate the Law Society's very concern by reducing the overall number of potential seats available to everyone, including those from historically disadvantaged groups. It is logically impossible that the Decision, which can only serve to prevent the creation of law school seats, could do anything to ***increase*** opportunities for individuals from historically disadvantaged groups to gain access to the legal profession.

81. As stated by the Federation's Special Advisory Committee:

> It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they currently have. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students.[23]

82. The Law Society's argument shows that the true purpose of the Decision is not about increasing access to the legal profession for certain historically disadvantaged groups, but about preventing an opportunity for evangelical Christians (see para. 610).

83. A similar rationale was relied upon by the NSBS in support of its decision to deny TWU graduates in Nova Scotia, which Justice Campbell rejected:

> …placing a barrier before Evangelical Christians or those willing to associate with them, so that the proportion of LGBT lawyers is increased would be so inappropriate and wrongheaded that it could not possibly be what was intended. It amounts to a quota system by which TWU graduates who are more likely to be Evangelical Christians are discouraged from applying so that the proportion of LGBT lawyers is raised. A more direct approach would be to directly limit the number of heterosexual articled clerks to reduce the disparity. That is every bit as strange as it sounds. That is not how social progress is achieved in a liberal democracy.

84. Justice Campbell's criticism applies with respect to the representation of any other historically disadvantaged group in the legal profession.

6. AVOIDING *TWU v. BCCT*

85. Not surprisingly, the Law Society says that the Supreme Court of Canada's decision in *TWU v. BCCT* "is not binding on the issues raised in this petition" (para. 433).

86. In response to paragraphs 434-435, TWU sought approval of a "Teacher Education Program" that would certify students to become public school teachers,[24] similar to a law degree that would qualify graduates to enter the legal profession. The Law Society

[23] Affidavit #2 of T. McGee, Exhibit C at 40.
[24] *TWU v. BCCT*, paras. 5, 32.

suggests TWU graduates can still enter the law society by attending "law schools without discriminatory admissions policies" (para. 409). This is similar to the rejected BCCT argument that TWU students could attend a public university to obtain teaching certification.[25]

87. At paragraphs 436-439, the Law Society says that its statutory discretion is broader than the BCCT. While the statutes are not identical, they are substantially similar. Additionally, the BCCT had power over program approval, not just recognition of graduates. This is more fully addressed in paragraphs 142-142 and 191 of the Petitioners' Argument.

88. The Law Society attempts to distinguish *TWU v. BCCT* at paragraphs 440-441 on the basis that there was no evidence that individuals "would be denied access to TWU… due to personal characteristics or that access to teacher colleges was limited". To the contrary, the Supreme Court recognized that students attending TWU "must sign"[26] the covenant and that some individuals "would not be tempted to apply for admission" and could only sign the Community Covenant "at a considerable personal cost".[27] It is common sense that enrollment in university professional programs is limited, particularly given TWU graduates had to attend SFU to be qualified to teach in public schools.

89. In response to paragraphs 442-446, TWU submits that the relevant conduct to be examined ought to be the same as in *TWU v. BCCT*, namely evidence that TWU fosters discriminatory lawyers [or teachers], not TWU's purported "discriminatory conduct" by asking students to sign the Community Covenant.

(a) *TWU v. BCCT* SHOULD NOT BE OVERTURNED

90. The Law Society goes further, arguing in paragraphs 448 and 453-454 that the Court is not bound by *TWU v. BCCT* on the basis of *Bedford* and *Carter* because (1) the issues are now characterized differently, (2) there have been significant changes to the law of equality and deference, and (3) there is now a greater recognition of same-sex persons.

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[25] *TWU v. BCCT*, paras. 38, 43.
[26] *TWU v. BCCT*, para. 4.
[27] *TWU v. BCCT*, para. 25.

91. Given the uncertainty, instability, and expense flowing from reconsidering numerous appellate decisions, courts have applied the *Bedford* test strictly[28] since, in the Supreme Court's words, the threshold is "not an easy one to reach" and must account for "the need for finality and stability".[29] The legal developments must be "significant" and based on circumstantial changes that "fundamentally shift[] the parameters of the debate".[30]

92. *Bedford* is clear that "re-characterizing" the issues is not a significant development and does not fundamentally shift the parameters of the debate.[31]

93. There are no relevant "significant" legal developments. While there may be greater LGBTQ recognition in the law, TWU is still a private institution not subject to the *Charter*. The state still has a duty to accommodate religious individuals (Petitioners' Argument, paras. 461-464 and *Loyola*, para. 54) and as in *TWU v. BCCT*, [32] the Supreme Court recently admonished a decision-maker for giving "no weight to the values of religious freedom engaged by the decision".[33]

94. If anything, religious minorities who hold views distinct from the broad public consensus are more in need of protection than before. Contrary to the Law Society's assertion that "the *Doré* approach…alerts us to the inapplicability" of *TWU v. BCCT* (para. 265), *Doré* in fact cited *TWU v. BCCT* with approval in its approach to "assessing whether the decision-maker took sufficient account" of the *Charter*.[34]

95. The parameters of the debate have not changed. First, the rationale that led the Court to conclude that the rights of possible applicants to TWU were not engaged has not changed. Second, the need to accommodate TWU students' religious freedom has not changed (Petitioners' Argument, paras. 461-464). Third, denying approval to TWU still "places a burden" on TWU and its students.[35] Fourth, a decision-maker still cannot make a decision based on the absence of evidence, and there is still no evidence that TWU graduates would

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[28] *R v Caswell*, 2015 ABCA 97 at paras. 38-40.
[29] *Bedford*, para. 44.
[30] *Bedford*, para. 42.
[31] *Bedford*, para. 46.
[32] *TWU v. BCCT*, para. 33.
[33] *Loyola*, para. 68.
[34] *Doré*, para. 32.
[35] *TWU v. BCCT*, para. 32.

not be competent nor that they would cause harm to the legal profession or the public interest.

7. THE *CHARTER*

(a) CORPORATE RIGHTS OF TWU

96. The Law Society says "it is not the case" that TWU's "*Charter* rights and freedoms have been impacted" by the Decision (para. 540).

97. While the concurring minority in *Loyola* would have expressly recognized a corporation's s. 2(a) *Charter* rights, the majority said it was "unnecessary"[36] to decide under the *Doré* framework, since the government had to respect the *Charter* protections that impacted Loyola and its religious community.[37]

98. The majority "recognize[d] that individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice"[38] and found that "[u]ltimately, measures which ***undermine the character of lawful religious institutions*** and ***disrupt the vitality of religious communities*** represent a profound interference with religious freedom".[39] The Decision, with its emphasis on rejecting the Community Covenant, clearly undermines the "character of [TWU as a] lawful religious institution" and disrupts the "vitality of [its] religious community."

(b) IMPACT OF THE DECISION ON TWU'S "ECONOMIC RIGHTS"

99. Following the Ontario decision, the Law Society argues that the impact on TWU is merely economic and not an interference with religious freedom (paras. 549-550).

100. This is incorrect. State action that "increases the cost" of religious beliefs or practices engages the *Charter*.[40] This includes economic costs. In *Hutterian Brethren*, the Court held that government measures interfere with religious freedom if they "impose costs on the religious practitioner in terms of money, tradition or inconvenience".[41] The Court also

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[36] Not "expressly declined" as stated by the LSBC Argument, para. 545.
[37] *Loyola*, para. 33.
[38] *Loyola*, para. 33.
[39] *Loyola*, para. 67, emphasis added.
[40] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 58.
[41] *Hutterian Brethren*, para. 95.

found that the government measures interfered with religious freedom because they would "impose an additional economic cost on the Colony".[42]

101. In any event, the "cost" here, is not merely economic. The denial of opportunity occasioned by the Decision places a significant burden on the free exercise of religion and the right of members of TWU's evangelical religious community to associate together based on common beliefs and practices.

(c) STATE SUPPORT

102. The Law Society cites *Adler* (para. 562), *Martinez* (para. 570) and *Bob Jones* (para. 571) to argue that TWU is not entitled to active "state support" to offer approved law degrees (paras. 562-567) or "actively ***facilitate*** religious practices" (para. 567).

103. The cases relied upon by the Law Society are not applicable as they all relate to claims to ***public funding*** or an exemption from paying into the public purse.[43]

104. TWU does not require or ask for a "state subsidy" or "state support". It seeks only tolerance, recognition and accommodation. Subsidizing an ***institution*** with state funding is completely different than the state accommodating religious belief and practice, which is its obligation. The *Charter* requires "state institutions and actors to ***accommodate*** sincerely held religious beliefs insofar as possible".[44] This is all TWU seeks: that its graduates be recognized as qualified to practice law. Indeed, as the Law Society admits, the state cannot "***impede*** religious belief or practice" (para. 567, emphasis in original).

105. If the Law Society's contorted interpretation of "state support" is right, it is difficult to see how many key religious freedom cases such as *Multani*, *Loyola*, or even *TWU v. BCCT* would have been decided the way they were. It would also be difficult to imagine how the state could permit religious primary and secondary schools to issue diplomas, or continue to grant charitable status to churches.

106. In response to paragraphs 488-490, the Law Society misapplies *Saguenay* by applying state duties on TWU. In *Saguenay*, the Court said ***the state*** cannot adhere to or impose a

[42] *Hutterian Brethren*, para. 97.
[43] *Adler*, para. 175 (no "*Charter* claim to public funding" to practice religion); *Martinez*, p. 15 (group effectively seeking a "state subsidy"); *Bob Jones* (tax-exemption).
[44] *R. v. N.S.*, para. 51, emphasis added.

religious belief.[45] It should be obvious that private religious organizations have no duty of religious neutrality. Once again, the Law Society confuses and imposes its own obligations on TWU.

107. The Law Society is not adhering to any belief merely by accepting TWU law graduates. The Law Society does not adhere to TWU's religious beliefs any more than they adhere to the personal beliefs of any individual who is admitted to the bar. The Law Society's obligation is to accommodate the lawful religious beliefs and practices of the TWU community.

(d) IDENTITY/PRACTICE DISTINCTION

108. The Law Society and the LGBTQ Coalition cite the hate speech case, *Whatcott*, arguing that TWU has an untenable "love the sinner, hate the sin" argument and that TWU denies that the Community Covenant could have an impact on LGBTQ individuals (paras. 451, 480, 498; LGBTQ Coalition, para. 28).

109. TWU acknowledges, as the Supreme Court did in *TWU v. BCCT* at para. 25:

- "TWU is not for everybody";
- TWU "is designed to address the needs of people who share a number of religious convictions"; and
- Many "homosexual student[s] would not be tempted to apply for admission".

The Supreme Court of Canada held that many LGBTQ students would only sign the Community Covenant at a "considerable personal cost", but then immediately said that this is "not in itself sufficient to establish discrimination as it is understood in our s.15 jurisprudence."

110. The Court in *Whatcott* clearly stated that "sexual orientation and sexual behavior can be differentiated for certain purposes."[46] Such a differentiation is more appropriate within a private religious community than perhaps anywhere else.

[45] *Saguenay*, paras. 73, 78.
[46] *Whatcott*, para. 122.

111. *Whatcott* should not be read outside of its hate speech context. The orientation/behaviour distinction cannot be used "where hate speech is directed toward behaviour in an effort to mask the true target, the vulnerable group".[47] *Whatcott* does not go so far as to make illegitimate or *de facto* unacceptable all religious beliefs relating to sexual conduct within religious communities. Such beliefs remain entitled to protection in the same manner stated by the Supreme Court of Canada in *TWU v. BCCT, Reference re Same-Sex Marriage* and *Loyola*.

112. The Law Society also says one can have beliefs on marriage but can be restricted from putting them into practice (see *inter alia*, para. 555). This ignores the identity/practice distinction when it comes to the religious rights of TWU and its community. It is unreasonable to suggest that religious minorities can have beliefs, but the state can marginalize them for associating together to adhere to such beliefs. As stated in *Saguenay*:

> [Religious belief] defines the moral framework that guides their conduct. Religion is an integral part of a person's identity. 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:
>
> > […] when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.[48]

113. The statement is apposite to this case, where the Law Society's justification of the Decision is not merely expressing an opinion, but advocates a hierarchy of rights that marginalizes religious convictions concerning marriage. In fact, the Law Society specifically disparages evangelical religious belief by calling it "disrespectful and discriminatory" and "derogatory" (para. 482). This is not state neutrality.

114. The Law Society's position undermines the character and identity of TWU and its community. As the Supreme Court stated in *Loyola*, "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom".[49]

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[47] *Whatcott*, para. 123.
[48] *Saguenay*, para. 73.
[49] *Loyola*, para. 67.

115. The state must remain neutral to maintain a private sphere with "a free space in which citizens of various beliefs can exercise their individual rights."[50]

116. The Law Society repeatedly says that LGBTQ applicants are excluded from attending TWU (*inter alia*, paras. 88, 103, 120, 374, 515, 586, 608).

117. The evidence before the Law Society was that some LGB students who share its evangelical religious beliefs attended TWU. Three former LGB students who have attended TWU have sworn affidavits, in addition to one person who wrote a letter to the Law Society (para. 474). This highlights the danger in excluding TWU law graduates to the bar wholesale, since the Decision would have the effect of excluding such LGBTQ individuals who choose to attend TWU's law school – the same individuals the Law Society says it is protecting.

(e) "NO MEANINGFUL CHOICE"

118. Citing *Hutterian Brethren*, the Law Society says that the "section 1 balancing inquiry" devolves to whether it leaves a person a "meaningful choice" to follow their religious beliefs and practices (paras. 578-579, 587).

119. First, the context of that comment in *Hutterian Brethren* relates to examining the incidental effects on a law of general application that inadvertently captured a religious group: "The incidental effects of a law passed for the general good on a particular religious practice may be so great that they effectively deprive the adherent of a meaningful choice".[51] Here there are no incidental effects; the Decision directly targets and affects a specific religious group.

120. Second, the "meaningful choice" dicta is a comment that some religious interference may not be severe when balancing the salutary and deleterious effects under a section 1 *Oakes* test, the severity of which varies from case to case.[52] It is by no means a requirement to demonstrate an interference with section 2 rights. It is notable that this dicta has never been applied in a religious freedom case before or after *Hutterian Brethren*.

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[50] *S.L.*, para. 10.
[51] *Hutterian Brethren*, para. 94.
[52] *Hutterian Brethren*, para. 87.

121. The *Doré* test requires the Law Society to establish that it has proportionately balanced the *Charter* rights at stake, meaning they "are limited no more than is necessary given the applicable statutory objectives".[53]

(f) "NECESSARY PRECONDITION" AND "EFFECTIVE IMPOSSIBILITY"

122. Citing *Fraser* and *Criminal Lawyers' Association*, the Law Society argues that because TWU is claiming a "positive right", evangelical Christianity must require, as a "necessary precondition", operating or attending a law school "governed by the Covenant" and that being an evangelical Christian would be "effectively impossible" (paras. 573-576) for an infringement to be made out. This is not the test for an infringement under s. 2 of the *Charter*.

123. First, TWU is not claiming a positive right. This is not one of those "exceptional circumstances" where TWU argues that the *Charter* requires "positive state action".[54] Rather, TWU submits that a state act (i.e., the Decision) disproportionately interferes with the rights of TWU and its community. The Decision was a rejection of TWU and its graduates based on shared religious beliefs and association. TWU was not seeking any right or benefit to which it and the members of its community were not entitled. TWU is fully prepared to meet the legitimate criteria for approval of its graduates and will educate them accordingly.

124. Second, the Supreme Court in *Mounted Police* rejected the "effectively impossible" threshold set out by the Law Society. The Court stated that effective impossibility is "not the legal test for infringement of s. 2(d)", but was used in *Fraser* to describe the effect of legislative schemes and exclusions in that particular case.[55] Indeed, even if it applies in this case, it applies to the "effective impossibility" of TWU graduates to enter the legal profession due to the Decision. The Court also stated that the "necessary precondition" is not a threshold requirement to demonstrating a "derivative right" and that "any suggestion that an aspect of a *Charter* right may somehow be secondary or subservient to other aspects of that right is out of keeping with the purposive approach to s. 2 (d)".[56]

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[53] *Loyola*, para. 4.
[54] *Fraser*, para. 193 (Rothstein J.), as well as para. 70 (majority).
[55] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 at para. 75.
[56] *Mounted Police*, paras. 78-79.

125. Third, the *Fraser* and *Criminal Lawyers' Association* cases relate only to freedom of association and expression. In *Criminal Lawyers' Association*, the positive right was access to documents in government hands.[57] In *Fraser*, the positive right was that of an "employees' association to make representations to the employer and have its views considered in good faith".[58] These are categorically different rights than the current case, and in any event do not relate to a test for an infringement of religious freedom as suggested by the Law Society (paras. 574-576). Under the test for a breach of freedom of religion, it is irrelevant "whether a particular practice or belief is required".[59]

(g) EQUALITY AND THE *CHARTER*

126. The submissions made by the Law Society and its supporting interveners misconstrue how the rights guaranteed under s. 15 of the *Charter* apply, or do not apply, in this case.

(i) The Community Covenant is not Discriminatory at Law

127. The Law Society and various interveners accuse TWU of engaging in "discrimination" because of the Community Covenant (paras. 597, 608).

128. The reason that the Community Covenant is not "discriminatory" is because it does not amount to unlawful or wrongful discrimination as understood in our jurisprudence.

129. TWU does not exclude anyone willing to abide by the Community Covenant, but it recognizes that the implementation of this code of conduct may reduce TWU's attractiveness to those who do not share these religious commitments. This fact is hardly nefarious, or even surprising, when proper regard is given to the context in which the Community Covenant is implemented: a private evangelical Christian university. As noted, the Supreme Court specifically recognized that TWU's admissions policy may have the effect of disincentivizing certain groups and individuals from applying to admission at TWU.[60]

130. The Law Society's argument is based on the faulty premise that increased opportunity for certain groups is necessarily discriminatory in an illegal and unconstitutional sense, even

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[57] *Criminal Lawyers' Association*, para. 5.
[58] *Fraser*, para. 99.
[59] TWU Argument, paras. 382-383, citing *Amselem.*
[60] *TWU v. BCCT*, at para. 25.

when practiced within the context of a private religious community that is exempt under the *Human Rights Code* and is not subject to the *Charter*. The Supreme Court of Canada held oppositely, finding that "the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence".[61]

131. The rule of law requires that courts and statutory decision-makers look to the law when determining whether an individual or party is engaging in discrimination. The law must not be supplanted by the moral intuitions of the state, or its delegates, in ignoring the specific protections granted to TWU and its community by the *Human Rights Code* and the *Charter*.

(ii) *Brown v. Board of Education*

132. The Law Society and its supporting interveners draw parallels with the seminal decision of *Brown v. Board of Education of Topeka*.[62] They submit that the Court would "revive" the "separate but equal" doctrine by recognizing a legal education provided at TWU (para. 497). This is a faulty analogy for the simple reason that TWU is not the public Board of Education of Topeka, Kansas. It is a private religious educational institution. The *Brown* decision is restricted to public education undertaken by government.

133. The reasoning in *Brown* is expressly limited to striking down a ***government policy*** to implement segregation in the provision of ***public*** education (*Brown*, e.g. pp. 491, 492, 495). This discrimination had the "sanction of law", because the African-American plaintiffs were "denied admission to schools attended by white children under ***laws*** requiring or permitting segregation according to race".[63] In other words, unlike the alleged "discrimination" complained of at TWU, the discrimination emanated directly from laws passed by the state.

134. The reason the court held that public education was "a right which must be made available to all on equal terms" was that "the state has undertaken to provide it".[64] This does not apply to recognition of a legal education program provided by TWU.

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[61] *TWU v. BCCT*, at para. 32.
[62] 347 U.S. 483 (1954) [*Brown*].
[63] *Brown*, p. 488.
[64] *Brown*, p. 493, emphasis added.

135. If the implementation of private religious policies run afoul of the "separate but equal" doctrine discarded in *Brown* over 60 years ago, as the Law Society suggests, it would be difficult to explain the lawful continuation of any private religious schools with codes of conduct. The plain explanation is that this decision was never intended, and has never been used, to prohibit religious codes of conduct in private educational institutions.

136. The way that *Brown* has been applied in Canada is consistent with this interpretation, in that it has been used in condemning discriminatory distinctions made ***by government*** in the provision of ***public education***. For instance, the case of *Moore v. British Columbia (Education)*, 2012 SCC 61, relied upon by West Coast LEAF (para. 5), applies *Brown* in addressing a failure by "the government" to deliver equally the "objectives of public education".[65]

(iii) <u>Minding the Gap</u>

137. Both the Law Society and West Coast LEAF rely on a statement of Madam Justice Abella in *Quebec v. A* that "state conduct" is discriminatory if it "widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it…".[66] They argue that recognizing TWU graduates is prohibited under section 15 of the *Charter*, because it would result in "widening the gap" between some disadvantaged groups and the rest of society (para. 537; West Coast LEAF Argument, para. 17).

138. Justice Abella's statement cannot be understood in isolation. *Quebec v. A* involved an equality challenge to provisions in Quebec's *Civil Code* where the legislature had chosen to give benefits to some groups, and not to others. Her statement is clearly aimed at controlling discriminatory conduct emanating ***from the state*** (*Quebec v. A*, para. 332) and must be understood in light of the nature of rights actually guaranteed by section 15, which guarantees equal access to benefits ***provided by law***, but not those offered by private actors.

139. The Law Society does not create or allocate law school seats under the *LPA*. These seats are not a statutory benefit created by the law which the government makes available to some groups and not others. TWU seeks to create a law school that will primarily serve its religious community. All the Law Society is being asked to do is recognize the graduates

[65] *Moore*, para. 36.
[66] *Quebec v. A*, 2013 SCC 5 at para. 332.

of that law school. It has no obligation, or right, to redefine a private religious community because it seeks to create opportunities for those who would not naturally be part of that community.

140. It cannot properly be said that the state's recognition of the rights of TWU and evangelical students to enter the legal profession conflicts with the rights of anyone.[67]

(iv) The Law Society does not Condone Discrimination by Accepting TWU Graduates

141. The Law Society now argues that recognizing TWU graduates would condone "a violation of legal principles the Law Society is mandated to uphold" (para. 520) and would "seriously impact the rights of LGBTQ persons and others" (para. 515). The obvious reason that the Law Society does not discriminate by recognizing TWU graduates is that, for the reasons set out above, TWU does not unlawfully discriminate against anyone.

142. The argument that the Law Society would be "condoning" discrimination (para. 520) by recognizing TWU graduates should be rejected. In support of this argument, both the Law Society (para. 509) and the LGBTQ Coalition (para. 48) rely on *Vriend v. Alberta*.[68]

143. The principle expressed in *Vriend*, which was decided several years before *TWU v. BCCT*, has no application. Like *Quebec v. A*, *Vriend* addressed the question of under-inclusive ***legislation***. The Alberta government failed to expand the protections that were offered to other groups in society to members of the LGB community. This "total exclusion from a legislative scheme"[69] (as later characterized by Abella J. in *Quebec v. A*) was a government decision to withhold protections from members of the LGBTQ community, ***rooted in law***, which it had undertaken to provide other societal groups.

144. This is not analogous to a decision by a statutory delegate to recognize the law degrees of individuals offered in the context of a private religious community. Indeed, the Court in *Vriend* took specific notice of the fact that the constitutional challenge in question

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[67] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras. 45-46.
[68] [1998] 1 S.C.R. 493 [*Vriend*].
[69] *Quebec v. A*, para. 361.

concerned the legislation and "did not concern the acts of King's College or any other private entity or person".[70]

(v) The Decision Discriminates on the Basis of Religion

145. The Law Society attempts to side-step its obligations under s. 15 of the *Charter* by arguing it distinguishes TWU graduates on the basis that they attended "a specific educational institution" (being TWU), which is not a "protected characteristic under s. 15" (para. 596).

146. However, this begs the question, why are graduates of this "specific educational institution" rejected by the Law Society and not others? What is the basis for this distinction? It is clearly the religious nature of TWU.

147. As the Law Society admits, the basis for the distinction is that graduates of the School of Law go to TWU (para. 596). Its rejection is based on the Community Covenant, which is attractive to evangelical Christian students and which establishes and maintains TWU's religious community. In other words, the reason that graduates of TWU have been singled out for distinction is because they have chosen to adhere to the religious beliefs contained in the Community Covenant. This is a protected characteristic under s. 15.

148. The Law Society argues that it would make this same distinction in regard to students from any other law school implementing a similar policy "whether religious belief was the basis for the policy or not" (para. 597). This is beside the point. If an institution implemented this policy for reasons unprotected by s. 15, the Law Society could plausibly argue a distinction made on that basis would be insufficient to engage the *Charter* (although it still may be outside of its statutory authority). However, as it is, the evidence is clear that the impugned policy at TWU is implemented ***on the basis of religious belief and practice***, which falls squarely within the ambit of s. 15. It is not open to the Law Society to make a distinction on this basis.

149. The Law Society further argues its Decision does not constitute a disadvantage against evangelical Christians because they may continue to go to public schools, instead of TWU (para. 606). By this logic, it would not constitute a disadvantage for the state to refuse sectarian religious education altogether, because it would always be open to the members of

[70] *Vriend*, para. 66.

these communities to attend public schools. This is particularly strained logic, since the Law Society ignores that LGBTQ persons are also free to attend other institutions, yet still maintains that TWU is "seeking to coerce others" (para. 584).

150. In essence, the Law Society's answer to the charge of discrimination is that evangelical Christians are not discriminated against because they can go to public school just like everyone else. A decision by the state to treat an enumerated group it regulates under section 15 just like everyone else, without consideration for the unique concerns and "needs of the members of the group",[71] is not an answer to a charge of discrimination. It is discrimination itself.

(h) THE *CHARTER* EQUALITY RIGHTS OF THOSE WHO ARE "EXCLUDED" ARE NOT ENGAGED

151. The Law Society argues that the Community Covenant has a "harmful impact" on LGBTQ persons (para. 477) and that "equality rights" of various categories of persons are "severely and negatively impacted" (para. 529) by the Community Covenant.

152. After the Petitioners filed their written argument, the BC Court of Appeal clarified , that in the context of a *Doré* analysis, "[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."[72]

153. Therefore, a standard of review of correctness applies to whether LGBTQ *Charter* rights are engaged in this case. For the reasons stated in the Petitioners' Argument, they are not engaged.

154. While some individuals will not choose to attend TWU, perhaps because of the "personal cost" involved, these arguments ignore that it is voluntary to attend TWU in the first place and that TWU is designed to serve the evangelical Christian community. Nothing requires a person to apply to or attend TWU, or agree with TWU's Statement of Faith. TWU gives all people, including those that are part of the evangelical community, one more option for law school. It does not compel individuals to do anything they are not voluntarily prepared to undertake in order to join a religious group.

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[71] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 at para. 20.
[72] *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 at para. 48.

155. *Loyola* recognized "the inescapable reality that Loyola is a Catholic high school whose students and parents have ***voluntarily selected an education infused with Catholic beliefs and values***."[73] Indeed, this private, collective dimension is what gives it constitutional protection.

156. The creation of additional opportunities to attend law school therefore cannot be construed as coercion (paras. 464, 558, 584). Recognizing TWU graduates accommodates its religious community. It does not impose a religious viewpoint on anyone.

157. As stated by the Court in *TWU v. BCCT*, "one must consider the true nature of the undertaking and the context in which this occurs".[74] Any obligations arising from the Community Covenant occur only when a person voluntarily decides to join TWU as a private religious educational community (contrary to the Law Society's half-hearted suggestion that TWU is not a "private organization" (para. 557)). Indeed, it would be illogical if *Charter* rights could be violated by alleged "coercion" imposed by a private university, when it is well-settled law that the *Charter* does not even apply to the conduct of public universities.

158. Forcing TWU to replace the Community Covenant with one that is "truly voluntary" (para. 558) is constitutionally unacceptable. In the context of *Loyola*, teaching Catholicism from a neutral perspective means that "the state is telling them how to teach the very religion that animates Loyola's identity" (para. 63). "To tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school."[75]

159. In the context of TWU, this was put well by Justice Campbell in *TWU v. NSBS* (para. 270):

> The impact on the religious expression would be to require it to be undertaken in a way that significantly diminishes its value. TWU's character as an Evangelical Christian University where behavioural standards are required to be observed by everyone would be changed. Replacing a mandatory code with a voluntary one would mean that students who wanted to be assured that they could study in a strictly Evangelical Christian environment would have to look elsewhere if they want to practice in Nova Scotia. That impact is direct.

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[73] *Loyola*, para. 158, emphasis added.
[74] *TWU v. BCCT*, para. 34.
[75] *Loyola*, para. 62.

(i) ALLEGED DISCRIMINATION ON OTHER GROUNDS: GENDER, MARITAL STATUS, RELIGION

160. The Law Society and West Coast LEAF also argue that TWU wrongfully discriminates based on gender, marital status, and religion (para. 6).

161. First, there is no evidence that these factors had anything to do with the Decision. The Law Society and West Coast LEAF are attempting to bootstrap additional justifications for the Decision when there was no evidence they were considered by the Benchers.

162. Second, some of these arguments flow from the most negative interpretations of the Community Covenant; there is no evidence that TWU adheres to those interpretations.

163. Third, there is no evidence that TWU would enforce the Community Covenant in the manner suggested; in fact, there is evidence to the contrary.[76]

164. Finally, for the reasons stated in the Petitioners' Argument and this Reply, these alleged grounds of discrimination are no more reason to deny recognition to TWU graduates than the alleged discrimination on the basis of sexual orientation. The equality rights of members of these groups are not engaged for the same reasons.

165. These additional arguments highlight the distinctive nature of TWU as a religious community and make explicit the opposition that many in society have to TWU's religious beliefs. If anything, these additional arguments highlight the need to protect the TWU community.

(j) PROPORTIONALITY

166. Along with the Law Society, the LGBTQ Coalition argues that LGBTQ rights are so "highly significant" that they "should outweigh other values that may be implicated" (LGBTQ Coalition Argument, para. 62; see also para. 615). This negates the importance of the rights of TWU and its community, and is contrary to the notion that if there is a conflict between rights, which is denied by the Petitioners, there is no "hierarchy of rights."[77]

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[76] Affidavit #1 of N. Hebert, para. 9; Affidavit #1 of R. Wood, para. 20.
[77] *Reference re Same-Sex Marriage*, para. 50.

8. THE *HUMAN RIGHTS CODE* AND THE *TWU ACT*

167. At paragraph 623, the Law Society makes a passing argument that TWU is not protected by s. 41 of the *Human Rights Code* because "the primary purpose of TWU's proposed law school is to issue secular law degrees and train law students".

168. This ignores the Supreme Court's repeated statements that TWU is protected by s. 41.[78] The protection afforded under s. 41 of the *Human Rights Code* is available when "a primary purpose" of the organization is the "promotion of the interests and welfare of an identifiable group or class of persons characterized by … a common…religion." The protection is not afforded based on one activity (the creation of a law school), but the overall purposes of TWU as an organization. There is little doubt that a primary purpose of TWU is to promote and support the welfare of the evangelical Christian community. The Law Society admits elsewhere in its argument that TWU is granting a preference to evangelical Christians (para. 610).

169. In response to para. 624 of the LSBC Argument, section 3(2) of the *Trinity Western University Act* is an empowering provision, not a restricting provision. It grants TWU the legislative power to be a university and provide university education from a Christian "viewpoint" and with an "underlying philosophy" that is Christian.

E. CONCLUSION

170. The real issue is whether TWU and its future graduates should be penalized because a majority of members of the Law Society disagree with the religious foundations of its community.

171. TWU opens opportunities for, and serves, a specific religious group that is entitled to tolerance, respect, and accommodation.

172. The response from the Law Society in defending the correctness of the Decision, which so clearly infringes *Charter* rights, militates against allowing the Benchers to consider this matter again.

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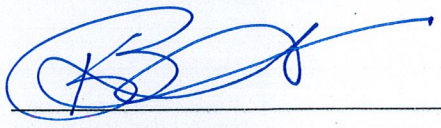
[78] *TWU v. BCCT*, paras. 25, 28, 32 and 35.

173. The Law Society concedes that it has "no concern that graduates … would be incapable of practicing law or that their competence … would be compromised" (para. 430). The Decision that the Benchers thoughtfully and carefully made in April of 2014 should be restored.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 17th DAY OF AUGUST, 2015.



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