Court File No.: 37209

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS

- and -

LAW SOCIETY OF UPPER CANADA

RESPONDENT

ATTORNEY GENERAL OF ONTARIO

INTERVENER

FACTUM OF THE RESPONDENT, LAW SOCIETY OF UPPER CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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PART I OVERVIEW

1. The Law Society of Upper Canada (the "Law Society") is a state actor exercising in the public interest statutory powers to set merit-based admission criteria for access to the legal education necessary for admission to the Ontario bar. The question in this appeal is whether the Law Society can be compelled by Trinity Western University ("TWU"), a private institution, to sanction its discriminatory admissions policy by accrediting TWU's proposed law school.

2. As the Ontario Courts unanimously found, the answer must be "no". By requesting that the Law Society exercise its jurisdiction to accredit its proposed law school, TWU is stepping outside its private sphere and seeking a public benefit from the Law Society. It must therefore accept that the Law Society is obligated to apply its statutory mandate in a manner consistent with the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), including the duty of state neutrality, and with the Ontario *Human Rights Code* (the "*Code*"). In light of its statutory mandate and obligations, the Law Society's refusal to accredit TWU's proposed law school is an entirely reasonable decision (the "Decision").

3. The Law Society's jurisdiction always started at the front door of legal education. When created by statute in 1797, the Law Society was given explicit statutory authority to set the admission criteria for admission of *students* of the law as a necessary prerequisite to admission to the bar itself. By the 1900s, non-merit based admission restrictions (such as religion and gender) had been removed as formal criteria for admission to prerequisite legal education.

4. Until 1957, the Law Society operated Osgoode Hall Law School as the only institution authorized to provide prerequisite legal education and had unrestricted authority to determine its admissions policy. The fact that after 1957 the Law Society chose to authorize third party university providers to offer part of the legal education required for access to the bar (short of the bar admission program whose delivery the Law Society has always kept for itself) did not reduce the public nature of the Law Society's mandate and obligations under the law.

5. The Law Society's rejection of discrimination is founded on the recognition that a diverse profession is in the public interest. It is also grounded on this critical reality: optimal competence in the legal profession is not only a function of proper training <u>in</u> the law, but also of equal access without discrimination <u>to</u> that training. That is why none of the 20 law schools which have thus

far obtained accreditation have a discriminatory admissions policy as a condition of entry to its own programs.

6. By contrast, as a condition of admission to its proposed law school, TWU will require students to agree to and sign a "Community Covenant" that will exclude prospective law students from attending TWU on the basis of personal characteristics (sexual orientation, gender, religion) that are irrelevant to merit and the intrinsic worthiness of prospective law students.

7. It is self-evident that, but for TWU's contention that its freedom of religion justifies its accreditation notwithstanding its discriminatory admissions' policy, there could be no valid objection to the Law Society's refusal to accredit a proposed law school with such a policy. TWU's invocation of its freedom of religion does not provide any such justification.

8. However broad freedom of religion may be in the private sphere, it cannot be used to force the Law Society to effectively adopt the admissions policy of TWU as its own. In the public sphere, which TWU has chosen to enter, no individual right can be absolute since, in that context, fundamental freedoms must be limited to protect and accommodate equally the rights and freedoms of others. TWU accepts this reality by recognizing that, once called to the bar, no lawyer (including Evangelical Christians) can lawfully discriminate by refusing to represent a client or hire an employee on discriminatory grounds. Similarly, it is not disputed that the Law Society could not adopt the Covenant or another discriminatory admissions policy for the legal education that the Law Society continues to provide itself through the bar admission program.

9. If it is ordered to accredit TWU as one of its third party providers of prerequisite legal education, the Law Society will be compelled to do indirectly what it could not do if it offered this education directly, namely, adopt a discriminatory restriction on who may gain access to the legal education necessary to become a lawyer. This discrimination will be wholly inconsistent with the Law Society's function to ensure a competent bar. It will also be deeply offensive to excluded minorities and the public served by lawyers since it will restrict access to prerequisite legal education for reasons that have nothing to do with inherent merit.

10. As a result of its discriminatory admissions policy, TWU's proposed law school is contrary to the Law Society's constitutional obligations and inimical to its objective of providing equal access to prerequisite legal education and equality of opportunity within the legal profession.

A. Statement of Facts

i. The Law Society has always had authority over admission to prerequisite legal education

11. The Appellants mistakenly assert that the Law Society "has no statutory power over universities or law schools."[1]

12. In fact, the Law Society was created in 1797 to provide the province with a "learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province." From its formation, the Law Society has had exclusive jurisdiction, confirmed by statute, over the licencing process, including the admission of *students of the laws* into the licencing process. This authority has never been fettered.[2]

13. The statutory history and powers of the Law Society, asserted before the Divisional Court and the Court of Appeal, are unchallenged. They include the following:

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[1] Factum of the Appellants at para 21.

[2] Reasons of The Honourable Justices MacPherson, Cronk and Pardu at paras 30–35, 109, Appeal Book of the Appellants [AB], Vol III, Tab 6 at 448–49, 475 [Court of Appeal Decision]; Reasons of Associate Chief Justice Marrocco, Justices Then and Nordheimer at paras 19–20, 95–97, AB, Vol III, Tab 4 at 401, 422 [Divisional Court Decision]. See also *An Act for the better regulating the Practice of the Law*, SUC 1797, 37 Geo III, c XIII, ss I, V, Book of Authorities of the Respondent [BA], Tab 5 (the Law Society's original enabling statute, which provided that "no person other than the present practitioners…shall be permitted to practise at the bar…unless such person shall have been previously entered of and admitted into the said society as a student of the laws" at 23). See also *An Act to amend the Law for the admission of Attorneys*, 1857, 20 Vict, c 63, s III, BA, Tab 6; *An Act respecting Barristers at Law*, 1859, 22 Vict, c 34, s 1, BA, Tab 7; *An Act respecting Attorneys at Law*, 1859, 22 Vict, c 35, ss 3, 8, BA, Tab 8; *An Act respecting Barristers-at-Law*, RSO 1877, c 139, s 1, BA, Tab 9; *An Act respecting the Law Society of Upper Canada*, RSO 1877, c 138, ss 36–39, 41, BA, Tab 10; *The Law Society Act*, SO 1912, c 26, s 42, BA, Tab 11; *The Law Society Act*, RSO 1970, c 238, ss 52, 54–55, BA, Tab 15; *Law Society Act*, RSO 1990, c L.8 ss 4.1, 26.1(1), 27(1)–(3), 62(0.1)4, 62(0.1)4.1, 62(0.1)21, 62(0.1)23, 62(0.1)26 [*Law Society Act*].

(a) The Law Society has the exclusive statutory jurisdiction over legal education that is required to be admitted to the Bar. At least since 1893, the Law Society has not conditioned access to the profession, including prerequisite legal education, on grounds related to personal characteristics that are irrelevant to the competence of a prospective lawyer;[3]

(b) Until 1957, the Law Society maintained exclusive responsibility over the legal studies that led to admission to the Bar.[4] The Law Society itself formerly operated the only law school[5] (Osgoode Hall) that provided the legal education required to be admitted to the Bar. It was, in effect, the only "accredited law school." The Law Society had direct control over admissions to its own law school. The only admissions criteria were merit-based;[6]

(c) After 1957, while the Law Society has authorized third party universities to deliver legal education on its behalf by accrediting them, it did not relinquish its ultimate responsibility and authority with respect to prerequisite legal education. The Law Society has maintained that power through to the present-day;[7]

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[3] Court of Appeal Decision at para 109, AB, Vol III, Tab 6 at 475; Divisional Court Decision at para 97, AB, Vol III, Tab 4 at 422; Christopher Moore, *The Law Society of Upper Canada and Ontario's Lawyers, 1797–1997* (Toronto: University of Toronto Press, 1997) at 200, AB, Vol VI, Tab 23B at 925.

[4] Court of Appeal Decision at para 33, AB, Vol III, Tab 6 at 448; Divisional Court Decision at para 26, AB, Vol III, Tab 4 at 402; Moore, *supra* at 250–62, AB, Vol VI, Tab 23B at 974–86.

[5] The Law Society opened Osgoode Hall Law School in 1889.

[6] The Law Society of Upper Canada, *Rules of The Law Society of Upper Canada*, Toronto: The Law Society of Upper Canada, 1941, BA, Tab 12.

[7] Divisional Court Decision at paras 20, 95, AB, Vol III, Tab 4 at 401, 422; See also *Rules and Regulations of the Law Society of Upper Canada and Osgoode Hall Law School* (1957), Rule 3 at viii, Rule 10 at xv, s 2 at xx, BA, Tab 13; C. Ian Kyer & Jerome E. Bickenback, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923–1957* (Toronto: University of Toronto Press for The Osgoode Society, 1987) at 260–61, BA, Tab 2; *The Rules of the Law Society of Upper Canada* (1964), at 12–22, BA, Tab 14; *Admission of Members General*, O Reg 419/70, s 26(1)–(6), BA, Tab 16; *Law Society Act*, *supra*, ss 4.1, 26.1(1), 27(1)–(3), 62(0.1)4, 62(0.1)4.1, 62(0.1)21, 62(0.1)23, 62(0.1)26. See also Canadian Common Law Program

(d) Accreditation is the process by which the Law Society authorizes universities to provide a portion of the legal education required for licensing on its behalf. The Law Society accepts graduates of those schools to have met the academic requirement without further inquiry.[8] Since it began accrediting universities to provide legal education on its behalf, the Law Society has set out clear requirements to be met by a law school in order to be accredited, including admissions criteria;[9]

(e) The Law Society has consistently exercised its responsibility and authority so as to ensure that admission to accredited legal education is not limited by any personal characteristics that are irrelevant to merit.[10] It has never accredited a law school that has a discriminatory admissions policy; and

(f) In order to obtain a license to practice law, one must have either graduated from an accredited Canadian law school or have a certificate of qualification from the Federation of Law Societies of Canada.[11] Graduates of Canadian civil law schools and internationally educated law school graduates[12] are required to obtain a

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Approval Committee, *Report on Trinity Western University's Proposed School of Law Program* (Ottawa: Federation of Law Societies of Canada, 2013), AB, Vol VIII, Tab 27A at 1430 [FLSC Report].

[8] The Law Society of Upper Canada, By–Law 4, *Licensing* (23 February 2017), ss 7 and 9(1) [Licensing By–Law]. One of the requirements for an L1 licence is, *inter alia*, a degree from "an accredited law school" which is defined as a "law school in Canada that is accredited by the Law Society." There are no unaccredited common law programs in Canada at present.

[9] Kyer & Bickenback, *supra* at 260–61, BA, Tab 2 (the requirement that an applicant have at least two years of undergraduate studies, which continues today). See also FLSC Report, *supra*, AB, Vol VIII, Tab 27A at 1430.

[10] Court of Appeal Decision at para 132, AB, Vol III, Tab 6 at 484; Divisional Court Decision at para 99, AB, Vol III, Tab 4 at 423.

[11] Licensing By-Law, *supra*, s 9(1) (the applicant must also have "experiential training").

[12] Currently, graduates of unaccredited civil law programs in Canada as well as internationally-educated law school graduates may apply to the National Committee on Accreditation, which is a committee organized under the auspices of the Federation of Law Societies of Canada, to obtain a

certificate of qualification in order to obtain a license to practice law in Ontario.[13]

14. Hence, the Law Society has at all times had the exclusive statutory authority over determining access to the Ontario bar, including admission to the prerequisite legal education that is offered at accredited law schools.[14] Simply put, the Law Society's powers over legal education begin at the front door of the law schools it accredits.

15. The Law Society has carried out its statutory mandate in respect of admission to legal education by acting to remove obstacles based on considerations other than merit.[15]

ii. The Law Society accredits schools to ensure professional competence in the public interest

16. Pursuant to the *Law Society Act*, the Law Society is statutorily obligated to establish and maintain standards of professional competence, and to carry out this and all other functions in the public interest.[16]

17. In focussing on competence as the primary measure against which admission to the profession will be judged, the Law Society has not considered irrelevant personal characteristics

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certificate of qualification which would satisfy the educational requirements for an L1 License under the Law Society's Licensing By–Law.

[13] Whatever the Law Society's historical practices relating to internationally-educated individuals have been, those practices cannot dictate that the Law Society must accredit an institution that insists upon imposing unequal access of admission. Consideration of the treatment of internationally-educated law school graduates is complex, especially in circumstances where students may not have access to non-discriminatory schools in their country.

[14] Court of Appeal Decision at paras 33–34, AB, Vol III, Tab 6 at 448–49; Divisional Court Decision at paras 20, 95, AB, Vol III, Tab 4 at 401, 422.

[15] Divisional Court Decision at para 96, AB, Vol III, Tab 4 at 422.

[16] *Law Society Act*, *supra*, ss 4.1, 4.2.

including religion,[17] race,[18] and gender.[19]

18. Thus, the Law Society has determined that competence is a function of two necessary and complementary elements:

(a) First, the pool of prospective candidates for the legal education required to be admitted to the Bar is selected based upon merit – and not by any irrelevant personal characteristics such as gender or sexual orientation; and

(b) Second, the candidates from that pool are trained to be competent.

19. TWU cannot satisfy the first component because its admissions policy operates to exclude individuals based on irrelevant personal characteristics.

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[17] In 1833, the legislature of Upper Canada abolished the requirement that persons called to the Bar take a religious oath as a qualification for admission to the Bar (Court of Appeal Decision at para 109, AB, Vol III, Tab 6 at 475; Divisional Court Decision at para 22, AB, Vol III, Tab 4 at 402; Robert E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34:2 NJCL 173 at 174–75, BA, Tab 3). Further, the Law Society did not have anti-Jewish quotas, in contrast to some Upper Canada universities in the latter part of the 19th century (Moore, *supra* at 200, AB, Vol VI, Tab 23B at 925).

[18] In 1855, a black Ontarian was called to the Bar without any mention of his race having been made in Law Society records (Court of Appeal Decision at para 109, AB, Vol III, Tab 6 at 475; Divisional Court Decision at para 23, AB, Vol III, Tab 4 at 402; Moore, *supra* at 177, AB, Vol VI, Tab 23B at 903).

[19] Clara Brett Martin was entered on the books as a student-at-law on June 26, 1893. Two years earlier, she had been turned down by the Law Society on the basis of a long tradition of English and American jurisprudence declaring that legislation referring to "persons" did not include women. Clara Brett Martin became the first woman barrister in the British Commonwealth – decades before women were recognized as "persons" in Canadian constitutional law (Divisional Court Decision at para 24, AB, Vol III, Tab 4 at 402; Moore, *supra* at 176, 180–83, AB, Vol VI, Tab 23B at 902, 906–09).

20. Consistent with its obligations to ensure non-discriminatory access to the prerequisite legal education and to the bar itself, the Law Society has determined that it is in the public interest to have a profession that is diverse and reflective of the population of Ontario. Hence:

(a) the Law Society has adopted policies that promote equity and diversity and combat discrimination on any basis, including religion, marital or family status, and sexual orientation;[20]

(b) the Law Society has imposed on its members an obligation to promote equality, to protect individuals' dignity and to respect Ontario human rights laws;[21] and

(c) the Law Society also provides a range of services and programs to lawyers, law firms and students-at-law to promote equity and diversity in the legal profession.[22]

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[20] Court of Appeal Decision at paras 108–09, AB, Vol III, Tab 6 at 474–75; Divisional Court Decision at para 25, AB, Vol III, Tab 4 at 402. These include a 1991 Statement of Policy that affirmed every member has the right to equal treatment with respect to conditions of employment without discrimination; a 1995 Statement of Values adopted by Convocation that recognizes the full participation of men and women in our profession regardless personal characteristics; and the 1997 Bicentennial Report and Recommendations on Equity Issues in the Legal Profession (Affidavit of Josée Bouchard sworn 23 October 2014 at paras 9–13, AB, Vol V, Tab 23 at 846–47 [Bouchard Affidavit]); The Law Society of Upper Canada, *Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment, A Guide for Law Firms and Other Organizations* (Toronto: The Law Society of Upper Canada, 2013) at 30, AB, Vol VIII, Tab 23H at 1273.

[21] The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: The Law Society of Upper Canada, 2014, r 6.3.1-1, commentary, BA, Tab 17.

[22] Bouchard Affidavit, *supra* at paras 15, 19, AB, Vol V, Tab 23 at 848, 849.

iii. TWU's admissions' policy and the Law Society's Decision

21. In January 2014, TWU asked the Law Society to accredit its proposed law school.[23] It is important to contrast what TWU is arguing in this appeal and what it actually sought in its application for accreditation:

(a) In its proposal for accreditation, TWU justified the creation of a new law school on the basis of the need to serve smaller communities located outside of urban centres in *British Columbia*.[24] Nowhere in its application did TWU allege that access to the Ontario bar and accreditation by the Law Society was the *sine qua non* for its viability;

(b) TWU, at the time of its application or thereafter, never requested that the Federation or the Law Society provide for a process of individual assessment of its graduates in the event the proposed law school was not accredited; and

(c) TWU never alleged that the TWU graduates from its undergraduate programs were denied admission to accredited law schools because of their religious beliefs or that access to the bar of Ontario was in any way impeded by the existing scheme.[25]

22. One unique and unprecedented aspect of TWU's application confronted the Law Society: TWU will require all prospective students, faculty and staff of its proposed law school to sign and abide by the Community Covenant. The Community Covenant is a contract that constitutes a condition precedent to admission to TWU's proposed law school. Breaching this contract can lead

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[23] Letter from Bob Kuhn, President of TWU, to Thomas G. Conway, Treasurer of The Law Society of Upper Canada (6 January 2014), AB, Vol XIII, Tab 27H at 2408. In December 2013, the Federation of Law Societies of Canada (the "Federation") granted preliminary approval to the proposed law school at TWU. In granting preliminary approval, the Federation expressly confirmed that the respective provincial law societies have statutory authority to determine access to the legal profession in their respective jurisdictions (FLSC Report, *supra*, AB, Vol VIII, Tab 27A at 1395).

[24] Trinity Western University, "Proposal for a School of Law at Trinity Western University" (15 June 2012), AB, Vol VIII, Tab 27A at 1437, 1442–43 [TWU School of Law Proposal].

[25] In contradistinction, see the Factum of the Appellants at para 164.

to disciplinary action, including expulsion.[26]

23. The Community Covenant provides, *inter alia*:

> The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of **Jesus Christ** as declared in the Bible …
>
> The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another …. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant …
>
> **Members of the TWU community**, therefore, **commit themselves** to:
>
> > … **uphold their God-given worth from conception to death** …
> >
> > … observe modesty, purity and appropriate intimacy in all relationships, **reserve sexual expressions of intimacy for marriage, and within marriage** take every reasonable step to resolve conflict and avoid divorce …
>
> In keeping with **biblical** and TWU ideals, community members voluntarily abstain from the following actions:
>
> > **sexual intimacy that violates the sacredness of marriage between a man and a woman** …
> >
> > … **according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation** ...[27] [emphasis added]

24. The Community Covenant imposes discriminatory burdens on many individuals and groups by reason of sexual orientation, marital status, gender, or religion.[28] It discriminates against:

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[26] Court of Appeal Decision at para 6, AB, Vol III, Tab 6 at 442–43; Divisional Court Decision at para 106, AB, Vol III, Tab 4 at 424; TWU Student Handbook, Student Accountability Policy [Student Handbook], AB, Vol IV, Tab 10M at 591.

[27] TWU Community Covenant, AB, Vol IV, Tab 10C at 535 [Community Covenant].

[28] Court of Appeal Decision at paras 117, 119, AB, Vol III, Tab 6 at 477, 478; Divisional Court Decision at paras 112–13, 116–17, AB, Vol III, Tab 4 at 426, 427–28; Report of Pamela Klassen [Klassen Report], AB, Vol VIII, Tab 24B at 1332; Affidavit of Helen Kennedy sworn 24 October 2014 at paras 18–21, AB, Vol V, Tab 21 at 783 [Kennedy Affidavit].

(a) married and unmarried lesbian, gay, bisexual, trans-gender and queer ("LGBTQ") persons because (i) unlike heterosexuals, in order to abide by the Community Covenant they cannot be sexually intimate, even if they are lawfully married and (ii) LGBTQ individuals who could not sign the Community Covenant and continue to express their identity;[29]

(b) individuals in common-law relationships, whether heterosexual or LGBTQ individuals, as a result of its pledge of abstinence outside of heterosexual marriage;[30]

(c) unmarried individuals, whether heterosexual or LGBTQ persons;

(d) women because it requires the signatory to commit to upholding the "God-given worth from conception to death" and amounts to a rejection of a woman's right to abortion services, and women's self-determination with regard to reproduction would therefore be negated;[31] and

(e) individuals who do not share a thoroughly Evangelical Christian worldview, including religious minorities such as Jews, Muslims, Buddhists, Atheists and Agnostics[32] as it repeatedly refers to TWU as a "distinctly Christian" environment.

25. The Community Covenant requires each of its members to become an "ambassador" of the TWU community. TWU also requires students and staff to report any conduct by others contrary to the Community Covenant. There can be no doubt that the Covenant will close the door of the proposed law school to otherwise meritorious applicants that could not sign the Covenant. [33]

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[29] Court of Appeal Decision at paras 117, 119, AB, Vol III, Tab 6 at 477, 478; Divisional Court Decision at para 113, AB, Vol III, Tab 4 at 426; Kennedy Affidavit, *supra* at paras 20–21, AB, Vol V, Tab 21 at 783.
[30] Divisional Court Decision at para 104, AB, Vol III, Tab 4 at 424; Klassen Report, *supra* at 5–6, AB, Vol VIII, Tab 24B at 1337–38.
[31] Klassen Report, *supra* at 5–6, AB, Vol VIII, Tab 24B at 1337–38.
[32] Divisional Court Decision at para 112, AB, Vol III, Tab 4 at 426; Klassen Report, *supra* at 6, 10, AB, Vol VIII, Tab 24B at 1337, 1342.
[33] Divisional Court Decision at paras 64–65, 67, AB, Vol III, Tab 4 at 413–14; Community Covenant, *supra*, AB, Vol IV, Tab 10C at 535; Student Handbook, *supra*, AB, Vol IV, Tab 10M at 591.

26. The Law Society invited TWU to provide written submissions, which it did on April 2, 2014. The public and the profession were also invited to provide written submissions.

27. The Law Society considered these submissions, along with relevant reports of the Federation and various memoranda on pertinent legal issues.

28. At the Convocation on April 10, 2014, Benchers discussed the TWU application and raised questions so that TWU would have the opportunity to respond. No vote was taken at this meeting.[34] On April 22, 2014, TWU provided written reply submissions to some of the issues raised at the April 10 Convocation.[35]

29. At the Convocation on April 24, 2014, TWU made oral reply submissions responding to the Benchers' questions from the Convocation on April 10 and the written comments the Law Society received on this matter. After the Benchers made numerous and thoughtful representations, Convocation voted to reject TWU's application for accreditation by a vote of 28 to 21 with one abstention.[36]

B. The Decisions Below

i. The Divisional Court

30. The Appellants sought judicial review of the Decision before the Ontario Divisional Court. In a unanimous decision, the Divisional Court upheld the Decision of the Law Society to refuse to accredit the TWU's proposed law school. The Divisional Court held that, throughout its history, the Law Society had clear jurisdiction, conferred by statute, to determine admission to the Bar in Ontario, including admission to the prerequisite legal education.[37]

31. The Divisional Court found that the Law Society was not seeking to interfere with the affairs of TWU, but rather that the private status of TWU did not compel the Law Society to accredit the proposed law school.[38]

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[34] Reasons for Decision – LSUC Convocation Transcript, 10 April 2014, AB, Vol I, Tab 1 at 23.
[35] Written Reply Submission with Respect to Accreditation of the TWU School of Law (22 April 2014), AB, Vol XIII, Tab 27G at 2362 [TWU Written Reply Submission].
[36] Reasons for Decision – LSUC Convocation Transcript, 24 April 2014, AB, Vol II, Tab 2 at 390.
[37] Divisional Court Decision at paras 95–97, AB, Vol III, Tab 4 at 422.
[38] Divisional Court Decision at para 115, AB, Vol III, Tab 4 at 427.

ii. The Court of Appeal

32. The Appellants appealed to the Court of Appeal of Ontario. In a further unanimous decision, the Court of Appeal dismissed the appeal, finding that the Law Society's Decision reflected a reasonable balancing of the *Charter* rights engaged with the statutory objectives of the Law Society.[39] The Court of Appeal found that the Law Society's statutory objectives to ensure the quality of those who practice law included proscribing discrimination in access to legal education.[40] The Court noted that the imposition of the Community Covenant as an admissions policy is deeply discriminatory to the LGBTQ community, and also to those who do not themselves hold the beliefs espoused in the Community Covenant.[41]

33. The Court of Appeal found that the Benchers engaged in an appropriate balancing exercise in accordance with the Law Society's obligation under *Doré*.[42] As TWU was seeking a public benefit from the Law Society, the Court of Appeal also found that the Decision adhered to the Law Society's obligation of state neutrality.[43]

PART II POSITION WITH RESPECT TO THE APPELLANTS' QUESTIONS

34. The Appellants' questions in this appeal obscure the only issue before this Court: the review of the Law Society's exercise of its statutory powers as an administrative decision-maker. That review should give full consideration to the Law Society's statutory objectives, its obligations under the *Charter* and the *Code* and to any *Charter* right of the Appellants that may be implicated. So considered, it becomes clear that, given the Law Society's mandate and legal obligations, its Decision is proportionate and reasonable.

PART III STATEMENT OF ARGUMENT

A. The *Doré*/*Loyola* analytical framework and reasonableness apply to the review of the Decision

35. An administrative decision that engages the *Charter* is reasonable where it proportionally

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[39] Court of Appeal Decision at para 143, AB, Vol III, Tab 6 at 488.
[40] Court of Appeal Decision at para 109, AB, Vol III, Tab 6 at 475.
[41] Court of Appeal Decision at paras 117–19, AB, Vol III, Tab 6 at 477–78.
[42] Court of Appeal Decision at paras 125–28, AB, Vol III, Tab 6 at 480–83.
[43] Court of Appeal Decision at para 142, AB, Vol III, Tab 6 at 488.

balances the relevant statutory objectives with the *Charter* values at play, and protects those *Charter* values in view of the statutory objectives.[44]

36. *Doré,* as affirmed in *Loyola*, sets out the analytical framework for the review of the Decision. The applicable standard of review is reasonableness and the reviewing court is to consider the statutory mandate of the Law Society, the *Charter* rights that may be engaged by the Decision and whether the Decision proportionally balances the statutory mandate with the *Charter* values engaged.

37. In accordance with the analytical framework set out in *Doré* and *Loyola*, the Law Society submits that its Decision is reasonable because:

(a) The Law Society properly considered its statutory mandate to ensure standards of professional competence, including the impact of admissions policies on admission to law school and the public interest in having a legal profession that is diverse and reflective of the population of Ontario. As a state actor and a statutory decision-maker, the Law Society was also obligated under the *Charter*, including its duty of state neutrality, and the *Code*, to consider the equality rights of prospective attendees of accredited law schools;

(b) The Law Society considered and weighed the impact of the Decision on the rights of the Appellant; and

(c) To the extent that the Decision limits the Appellants' *Charter* rights, if at all, the Law Society proportionally balanced the engaged *Charter* rights with the Law Society's statutory mandate and human rights obligations.

38. While purporting to accept the applicability of the framework in *Doré* and *Loyola*, the Appellants suggest an opportunity for "clarification" and that the reasonableness standard can be "misunderstood." As addressed further below, whether one applies the *Doré/Loyola* framework as articulated by this Court, or as sought to be revised by the Appellants, the Law Society's Decision is clearly justified and reasonable.

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[44] *Doré v Barreau du Québec*, 2012 SCC 12 at paras 55–56, [2012] 1 SCR 395.

B. The Law Society's Decision is reasonable

i. The Law Society's statutory mandate and obligations

a) The Law Society has jurisdiction to set the conditions for admission to the Ontario Bar

39. The Appellants' assertion[45] that the Law Society acted beyond the scope of its statutory mandate is incorrect. The Law Society's refusal to accredit TWU was within its jurisdiction to regulate the legal profession in the public interest. Contrary to the Appellants' submissions, the Law Society's statutory mandate logically and appropriately includes ensuring that accredited law schools do not discriminate in their admissions practices.

40. In deciding whether to accredit TWU's proposed law school, the Law Society was first required to consider its statutory mandate (including the *Law Society Act* and the Law Society By-Laws) and to also take into account its legal obligations under the *Charter* and the *Code*. In this regard, the Decision fulfills the Law Society's mandate as a public interest regulator in respect of access to the profession and gives effect to the relevant statutory objectives and legal constraints.

41. The precise nature and extent of the Law Society's statutory mandate with regard to its explicit jurisdiction over legal education, including admissions criteria, is confirmed by its legislative history. The legislative history of a decision-maker's enabling statute is relevant to interpreting its statutory mandate and objectives.[46] The history of the Law Society's powers – and the steps the Law Society has taken with those powers – make it clear that the Law Society's jurisdiction over legal education was, and continues to be, to act in the public interest and for this purpose to remove barriers to access to legal education.

42. As it relates to the public interest mandate of the Law Society, each appellate court has agreed that a law society has the statutory power to take into account the admissions policy of TWU. Not only did the Court of Appeal and the Divisional Court correctly find that the Law Society's statutory mandate included considering the admissions policy of TWU, the British Columbia Court of Appeal also found that those respective administrative decision-makers were statutorily empowered to consider the impact of the TWU admissions policy in fulfilling their

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[45] Factum of the Appellants at para 140.
[46] *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 66, [2013] 2 SCR 559.

statutory mandate.[47] The British Columbia Court of Appeal affirmed the finding of the application judge that "a decision to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties under the *LPA.*"[48]

43. These findings are consistent with this Court's conclusion in *TWU 2001* that a public regulator acting in the public interest must consider "all features of the education program at [the university]", including the institution's admissions policy.[49]

b) Equality of access is embedded in the Law Society's statutory mandate

44. As demonstrated by its consistent approach to admission to legal education, the Law Society has determined that ensuring standards of professional competence can be best achieved by ensuring that admission to the necessary legal education is based on merit alone. That policy was essentially rooted in the recognition that discrimination is antithetical to merit – and merit is the ultimate guarantor of competence.[50] Thus, equal access is an essential component of the Law Society's competence function: "if the legal profession is open to everyone then, perforce, it is open to the 'the best and the brightest.'"[51]

45. As this Court found, personal characteristics cannot "be used inappropriately to permit the exclusion of people from activities for which, in terms of personal merit, they were qualified."[52]

46. As set out above, competence is comprised of two elements: (i) the pool of prospective candidates for the legal education required to be admitted to the Bar is selected on merit and (ii)

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[47] *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 57, BCLR (5th) 42 [*TWU v LSBC* CA]. See also *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326 at para 108, 85 BCLR (5th) 174, Hinkson CJ [*TWU v LSBC* BCSC] ("I also find that a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations under the LPA" at para 108); See also *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59 at para 89, 1185 APR 1.

[48] *TWU v LSBC* CA, *supra* at para 57.

[49] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 13, [2001] 1 SCR 772.

[50] Court of Appeal Decision at para 109, AB, Vol III, Tab 6 at 475.

[51] Divisional Court Decision at para 97, AB, Vol III, Tab 4 at 422.

[52] *Miron v Trudel*, [1995] 2 SCR 418 at para 159, 124 DLR (4th) 693.

the candidates from that pool are trained to be competent. The Law Society acknowledges that TWU fulfills the second element. However, by operation of the Community Covenant, TWU fails the first element by arbitrarily limiting the pool by excluding individuals based upon gender, sexual orientation, religion and marital status, criteria that are unrelated to merit and therefore unrelated to competence.

47. Beyond competence and considering the public interest, this Court has held that administrative decision-makers, such as the Law Society, always have a "legitimate interest in promoting and protecting shared values of equality, human rights and diversity."[53] Indeed, the duty to act in the public interest has been interpreted purposively and with considerable deference to the views of law societies with respect to the scope and application of the public interest duty.

48. In *Green v. Law Society of Manitoba*, this Court held very recently that "the meaning of 'public interest' in the context of the *Act* is for the Law Society to determine… the independence the legislature has given the Law Society under the *Act* is evidence of an intention to give the Law Society all necessary powers to regulate its members."[54] Courts have held that the scope of the phrase "public interest" must be "interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used."[55]

49. In this case, the Court of Appeal and the Divisional Court correctly found that the Law Society had the ability to consider the discriminatory aspects of the Community Covenant when coming to its Decision on accreditation. Both Courts correctly held that the requirement in section 4.2 of the *Law Society Act* to consider the public interest allows the Law Society to engage in:

> a much **broader** spectrum of considerations [than TWU argued] with respect to the public interest when they are exercising their functions, duties and powers, including whether or not to accredit a law school.[56] [emphasis added]

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[53] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at para 47, [2015] 1 SCR 613 [*Loyola*].
[54] *Green v Law Society of Manitoba*, 2017 SCC 20 at paras 29–30, 407 DLR (4th) 573.
[55] *Stewart v Canadian Broadcasting Corp.* (1997), 150 DLR (4th) 24 at 104, 1997 CanLII 12318 (Ont Sup Ct).
[56] Divisional Court Decision at para 58, AB, Vol III, Tab 4 at 412; Court of Appeal Decision at para 107, AB, Vol III, Tab 6 at 474. See also *TWU v LSBC* BCSC, *supra* at paras 103–08. See also Divisional Court Decision at para 129, AB, Vol III, Tab 4 at 431 (The Divisional Court correctly

50. Ensuring equality of access is embedded within the Law Society's mandate to establish and maintain standards of professional competence. Former Chief Justice Brian Dickson observed, in a seminal speech on the legal profession, that equality of admissions to law school is imperative to ensure that the profession is comprised of the best candidates:

> I want to say a few words about the gatekeepers to legal education, namely those involved in the admission process. Those who fulfill this role are, in a real sense, the gatekeepers of the legal profession. **Ultimately, the ethos of the profession is determined by the selection process at the law schools. In order to ensure that our legal system continues to fulfil its important role in Canadian society, it is necessary that the best candidates be chosen for admission to law schools**.
>
> Furthermore, it is incumbent upon those involved in the admission process to ensure equality of admissions … **Canada is a country which prides itself on adherence to the ideal of equality of opportunity.** If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession.[57] [emphasis added]

51. The accreditation of TWU's proposed law school would further run counter to the Law Society's statutory objectives as it would send an acutely harmful message that those who would be excluded by the Community Covenant are inherently unworthy or underserving of equal access to and representation in the legal profession. On this basis, the United States Supreme Court has recognized that it is necessary to proscribe unequal access to legal education:

> In order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and ethnicity. All members of our heterogeneous society must have confidence in the openness and integrity of the educational institutions that provide this training. As we have recognized, law schools "cannot be effective in isolation from the individuals and institutions with which the law interacts." [citation omitted] **Access to legal education (and thus the legal profession) must be**

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found, and the British Columbia Supreme Court agreed, that this is a key distinguishing factor from the decision in *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 DLR (4th) 296).

[57] Brian Dickson, "Legal Education" (1986) 64:2 Can Bar Rev 374, BA, Tab 4.

> **inclusive of talented and qualified individuals of every race and ethnicity, so that all members of our heterogeneous society may participate in the educational institutions that provide the training and education necessary to succeed in America.**[58] [emphasis added]

52. Hence, contrary to the Appellants' contention,[59] the Law Society has a responsibility and interest in access and admissions to prerequisite legal education in the public interest.

c) The Law Society was required to consider the *Charter* and the *Code*

53. The Appellants place significant emphasis on the fact that TWU is a private institution. This emphasis is misplaced in this case. TWU's private status, and consequent exemption from British Columbia's human rights statute, does not alter the *Law Society's* own obligations as a public actor governed by the law applicable in Ontario, including the *Code* and the *Charter*. The Law Society is a state actor, and it remains so even when exercising its powers in respect of a private institution such as TWU.

54. In applying for accreditation, TWU is not merely proposing to open a private law school: it is also seeking to engage the statutory powers of the Law Society for the purpose of obtaining the state's approval of its law school.[60] That choice entails consequences, namely, that of accepting that it is stepping into the public square and that, therein, the Law Society is bound to adhere to its obligations as a public actor.

55. The Law Society, as a public actor and gatekeeper, cannot exercise its statutory power in respect of access to the Bar, including educational requirements, in a discriminatory manner. Religious groups like TWU, within the private sphere, may be allowed to discriminate pursuant to the freedom of religion protected by section 2(a) of the *Charter* or pursuant to an exemption like section 41 of the British Columbia *Human Rights Code*. However, this does not alter the fact that the *Charter* and the *Code* clearly applies to the Law Society in Ontario. The Divisional Court recognized the importance of this distinction:

> The decision of the respondent did not purport to interfere with the right of TWU to create its law school in the fashion that it proposes, exercising its rights to freedom of religion. **That right does not**

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[58] *Grutter v Bollinger*, 539 US 306 (2003) (per Justice Sandra Day O'Connor).
[59] Factum of the Appellants at paras 121, 140.
[60] Court of Appeal Decision at para 138, AB, Vol III, Tab 6 at 487.

> **carry with it, however, a concomitant right in TWU to compel the respondent to accredit it, and thus lend its tacit approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school**. To reach a conclusion by which TWU could compel the respondent, directly or indirectly, to adopt the world view that TWU espouses would not represent a balancing of the competing *Charter* rights. Rather, such a conclusion would reflect a result where the applicants' rights to freedom of religion would have been given unrestricted sway.[61] [emphasis added]

56. Hence, neither the Law Society's jurisdiction over legal education nor its pertinent legal obligations are ousted by TWU's private status. TWU may be allowed to discriminate, but the Law Society is not. The Law Society is certainly not *required* to sanction an admissions policy which would be illegal for the Law Society itself to promulgate.

d) State neutrality requires that the Law Society neither prefer nor prejudice any religion

57. The Law Society must act in a way that conforms to the standards of state neutrality: it must not prefer any religion or religious group over another.[62] State neutrality requires that the state express no preference in matters of spirituality. It is a principle that requires the state to encourage everyone to participate freely in public life regardless of their beliefs.[63]

58. In *Saguenay*, this Court observed the distinction between recognizing religion in society and with using religion to justify a discriminatory practice: "I concede that the state's duty of neutrality does not require it to abstain from celebrating and preserving its religious heritage, but that does not justify the state engaging in a discriminatory practice for religious purposes, which is what happened in the case of the city's prayer."[64] The Court held that the recitation of the prayer at the council's meetings was "above all else a use by the council of public powers to manifest and profess one religion to the exclusion of all others", which violated the council's obligations of neutrality.

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[61] Divisional Court Decision at para 115, AB, Vol III, Tab 4 at 427.
[62] *R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295 at 337, 18 DLR (4th) 321 [*Big M*]; *S.L. v Commission scolaire des Chênes*, 2012 SCC 7 at para 32, [2012] 1 SCR 235 [*S.L.*].
[63] *Big M, supra* at 346.
[64] *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 116, [2015] 2 SCR 3 [*Saguenay*].

59. Similarly, the Law Society can neither directly nor indirectly adopt an admissions policy in the context of prerequisite legal education that favours one religion over others. The Law Society's accreditation of TWU would have amounted to the Law Society condoning TWU's discriminatory policy and exhibiting a preference for the religious tenets of Evangelical Christianity.[65]

60. The Law Society had to exercise its powers in a way that is not seen to be enforcing or "accrediting" any form of religiously-based preference or exclusion:

> By expressing no preference, the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally.
>
> …
>
> If the state adheres to a form of religious expression under the guise of cultural or historical reality or heritage, it breaches its duty of neutrality. If that religious expression also creates a distinction, exclusion or preference that has the effect of nullifying or impairing the right to full and equal recognition and exercise of freedom of conscience and religion, there is discrimination.[66]

61. It follows that, in order to discharge its statutory mandate in accordance with its legal obligations, the Law Society was required to ensure that all prospective licensees are afforded access to the profession through non-discriminatory admissions policies in accredited law schools, the bar admission program and the licensing process.

e) The Law Society cannot discriminate directly or indirectly

62. The Law Society continues to have jurisdiction and responsibility over prerequisite legal education. As a result of its obligation under the *Charter* and the *Code*, the Law Society is precluded from discriminating itself or sanctioning the discrimination of an institution accredited to provide prerequisite legal education on its behalf. While it had chosen by the end of the 19th century to discharge its mandate by promoting equal access to legal education, the Law Society became in the last decades of the 20th century legally and constitutionally obligated to consider the

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[65] *Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825 at paras 50, 54, 133 DLR (4th) 1 [*Ross*].
[66] *Saguenay*, *supra* at paras 74–78.

Charter and human rights legislation when interpreting its own statute[67] and to act consistently with the values underlying its statutory grant of discretion.[68] Had the Law Society failed to consider the *Charter* and its obligations under the *Code*, its Decision would have been unreasonable.[69]

63. The Appellants submit that there are no equality rights at stake in this appeal.[70] On the contrary, preserving and protecting equality rights and interests is, manifestly, the basis upon which the Law Society made the Decision.

64. The *Code* is quasi-constitutional law and administrative bodies must take into account the *Code* in situations where human rights issues arise.[71] As stated by this Court, "human rights legislation must be offered accessible application to further the purposes of the *Code* by fostering 'a general culture of respect for human rights in the administrative system'."[72]

65. Section 6 of the *Code* requires equal access to self-governing professions, and prohibits discrimination based on, *inter alia*, creed, sex, sexual orientation, gender identity, gender expression or marital status.[73] There is no exception under the *Code* from the guarantee of equal access to self-governing professions set out in section 6 – not even for religious or educational institutions.[74]

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[67] *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15 at paras 102–03, 114–17, 144, [2007] 1 SCR 650 [*VIA Rail*]; *Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14 at para 39, [2006] 1 SCR 513 [*Tranchemontagne*].

[68] *Chamberlain v Surrey School District No. 36*, 2002 SCC 86 at para 71, [2002] 4 SCR 710 [*Chamberlain*]; *Pinet v St. Thomas Psychiatric Hospital*, 2004 SCC 21 at paras 19–23, [2004] 1 SCR 528; *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 at paras 62–75, [2010] 1 SCR 815.

[69] *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para 99, [2006] 1 SCR 256 [*Multani*].

[70] Factum of the Appellants at para 119.

[71] *Tranchemontagne*, *supra* at paras 13–14, 26, 33.

[72] *British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52 at para 53, [2011] 3 SCR 422; *Tranchemontagne*, *supra* at paras 33, 39; *VIA Rail*, *supra*.

[73] *Human Rights Code*, RSO 1990, c H.19, s 6.

[74] In contrast, there are exceptions, such as under section 18 of the *Code*, available to private service providers that are not available under section 6. Section 18 provides that equal treatment with respect to "services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution

66. Accrediting TWU would create differential access to a public benefit – prerequisite legal education as determined by and provided on behalf of the Law Society – based on prohibited grounds. Individuals who are willing to sign the Community Covenant will have greater access to the exclusion of those unwilling or unable to sign the Community Covenant because of its discriminatory provisions.

67. In short, those unwilling or unable to sign the Community Covenant will have a lesser opportunity to obtain the legal education required to be licensed to practice law in Ontario than will others. This amounts to (i) a clear advantage to those willing to sign the Community Covenant and (ii) a corresponding deprivation to those unable to sign it. The Court of Appeal and the Divisional Court unanimously found that this distinction cannot be tolerated under section 15 of the *Charter* or section 6 of the *Code.*[75] As stated by this Court: "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[76]

68. Furthermore, exclusion of a historically disadvantaged group from public benefits conveys a denigrating message that the excluded are not equal members of society. As stated by Justice L'Heureux-Dubé:

> Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of

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or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified." However, this exemption does not apply to the guarantee of equal access to vocational associations set out in section 6 of the *Code*.

[75] Court of Appeal Decision at para 115, AB, Vol III, Tab 6 at 476; Divisional Court Decision at paras 102, 106–10, AB, Vol III, Tab 4 at 423, 424–25.

[76] *Quebec (Attorney General) v A*, 2013 SCC 5 at para 332, [2013] 1 SCR 61. See also *Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396 (where the Court held that a decision must be examined in its full context and that consideration should be given to the negative impact of the impugned law on the excluded group).

> the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction.[77]

69. The Community Covenant refers to certain acts, including sexual intimacy outside of heterosexual marriage, as being "destructive"[78], and deems such conduct illicit and non-virtuous.[79] The Community Covenant thus offends the human dignity of those that it excludes.

70. This Court has identified human dignity as an "essential value"[80] underlying the section 15 equality guarantee: "Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society."[81]

71. Through its exclusion of individuals on prohibited grounds, the Community Covenant perpetuates prejudice against those minority groups.

72. Justice MacPherson, for the Court of Appeal, came to a concise determination: "My conclusion is a simple one: the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts."[82] The very same can be said of the other groups precluded from signing or unwilling to sign the Covenant because it discriminates on religious or gender grounds.

73. The Appellants assert that the Law Society's Decision to deny accreditation is contrary to the *Code* because it imposes differential treatment on TWU and its prospective students.[83] This argument turns the notion of equal access on its head. The Decision promotes and protects equality of access by ensuring every individual will continue to have an equal opportunity, based on merit, to acquire the legal education required for bar admission.

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[77] *Egan v Canada*, [1995] 2 SCR 513 at 567, 124 DLR (4th) 609.
[78] Community Covenant, *supra*, AB, Vol IV, Tab 10C at 535.
[79] Affidavit of Pamela Klassen sworn 23 October 2014, AB, Vol VIII, Tab 24 at 1312.
[80] *R v Kapp*, 2008 SCC 41 at para 21, [2008] 2 SCR 483.
[81] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53, 170 DLR (4th) 1.
[82] Court of Appeal Decision at para 119, AB, Vol III, Tab 6 at 478.
[83] Factum of the Appellants at para 127.

ii. The Alleged Impact of the Decision on the Appellants' rights

a) The exercise of individual rights is necessarily limited in the public sphere

74. The Law Society was bound to consider and give due weight to the impact of TWU's exclusionary admissions policy on those unable or unwilling to sign the Community Covenant. The Law Society's Decision also gave due consideration to the *Charter* rights claimed by the Appellants in their desire to offer and receive legal training in an Evangelical Christian community setting.

75. In considering the alleged impact on TWU's rights and freedoms, and their respective scope, one must bear in mind that no right or freedom is absolute.[84] Freedoms, such as freedom of religion, are "inherently limited by a number of considerations, including the rights and freedoms of others."[85]

76. This is particularly true in the public sphere. The Appellants accept that once they have entered the public sphere as members of the bar, they are bound by the anti-discrimination laws and rules of the society so that, as law practitioners, they cannot discriminate on prohibited grounds as employers or providers of legal services to the public.[86]

77. The Appellants assert that "TWU does not abandon its private nature and enter the public domain by operating a law school."[87] This submission might be correct to the extent TWU is not seeking any public sanction or benefit. But it is incorrect here: by seeking accreditation, TWU is asking for a public benefit, namely, that of offering on the Law Society's behalf the academic legal education which the Law Society has determined is one of the prerequisites to licensing. In effect, TWU seeks to do what until 1957 only the Law Society could do, and in respect of which the Law Society continues to have ultimate authority. In exercising that authority, the Law Society must accommodate as fully as it can everyone's rights and freedoms. TWU accepts only that the Law

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[84] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 61, [2004] 2 SCR 551 [*Amselem*]; *S.L.*, *supra* at para 25.
[85] *Young v Young*, [1993] 4 SCR 3 at 94, 108 DLR (4th) 193.
[86] See for example FLSC Report, *supra*, AB, Vol VIII, Tab 27A at 1454; FLSC Report, *supra*, AB, Vol IX, Tab 27A at 1526; TWU Written Reply Submission, *supra*, AB, Vol XIII, Tab 27G at 2397.
[87] Factum of the Appellants at para 173.

Society can prescribe the content of legal education required for the bar; but the Law Society has also always prescribed the conditions of admission to such legal education.

78. The Appellants seek a public benefit from a state actor while also insisting on their right to impose the terms of the Community Covenant on others. In the public sphere, everyone has the right to his or her own freedom of religion and conscience. Such diversity of rights and freedoms can only exist if no one person is entitled to impose his or her own code of conduct on others: "No one is to be forced to act in a way contrary to his beliefs or conscience."[88]

b) The Appellants' freedom of religion

79. A decision infringes freedom of religion under section 2(a) of the *Charter* where: (1) the claimant sincerely holds a belief or believes in a practice that has a nexus with religion (the subjective component); and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs (the objective component).[89]

80. With respect to the first criterion, the Law Society does not question the sincerity of the religious beliefs being proclaimed. However, the Appellants must demonstrate that they sincerely believe that excluding others who do not share their beliefs from the proposed TWU law school has a nexus with religion and is a "personal religious obligation" or subjectively engenders a personal connection with the divine.[90] While this test is a subjective one, it is telling that Evangelical Christians have never had, nor indicated that they require, as matter of religious obligation or to engender a personal connection with the divine, such an environment in which to obtain the prerequisite legal education necessary to obtain a license to practice law in Ontario.

81. On the contrary, the evidence is clear that TWU graduates have attended and continue to attend other accredited law schools while maintaining their faith. Mr. Volkenant is currently attending the University of Alberta Law School. The Appellants do not argue (and it is not arguable) that accredited law schools and the Law Society have been violating the freedom of religion of Evangelical Christians such as Mr. Volkenant by requiring them to attend classes with people from the groups now sought to be excluded by the Community Covenant from TWU's

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[88] *Big M*, *supra* at 337.
[89] *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at para 155, [2013] 1 SCR 467 [*Whatcott*].
[90] *Amselem*, *supra* at para 56.

proposed law school. The imposition, at an accredited law school, of an admissions policy such as the Community Covenant is, at its highest, a preference that relates to religious tenets.[91]

82. Without diminishing the sincerity or the legitimacy of the Appellants' beliefs, the Law Society submits that having a law school accredited by the Law Society does not meet this first criterion.

83. With respect to the second criterion, even assuming that the Appellants' preference to attend an Evangelical Christian law school that is accredited by the Law Society meets the first criterion, the Law Society's Decision not to accredit such a school does no more than trivially or insubstantially interfere with their religious freedom. In *Loyola*, this test was described as requiring "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities…"[92]

84. In *Amselem*, this Court confirmed that not every action will become summarily unassailable and receive automatic protection under the banner of freedom of religion.[93] In this regard, the jurisprudence on freedom of religion recognizes that there is "vast array" or a spectrum of degrees of importance of the religious claims. There must therefore be an inquiry into the actual limit that is placed on the religious practices of the claimant:

> There is no magic barometer to measure the seriousness of a particular limit on a religious practice… Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any

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[91] In contrast, religious practices that have been recognized as protected under section 2(a) are typically noted as being required by religious dogma. For example, in *Multani*, the religious claimant believed his faith "requires him to wear a kirpan at all times" (*Multani, supra* at para 3). In *Amselem*, the asserted right was to build a temporary religious structure on a condominium balcony for purposes of ceremonial holiday observance. This Court notes that such commemoration is a demonstration of their faith and that "Jews are obligated to dwell in these succahs" (*Amselem, supra* at para 6). In *Hutterian*, the asserted right was to not have one's picture taken for a driver's license. The Court found that the religious claimants sincerely believed that not having their photo taken was, in fact, a Commandment (*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para 7, [2009] 2 SCR 567 [*Hutterian*]).

[92] *Loyola, supra* at para 67.

[93] *Amselem, supra* at para 62.

> significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.
>
> … The bare assertion by a claimant that a particular limit curtails his or her religious practice does not, without more, establish the seriousness of the limit for purposes of the proportionality analysis. Indeed to end the inquiry with such an assertion would cast an impossibly high burden of justification on the state. We must go further and evaluate the degree to which the limit actually impacts on the adherent.[94]

85. Here, there is no evidence of any substantial or non-trivial interference with religious beliefs or practices:

(a) The Appellants have not adduced evidence that attending one of the twenty currently accredited law schools substantially interferes with acting in accordance with their religious beliefs[95];

(b) There is no evidence that Evangelical Christians require a law school at TWU to enter the profession or practice law;

(c) There is no evidence that a law school with an admissions policy like the one that is in place at TWU is essential for adults to maintain their faith while learning the law, and

(d) There is, in addition, no evidence to the effect that any accredited law school has any discriminatory admissions policy, or has in fact discriminated in the admission of any member of the Evangelical community.[96]

86. On the contrary, the evidence is that "existing law schools have: (1) students who have religious beliefs similar to those on which TWU is founded; and (2) have produced lawyers who also hold such views."[97]

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[94] *Hutterian*, *supra* at paras 89–90.
[95] Divisional Court Decision at para 122, AB, Vol III, Tab 4 at 429.
[96] Divisional Court Decision at para 122, AB, Vol III, Tab 4 at 429.
[97] Letter from Kevin G. Sawatsky, Vice-Provost and University Legal Counsel, Trinity Western University, to John J.L. Hunter, Chair of the Federation of Law Societies of Canada Special

87. The Law Society submits that, among the "vast array of beliefs and practices" that may be subject to a claim of freedom of religion (as described by this Court in *Hutterian*), having a law school accredited by the Law Society falls at the most subjective end of the spectrum that is defined by mere personal preferences. There is no evidence whatsoever that it is required to fulfill any claimant's subjective sense of religious obligation or to maintain a connection with the divine.

88. In essence, TWU is seeking to control admission to its proposed law school with an admissions policy that goes beyond protecting the right to hold and proclaim religious beliefs and, in fact, imposes control over the conduct of its prospective students based on personal characteristics. In the result, the evidence is clear that individuals are excluded from TWU based on their identity, or will be forced to forsake their identity in order to attend TWU's proposed law school.

89. On the other hand, the Law Society is not preventing the practice of any religious belief. Rather, it is only precluding the Appellants from doing what they accept they are prohibited from doing in the profession: discriminating against or excluding individuals on the basis of personal characteristics. Any person harbouring Evangelical Christian beliefs who meets the merit based criteria of an accredited law school can attend that law school and profess his or her faith. For this reason, the Court of Appeal held that the Decision "does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others – members of the LGBTQ community."[98]

90. As this Court held in *S.L.*,[99] being exposed to other religious beliefs is not as such an infringement of freedom of religion: it is actually beneficial in the diverse society into which licensed lawyers will have to practice and integrate.

91. The Appellants rely upon this Court's findings in *Loyola*. However, the nature of the infringement in *Loyola* was revealingly different. *Loyola* was a private Catholic denominational school that was being required to teach Catholic values in a neutral way. That interference, this Court held, was in respect of an "essential ingredient", namely, passing on the values of the

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Advisory Committee on Trinity Western University's Proposed School of Law (17 May 2013), AB, Vol IX, Tab 27A at 1612 [Letter from Sawatsky to Hunter dated 17 May 2013].

[98] Court of Appeal Decision at para 138, AB, Vol III, Tab 6 at 487.

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

Catholic faith to children. The Appellants do not assert that attending an accredited law school is an "essential ingredient" of the Evangelical faith.

92. Therefore, the Law Society's Decision does not constitute an infringement of TWU's freedom of religion rights.

c) The Appellants' freedom of association or expression

93. The Law Society' Decision does not limit the Appellants' freedom of association. The Appellants have not clearly articulated any associational activity, or any shared goal, that the Decision interferes with. The Decision does not impact Evangelical Christians' right to join together either at TWU or as a group in accredited law schools. The Appellants do not belong to a vulnerable group that is in jeopardy of not being able to access legal education.

94. Similarly, the Appellants are free to express the beliefs embodied in the Community Covenant while attending any law school currently accredited by the Law Society. There is no evidence to the contrary.[100] However, this freedom does not extend to demanding that the Law Society, a state actor, sanction their religious beliefs and act on those beliefs by denying equal access to the legal profession. Religious belief and expression may be virtually unconstrained, but practice that affects the rights of others is not.[101]

d) The Appellants' equality rights

95. In this case, the Appellants are seeking, under the guise of section 15, protection for a right to discriminate on the basis of religion with respect to who can attend the TWU's proposed law school. TWU is not seeking to be treated like the other accredited law schools, but rather to be treated differently, so as to be able to discriminate in a manner that other law schools cannot.

96. Even assuming that the Law Society's Decision not to accredit TWU creates a distinction on the ground of religion, it arises not from any demeaning stereotype but from a neutral and defensible policy choice (mandated by its obligation under section 15 of the *Charter* and section 6 of the *Code*) the Law Society made in accordance with its public interest role. Mr. Volkenant's claim is to have the unfettered ability to attend an educational institution that teaches his religion,

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[100] Affidavit of Benjamin Alarie sworn 24 October 2014 at paras 21–23, AB, Vol V, Tab 22 at 797 [Alarie Affidavit].

[101] *Amselem*, *supra* at para 62; *B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315 at para 226, 122 DLR (4th) 1.

not to be free from religious discrimination.[102] He has and retains that right but he cannot extend it to force a public actor to adopt his discriminatory beliefs.

97. The students who would attend TWU's proposed law school would choose to attend a faith-based university that discriminates against several minority groups. They can now apply to attend any other law school in the country, where they could not be denied entry on the basis of religion or any other prohibited ground. They are not denied any benefit available to other students.[103]

e) *TWU 2001* is not determinative of the *Charter* rights at issue

98. The Appellants rely on *TWU 2001* to establish the extent of the Law Society's interference with their freedom of religion. The *TWU 2001* decision is distinguishable for the following reasons: (1) the statutory regime governing the B.C. College of Teachers ("BCCT") is different than that governing the Law Society; (2) the evidentiary record was materially different; (3) the Court in *TWU 2001* did not engage in a human rights analysis required in this case; and (4) Canadian discrimination law no longer distinguishes between identity and conduct.

99. First, unlike the Law Society, the BCCT did not claim statutory authority over admission to the specific prerequisite educational component to enter the teaching profession in B.C. Instead, the BCCT merely contended that the effect of TWU's teaching would likely lead its graduates to potentially discriminate in the public school system. That has nothing to do with the Law Society's position in the case at bar.[104] The BCCT was not focused on the effect of discrimination on the "input" to the college, but on the alleged discriminatory impact on its "output", the student graduates. The Court found there was no evidence of likely discriminatory behaviour upon graduation.

100. Second, in *TWU 2001* there was no evidence that anyone had been denied admission to TWU's teachers program because of a refusal to sign the Community Covenant. In the case at bar, the uncontradicted evidence before this Court is that the Community Covenant excludes identifiable groups since, as the Divisional Court found, no one can become a student of TWU

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[102] These are analogous to findings of the Supreme Court of Canada in *Hutterian, supra* at paras 107–08.

[103] Divisional Court Decision at para 99, AB, Vol III, Tab 4 at 423.

[104] Court of Appeal Decision at para 58, AB, Vol III, Tab 6 at 456.

unless they sign the Community Covenant. The distinction between these cases becomes particularly stark when one considers that in the present case, there is a lack of available space in law schools.[105]

101. Third, the application of human rights legislation is different here than in *TWU 2001*. In *TWU 2001*, the Court noted that TWU was exempt from provincial human rights legislation but did not consider BCCT's obligations under the British Columbian *Human Rights Code* in respect of admissions,[106] since that was not relevant to the case put forth. In this case, the Divisional Court correctly held that the Law Society is required to comply with the requirements of the *Code* in reaching its Decision, namely, it is prohibited, as a self-governing professional body, from denying equal access to its membership on the basis of discrimination.[107]

102. Fourth, the Divisional Court correctly found that, since the decision in *TWU 2001*, human rights law and jurisprudence has evolved. Thus, in *TWU 2001*, the Court distinguished between one's identity and one's conduct as it related to one's sexual orientation, a distinction the Court eliminated in *Whatcott*.[108]

iii. The Decision is reasonable as it represents a proportional balance of *Charter* rights with the Law Society's statutory objectives

103. The Court of Appeal correctly found that the Law Society's Decision reasonably and proportionally balanced all the applicable rights with the Law Society's statutory objectives, and the Law Society's Decision therefore cannot be found to be unreasonable.[109]

104. In this case, even assuming that any of the Appellants' rights were limited, the Law Society's Decision reflects a proportional balancing of the rights and obligations in issue.

105. One may attempt to assess a balance of rights by seeking out a reconciliation of those rights.[110] However, further to this Court's guidance in *Doré* and *Loyola*, a balance of rights may

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[105] Divisional Court Decision at paras 61, 67, AB, Vol III, Tab 4 at 413, 414.
[106] *Human Rights Code*, RSBC 1996, c 210.
[107] Divisional Court Decision at para 69, AB, Vol III, Tab 4 at 415.
[108] Divisional Court Decision at para 113, AB, Vol III, Tab 4 at 426.
[109] Court of Appeal Decision at paras 107–08, AB, Vol III, Tab 6 at 474; Divisional Court Decision at para 124, AB, Vol III, Tab 4 at 430.
[110] Such as the analysis this Court undertook in *R v N.S.*, 2012 SCC 72, [2012] 3 SCR 726.

also be assessed by examining the impact of relevant statutory mandate on the rights and obligations that are engaged by the decision at issue.

106. If there is any non-trivial or substantial interference with the Appellants' *Charter* rights, that interference is but a reasonable burden imposed in exchange for TWU's choice to enter into the public domain of providing a legal education for the purposes of accreditation by the Law Society and obtaining a public licence to practice law in Ontario.[111]

107. In the public sphere, where different rights and interests must necessarily be balanced, the exercise of fundamental freedoms must be constrained where it is necessary to protect others' freedoms and equality. An individual's religious freedom is limited where it could promote discrimination against a minority group.[112] *A fortiori*, this must be so where one is seeking, not freedom from constraint, but rather a public benefit from a public regulator. Here, the Appellants' assertion of their freedom to exclude others while seeking a public benefit directly interferes with the equality rights of those excluded by the Community Covenant. This distinction was integral to the conclusions of the courts below that the Decision represented a proportionate balance: "it is at that point that the right to freedom of religion must yield."[113]

108. This Court articulated the limits of fundamental freedoms in the public sphere in *S.L.* There, the appellants opposed the mandatory teaching of all religions from a neutral prospective in public schools. The Court held that since the state had taken a position of neutrality with respect to all religions, it could not exempt – thereby favouring – any one group from the policy of neutrality. The Court wrote:

> Religious neutrality is … a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights. …
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> state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all

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[111] Divisional Court Decision at paras 102, 115, AB, Vol III, Tab 4 at 423, 427.

[112] *Ross*, *supra*. See also *Chamberlain*, *supra* at para 19, where the Court held that the religious views of one part of the community cannot exclude from consideration the values of equality and respect for other members of the community. Different groups must be given recognition.

[113] Court of Appeal Decision at para 134, AB, Vol III, Tab 6 at 485; Divisional Court Decision at para 117, AB, Vol III, Tab 4 at 428.

> postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected. …
>
> The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.[114]

109. The Law Society is consequently obligated to provide the right to equal protection without discrimination in all its functions, including the accreditation of law schools. Specifically, in this case, the Law Society was obligated to ensure that all persons have equal access to the legal (and judicial) professions in Ontario and that no one experiences barriers on the basis of religion, marital status, gender and sexual orientation. This is particularly important given the limited number of spaces in law schools.[115] Therefore, individuals who would be willing to sign the Community Covenant would have greater access to the exclusion of those unable to sign it. Evangelical Christians would be afforded a preference by the state in obtaining a licence to practice law in Ontario.

110. The Appellants state that the Decision "should have been about individual graduates of TWU's proposed law school."[116] This amounts to an attempt to recast TWU's original application for accreditation.

111. TWU has only ever sought accreditation for its proposed law school by the Law Society. At no time did TWU seek, or inquire about, a process for how the Law Society may deal with individual graduates of a still yet-to-be established law school at TWU. This fact was expressly noted by the Divisional Court: "… we recognize that [the Law Society] has never been asked, by either of the applicants or by anyone else, what its position would be if an individual graduate of a TWU law school made his/her own application for admission."[117]

112. The Appellants rely heavily on the Court of Appeal's finding that the Decision represents an infringement of section 2(a) of the *Charter*. However, the Court of Appeal expressly concluded

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[114] *S.L.*, *supra* at paras 10, 32, 40. See also *Whatcott*, *supra* at para 162.
[115] Divisional Court Decision at para 67, AB, Vol III, Tab 4 at 414.
[116] Factum of the Appellants at para 139.
[117] Divisional Court Decision at para 128, AB, Vol III, Tab 4 at 431.

that it is premature to assess whether the Decision interferes with an individual's freedom of religion. Justice MacPherson wrote:

> In my view, it is premature to attempt to assess on the facts now before us whether and to what extent there may be an interference with Mr. Volkenant's s. 2(a) *Charter* rights or indeed an interference with the s. 2(a) rights of any other student who eventually graduates from TWU's law school, should they face some alternate process to be admitted to the Bar of Ontario.[118]

113. Accordingly, the Appellants are asserting that the Decision causes a severe infringement on their religious liberty without identifying, or even knowing, what the infringement is.

114. The Appellants further assert that "TWU graduates are excluded from practicing law in Ontario" as a result of the Decision,[119] and that "but for the religious content of the Covenant, TWU graduates would be accepted to practice law in Ontario."[120] They further state that "no one from TWU will be admitted to the Ontario Bar" as a result of the Decision.[121] These statements are demonstrably contrary to the evidence. There is no evidence whatsoever that any person holding the religious views embodied in the covenant has ever been denied access to an accredited law school or to the Ontario bar.

115. As TWU itself stated, there are students enrolled in accredited law schools, and there are licensed lawyers currently practicing that "hold religious beliefs similar to those on which TWU is founded."[122] Moreover, the Appellants' own affiants include TWU undergraduates who graduated from accredited law schools and who are successfully practicing law in Ontario. The proposition that the Law Society, with the Decision, is singling-out Evangelical Christians and subjecting them to differential treatment based upon their religious beliefs is unfounded and fallacious. On the contrary, the Decision preserves equal access to the legal education necessary to become licenced to practice law in Ontario regardless of personal characteristics, such as religion, that are irrelevant to merit or competence.

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[118] Court of Appeal Decision at para 96, AB, Vol III, Tab 6 at 469.
[119] Factum of the Appellants at para 164.
[120] Factum of the Appellants at para 74.
[121] Factum of the Appellants at para 160.
[122] Letter from Sawatsky to Hunter dated 17 May 2013, *supra*, AB, Vol IX, Tab 27A at 1612.

116. The Appellants also claim that the Decision is not proportionate because the Law Society does not have the authority to "police every law school" to ensure conformity with the Law Society's values.[123]

117. The Appellants misconceive the basis of the Law Society's Decision. The Appellants are attempting to exercise their *Charter* rights to compel the Law Society to incorporate TWU's admissions policy into its legal education and licencing regime. The Appellants' rights do not extend this far.[124]

118. There can be no doubt that the *Charter*, including the duty of state neutrality, and the *Code*, constrain government action and do not allow the Law Society to adopt and sanction as its own the implementation of a discriminatory admissions policy which is inconsistent with its statutory mandate to ensure optimal competence of the bar and act in the public interest by fostering equality in discharging its mission.[125]

119. As found by the Court of Appeal and the Divisional Court, the Decision achieves a balance in respect of TWU as an institution and in respect of individual prospective attendees of the TWU's proposed law school.

120. From the perspective of TWU as a community, not only does the Decision not pose a threat to its survival, there is no evidence whatsoever that any religious obligation is violated. In contrast, for example, in *Hutterian*, the Court observed that the state regulation in that case posed a subjective threat to the Hutterite community.[126] Here, the Decision has no impact on the fifty undergraduate and graduate programs – or the five thousand students otherwise enrolled at TWU. The Decision does not even prevent TWU from opening a law school – as recognized by the Divisional Court.[127]

121. TWU did not suggest that a law school was necessary for the survival of its community. It is noteworthy that in its application to the Federation, TWU explained that the intended purpose of the law school would be to train students interested in practicing in small to medium sized firms,

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[123] Factum of the Appellants at para 138.
[124] Divisional Court Decision at para 115, AB, Vol III, Tab 4 at 427.
[125] Factum of the Appellants at para 120.
[126] *Hutterian*, *supra* at para 8.
[127] Divisional Court Decision at para 120, AB, Vol III, Tab 4 at 428.

and outside the major urban areas in British Columbia.[128] TWU did not claim that Evangelical Christians required a law school at TWU accredited by the Law Society in order to become lawyers in Ontario.

122. While TWU may prefer its own law school, it is effectively asserting rights of religious liberty to compel state support for its faith-based enterprise. However, freedom of religion cannot be invoked to compel government support for a religion. As Chief Justice Dubin stated in *Adler*:

> The right involves the freedom to pursue one's religion or beliefs without government interference, and the entitlement to live one's life free of state-imposed religions or beliefs. It does not provide, in my view, an entitlement to state support for the exercise of one's religion. Thus, in order to found a breach, there must be some state coercion that denies or limits the exercise of one's religion.[129]

123. As it relates to individuals, the Decision similarly represents a proportionate balancing of the Law Society's statutory mandate with the *Charter* values at stake. Prospective attendees of a law school at TWU can attend any accredited law school: and neither the Law Society nor accredited schools discriminate against them based on their religious beliefs, whether in connection with admissions or in any other capacity. While the Decision not to accredit TWU's prospective law school may mean that some Evangelical Christians may be denied their preference, it ensures that no one, including Evangelical Christians, is denied equal access to any accredited law school.

124. Freedom of religion jurisprudence has recognized that having to make alternative arrangements in order to accommodate one's own religious practices does not automatically amount to being deprived of a choice between adhering or not to the edicts of one's religion. In *Hutterian*, this Court held that the arrangements necessary to compensate for being deprived of self-sufficiency in transportation did not amount to an infringement:

> On the record before us, it is impossible to conclude that Colony members have been deprived of a meaningful choice to follow or not to follow the edicts of their religion. The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver's licence must permit a photo to be taken for the

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[128] TWU School of Law Proposal, *supra*, AB, Vol VIII, Tab 27A at 1437, 1442.
[129] *Adler v Ontario* (1994), 19 OR (3d) 1 at 10, 116 DLR (4th) 1 (Ont CA), aff'd [1996] 3 SCR 609, 30 OR (3d) 642, BA, Tab 1. See also Charney, *supra*, BA, Tab 3.

> photo identification data bank. Driving automobiles on highways is not a right, but a privilege…
>
> I conclude that the impact of the limit on religious practice imposed by the universal photo requirement for obtaining a driver's licence is that Colony members will be obliged to make alternative arrangements for highway transport. This will impose some financial cost on the community and depart from their tradition of being self-sufficient in terms of transport. These costs are not trivial. But on the record, they do not rise to the level of seriously affecting the claimants' right to pursue their religion. They do not negate the choice that lies at the heart of freedom of religion.[130]

125. In this case, as a result of the Decision, Evangelical Christians will be free to continue to do what they have always been free to do: attend accredited law schools. In reality, the only thing that prospective individual attendees of TWU's proposed law school are being deprived of is the opportunity to attend an accredited law school with students who share the very same religious faith and adhere to the same code of conduct. In public society, the inability to exclude people of different faiths cannot amount to a substantial infringement on one's freedom of religion.[131] Rather, it is a *sine qua non* of a free and democratic society which accommodates each person's rights and freedoms as fully as possible, without infringing anyone's rights.

126. Further, nothing precludes like-minded students in accredited schools to voluntarily abide by the code of conduct prescribed in the Community Covenant, and to do so in association with other like-minded students.[132]

127. In short, there is no evidence that TWU would be in any jeopardy if its proposed law school is not accredited by the Law Society, and there is similarly no evidence that a law school at TWU is essential in any way for Evangelical Christians to maintain and observe their faith.

128. By contrast, what the Appellants are demanding is an absolute right to force the Law Society to incorporate into its admissions process a regime that excludes otherwise meritorious

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[130] *Hutterian*, *supra* at paras 98–99.
[131] *S.L.*, *supra* at para 40.
[132] See, for example, descriptions of faith-based groups within accredited schools like the University of Toronto described in the Alarie Affidavit, *supra*, AB, Vol V, Tab 22 at 792.

potential licensees from the pool of candidates to legal education. As described above, this would be materially inconsistent with the statutory mandate of the Law Society because:

(a) it would force the Law Society to directly discriminate based on personal characteristics that are irrelevant to one's competence to participate in the legal profession;

(b) it would undermine the Law Society's consistent and long-standing commitment to equal access to the legal profession;

(c) it would perpetuate prejudices against minorities including the LGBTQ community, women, common law couples, unmarried people, and people whose faiths are different from Evangelical Christianity;

(d) it would artificially restrict the pool of candidates for the Bar, thus denying the people of Ontario a legal profession that is comprised of "the best and the brightest"; and

(e) it would send a negative and demeaning message to affected minorities.[133]

129. There are undeniable and salutary benefits to equal access to the legal profession. The Law Society's Decision to maintain such equal access represents a proportional balancing of the statutory objectives and *Charter* values at stake. Consequently, it is reasonable.

a) The Decision is affirmed by an *Oakes*/Section one analysis

130. Whatever analytical framework is used, there is no basis to interfere with the Decision. An application of the *Oakes* proportionality analysis under section 1 of the *Charter* affirms the decisions of the Divisional Court and the Court of Appeal.

131. The Decision is rationally connected to the objective of ensuring equal access to legal education and proscribing discrimination from admissions to prerequisite legal education. The Decision preserves an age-old regime whereby no accredited law school conditions access thereto on personal characteristics such as sexual orientation or gender.

132. To the extent the Decision impairs any rights, it does so only minimally. As noted above, the Decision does not interfere with any belief or any religious practice. It merely withholds state

[133] See *Quebec v A*, *supra* at paras 324–25.

support from an institution that seeks to exclude others based on those religious beliefs. To accede to the Appellants' position would mean that the Law Society can be compelled to forsake its commitment to equality of access – and accept a population of prospective licensees that was chosen based upon personal characteristics that are irrelevant to merit and competence. There is no basis to assert that freedom of religion extends that far.

133. Finally, for the reasons already canvassed, the Decision strikes a proportionate balance between the Law Society's statutory objectives and the alleged infringement. Evangelical Christians will continue to have what they have always had: equal access to legal education. They are only denied something that other groups might wish but that no other group enjoys: the right to exclude others from an accredited law school based upon personal characteristics that are irrelevant to competence or the worthiness of the individual as a prospective law student and lawyer. On the other hand, the salutary effect of the Law Society's refusal to accredit TWU is very significant. Not only does it preserve equal access to the profession, but the Law Society also reaffirms its commitment to recognize and promote the equality of all persons regardless of religion, marital status, gender and sexual orientation.

PART IV COSTS

134. The Law Society requests its costs.

PART V NATURE OF ORDER SOUGHT

135. The Respondents respectfully request that the appeal be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 18th day of July, 2017.

Guy J. Pratte
Nadia Effendi
Duncan Ault

Counsel for the Respondent, Law Society of Upper Canada

PART VI TABLE OF AUTHORITIES

Source		Para. in Factum
Cases		
1.	*Adler v Ontario* (1994), 19 OR (3d) 1, 116 DLR (4th) 1 (Ont CA), aff'd [1996] 3 SCR 609, 30 OR (3d) 642	123
2.	*Agraira v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 SCR 559	41
3.	*Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567	82
4.	*B. (R.) v Children's Aid Society of Metropolitan Toronto*, [1995] 1 SCR 315, 122 DLR (4th) 1	95
5.	*British Columbia (Workers' Compensation Board) v Figliola*, 2011 SCC 52, [2011]	65
6.	*Chamberlain v Surrey School District No. 36*, 2002 SCC 86, [2002] 4 SCR 710	64
7.	*Council of Canadians with Disabilities v VIA Rail Canada Inc.*, 2007 SCC 15	64, 65
8.	*Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395	35
9.	*Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609	69
10.	*Green v Law Society of Manitoba*, 2017 SCC 20, 407 DLR (4th) 573	48
11.	*Grutter v Bollinger*, 539 US 306 (2003)	51
12.	*Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497, 170 DLR (4th) 1	71
13.	*Loyola High School v Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613	35, 47
14.	*Miron v Trudel*, [1995] 2 SCR 418, 124 DLR (4th) 693	45
15.	*Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3	59
16.	*Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256	65
17.	*Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23, [2010] 1 SCR 815	64
18.	*Pinet v St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 SCR 528	64
19.	*R v Big M Drug Mart Ltd.*, [1985] 1 SCR 295, 18 DLR (4th) 321	58
20.	*R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483	71
21.	*Ross v New Brunswick School District No. 15*, [1996] 1 SCR 825, 133 DLR (4th) 1	60
22.	*Quebec (Attorney General) v A*, 2013 SCC 5, [2013] 1 SCR 61	68, 128
23.	*S.L. v Commission scolaire des Chênes*, 2012 SCC 7	58, 76, 91, 109, 125
24.	*Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11, [2013] 1 SCR 467	80

Source		Para. in Factum
25.	*Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551	76
26.	*Stewart v Canadian Broadcasting Corp.* (1997), 150 DLR (4th) 24, 1997	48
27.	*Tranchemontagne v Ontario (Director, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513	64
28.	*Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 SCR 772	43
29.	*Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326, 85 BCLR (5th) 174	42
30.	*Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25, 381 DLR (4th) 296	49
31.	*Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423, BCLR (5th) 42	42
32.	*Withler v Canada (Attorney General)*, 2011 SCC 12, [2011] 1 SCR 396	
33.	*Young v Young*, [1993] 4 SCR 3, 108 DLR (4th) 193	76
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34.	C. Ian Kyer & Jerome E. Bickenback, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923–1957* (Toronto: University of Toronto Press for The Osgoode Society, 1987)	12, 13(b), 13 (d)
35.	Robert E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" (2015) 34:2 NJCL 173.	17, 123
36.	Brian Dickson, "Legal Education" (1986) 64:2 Can Bar Rev 374	50
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37.	*An Act for the better regulating the Practice of the Law*, SUC 1797, 37 Geo III, c XIII	12
38.	*An Act to amend the Law for the admission of Attorneys*, 1857, 20 Vict, c 63	12
39.	*An Act respecting Barristers at Law*, 1859, 22 Vict, c 34	12
40.	*An Act respecting Attorneys at Law*, 1859, 22 Vict, c 35	12
41.	*An Act respecting Barristers-at-Law*, RSO 1877, c 139	12
42.	*An Act respecting the Law Society of Upper Canada*, RSO 1877, c 138	13 (b)
43.	*The Law Society Act*, SO 1912, c 26	12
44.	*The Rules of the Law Society of Upper Canada (1964)*	13(c)
45.	The Law Society of Upper Canada, *Rules of The Law Society of Upper Canada*, Toronto: The Law Society of Upper Canada	13(b)
46.	*Rules and Regulations of the Law Society (adopted in 1957), Rules of the Society*	13(c)
47.	Regulations of the Legal Education Committee – Part II, *Bar Admission Regulations* (1958)	13(c)
48.	*The Law Society Act, R.S.O. 1970*, c. 238	12
49.	The Law Society of Upper Canada, By–Law 4, *Licensing* (23 February 2017)	13(d)
50.	*Law Society Act*, RSO 1990 c L.8	16

Source		Para. in Factum
51.	The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: The Law Society of Upper Canada, 2014	20(b)
52.	*Human Rights Code*, RSO 1990, c H.19	66
53.	*Human Rights Code*, RSBC 1996, c 210	101