S.C.C. FILE NUMBERS: 37209 & 37318

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO
AND THE COURT OF APPEAL OF BRITISH COLUMBIA)

BETWEEN: **FILE: 37209**

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT

AND BETWEEN: **FILE: 37318**

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS

[Style of Cause continued]

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

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A. INTRODUCTION

1. Twenty-seven groups are intervening in these two appeals. Many support the law societies' decisions to reject TWU graduates (together the "**Decisions**"). In doing so, they make arguments that would reduce tolerance for diverse communities in Canada.

2. Private communities in Canadian society are "bound together by the values of accommodation, tolerance and respect for diversity" as reflected in the Constitution's commitment to equality and minority rights.[1]

3. The state must be tolerant. Tolerance of private communities means "the principled refusal to use coercive state power to impose one's views on others, and therefore a commitment to moral competition through recruitment and persuasion alone."[2] They cannot exist or thrive if they are punished by the state for defining their own values and membership criteria. A "truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct."[3]

4. The state must also accommodate the different beliefs and practices that define these communities.[4] The state acts illiberally and intolerantly when it tells private communities – religious or otherwise – to eliminate distinctions in order to be "accommodated." Such an approach improperly homogenizes private associations and reduces the meaningful differences between groups. Accommodating differences, not eliminating them, "is the essence of true equality."[5]

5. As this Court held the last time TWU's code of conduct was impugned by a self-regulating professional body, the "diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected."[6]

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[1] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 21.
[2] William A. Galston, *The Practice of Liberal Pluralism* (New York: Cambridge University Press, 2005) at 4 **[Reply BOA, Tab 2]**.
[3] *R. v. Big M Drug Mart*, [1985] 1 S.C.R. 295 at 336.
[4] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 [*Saguenay*] at paras. 68, 74.
[5] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [*Andrews*] at 169.
[6] *Trinity Western University v. College of Teachers*, 2001 SCC 31 [*TWU #1*] at para. 33.

B. THE DECISIONS

The Decisions of the Law Societies are about the Graduates

6. Contrary to the suggestion of many interveners, the law societies' acceptance of TWU graduates through either "accreditation" or "approval" would *not* mean TWU receives "a unique and significant public good."[7] The law societies are not asked to approve TWU's religious nature. Acceptance of graduates also does not mean TWU receives the law societies' authorization or approval to deliver legal education on their behalf.

7. The law societies cannot, by law, assess TWU's religious values. They do not exercise any control or authority over any other law school's non-academic policies. Other law schools across the country do not receive a public good or deliver education on LSUC's behalf when their graduates are accepted as articling students and lawyers. There is no evidence the law societies exercise any input or control over who enters any other law school in Canada.

8. "Accreditation" or "approval" is only about the individual qualifications of law school graduates to enter the bar. In both BC and Ontario, a decision to "approve" or "accredit" TWU only means that its graduates are academically competent and prepared to enter the bar. It is manifestly incorrect to say that LSUC has not "prevented [TWU] graduates from becoming members of the Ontario Bar."[8] That is precisely what LSUC's decision does, which even an intervener opposing TWU's law school says is "certainly unconstitutional."[9]

9. It is incorrect to suggest that TWU might have asked LSUC for a "process of individual assessment of its graduates," as some interveners argue.[10] The current process *is the process* for individual assessment of graduates.[11] The law societies' rules are not a "simplified path," but the only path for TWU graduates.[12]

10. LSBC and LSUC have passed similar rules to determine the qualification of applicants to the bar, consistent with the national scheme for accepting law school graduates. Those rules are

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[7] Canadian Civil Liberties Association, para. 2.
[8] Criminal Lawyers' Association, para. 28.
[9] Criminal Lawyers' Association, para. 22; see also Law Students' Society of Ontario, para. 24.
[10] Attorney General of Ontario, para. 19; Criminal Lawyers' Association, fn. 30.
[11] See the Factum of the Law Students' Society of Ontario.
[12] LGBTOUT, para. 14.

part of the national agreement of all law societies, and based on the national standard established by the Federation of Law Societies of Canada (the "**Federation**").[13] Competency for entry to bar admission programs is based on the successful completion of a Canadian law degree. (Obtaining entry to the bar through a Certificate of Qualification via the Federation is only available for foreign-trained or Canadian civil law graduates.)[14] Through this national scheme universities provide legal education, not law societies.

11. Contrary to the submissions of some interveners,[15] the effect of the Decisions is that TWU graduates cannot practice in BC or Ontario, even if they attempt to transfer into these law societies after being admitted in another province.[16] As part of the national regime, the law societies agreed to allow the Federation to approve law schools to ensure that properly trained lawyers could freely practice law anywhere in Canada.

12. Even if there could be another process, there would be no point in it. Both LSBC and LSUC accept that TWU graduates would be competent and prepared to enter the bar.[17] Any alternative process for TWU graduates would be based only on the religious beliefs and practices of TWU, which itself shows the discriminatory nature of the Decisions.

The Law Societies' Rejections do not Relate to Competence

13. Some interveners suggest that the Decisions ensure competence, because competence is based on merit, and admission to the bar ought to be based only on merit.[18]

14. TWU and Brayden Volkenant agree that membership in the law societies "be open to all individuals on the basis of their own merits and capacities" without barriers based on irrelevant

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[13] Affidavit #1 of K. Jennings [**Respondents' Record (BC)**], Exhibit B [**Vol. III, at 130**] and Exhibit L [**Vol. IV, at 52**]; in BC, see Rule 2-27(4) [**LSBC Book of Authorities, Vol. II, at 320**], now Rule 2-54(2) and in Ontario, see By–Law 4, Licensing, ss. 7 and 9(1).
[14] Affidavit #1 of K. Jennings, Exhibits C, J, & K [**Respondents' Record (BC), Vol. III, at 140, Vol. IV, at 1, 28, 47**].
[15] Criminal Lawyers' Association, fn. 30; Law Students' Society of Ontario, para. 8.
[16] In Ontario, see LSUC's Inter-Jurisdictional Mobility Report [**Appellants' Record (Ontario), Part III, Vol. XII-XIII, Tab 27D, at p. 2204 (para. 13)**]. In BC, see former Rule 2-49(1)(e)(i), now Rule 2-79.
[17] LSUC Factum, para. 46; LSBC Factum, para. 94; *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 at para. 107.
[18] Attorney General of Ontario, paras. 25, 33; Start Proud and Outlaws, para. 17.

characteristics such as religion.[19] Admission to the bar ought to be based on individual merit alone, assessed when law school graduates apply to the law societies.

15. Since LSBC and LSUC agree that TWU graduates will be competent and prepared to enter the bar, why do they reject TWU graduates based on something other than merit (i.e., religion and association with TWU)? The law societies cannot achieve an objective of *not excluding* individuals from the legal profession on grounds other than individual merit *by excluding* TWU graduates from the legal profession on grounds unrelated to individual merit.

16. There is simply no evidence that the law societies do anything to assess the merit or qualifications of any persons being admitted to Canadian law schools. They assess merit only among those emerging from Canadian law schools. They have now treated TWU graduates differently based solely on the religious foundation of their educational community.

17. "Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed."[20] The law societies, unlike TWU, have *Charter* obligations that prohibit excluding graduates solely based on their association with TWU's evangelical Christian community.

18. Public opinion is always changing. The accommodation of minorities in our society protects everyone's rights, irrespective of current majoritarian opinion. This Court, "unaffected by the shifting winds of public opinion," ought to safeguard them here.[21]

The Impact on Graduates is not Premature

19. It is illogical to suggest that the impact of the Decisions on TWU graduates is premature or "hypothetical."[22] If the law societies need not consider the interests of TWU's future graduates, how can they base their entire decisions on the consideration of the (no less hypothetical) interests of future LGBTQ applicants to TWU who might be affected by the Covenant?

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[19] Attorney General of Ontario, para. 25.
[20] *Andrews*, at pp. 174-175.
[21] *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at para. 13.
[22] Criminal Lawyers' Association, para. 16, fn. 30; Attorney General of Ontario, para. 19.

20. It is absurd to suggest that TWU and its graduates must wait to seek redress until they complete three years of legal education and have a law degree that may not result in the ability to practice law. This also ignores that the LSBC's decision caused the Minister to revoke TWU's ability to grant law degrees. The Decisions ensure there will be no applicants to or graduates from a TWU law school. It is no more premature than the rights affected in *Loyola*.

C. THE LAW SOCIETIES

The Law Societies Would Not Indirectly Discriminate

21. The Covenant is a faith-based policy of a private Christian university and its religious community. But some interveners support the law societies in wrongly equating it to government policy. For example, they state that: (a) indirectly affirming "private actors' practices" would mean the law societies unlawfully discriminate;[23] (b) approving TWU would incorporate TWU's admission policy into the law societies' admission policies and infringe the *Charter*;[24] and (c) accepting TWU graduates would be sanctioning, endorsing, or condoning inequality.[25]

22. These arguments ignore and would undermine jurisprudence interpreting ss. 15(1) and 32 of the *Charter* by indirectly making private activity subject to the *Charter*. This would reduce the freedoms and diversity of all Canadians. The Covenant is TWU's religious policy, not the law societies'.

23. The jurisprudence relating to ss. 15(1) and 32 of the *Charter* is clear. Under s. 32, the *Charter* only applies to governmental activity.[26] Section 15(1) only applies to accessing a benefit that *the law* has conferred.[27] Neither threshold is met. TWU is not carrying out a governmental activity. And the "law" does not create law school spaces. The law societies do not argue otherwise.

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[23] Canadian Bar Association, para. 32; West Coast LEAF, paras. 7-9.
[24] Canadian Bar Association, paras. 18, 32; LGBTOUT, para. 13.
[25] LGBTOUT, para. 24; Start Proud and Outlaws, para. 16; Advocates' Society, paras. 21, 25; Canadian Civil Liberties Association, paras. 3, 7; West Coast LEAF, paras. 19, 21; BC LGBTQ Coalition, para. 23.
[26] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 44.
[27] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at paras. 28-35.

24. The *Charter* protects against differential treatment created and controlled by governmental actors. It does not prevent lawful, differential treatment created and controlled by private entities. Any exclusionary impact of the Covenant is entirely the result of the religious beliefs and practices of TWU as an evangelical Christian community. The private, lawful Covenant is not converted into public, unlawful discrimination simply because the *Charter* applies to the law societies.

25. These intervener arguments would circumvent the requirement that a private entity first be found to be carrying out a "governmental activity" before *Charter* obligations can be imposed on it. Otherwise, the mere fact that government chooses to regulate and then license some enterprise could transform private policies into government acts. It would improperly open up all private action to judicial review, "strangle the operation of society," and "diminish the area of freedom within which individuals" and private associations can act.[28]

26. Regulatory approval cannot mean approval of the beliefs of a private group. A municipality, for example, does not affirm the views, beliefs or practices of private groups by permitting them to publically demonstrate or hold a parade. If this were not the case, government would act, endorse, and speak in incoherent and contradictory ways. Further, regulation could be used as a tool by government to silence minority beliefs and expression.

27. If the *Charter* were applied in this manner, it would impose an enormous burden on government to examine the private views of private actors. For example, if a church, private club, or corporation sought a zoning change to build on its land, it would make all of its beliefs and practices vulnerable to *Charter* scrutiny. This would have serious implications for Canadian diversity, as the *Charter* would become a tool for the "homogenization of private players."[29]

28. Government in a liberal pluralistic society must be able to permit private entities to carry on activities that would breach the *Charter* (if the *Charter* applied to them), without itself breaching the *Charter*. Government must be very cautious about using binding general public principles "to intervene in the internal affairs of civil associations. It will, rather, pursue a policy of maximum feasible accommodation, limited only by the core requirements of individual security and civic unity":

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[28] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 262.
[29] *Saguenay*, para. 74.

> That there are costs to such a policy cannot reasonably be denied. It will permit internal associational practices (for example, patriarchal gender relations) of which many strongly disapprove. It will allow many associations to define their membership in ways that may be seen as restraints on individual liberty. And it will, within limits, protect those whose words and way of life express deep disagreement with the regime in which they live. But unless liberty – individual and associational – is to be narrowed dramatically, these costs must be accepted.[30]

29. These intervener arguments are inconsistent with the notion of state neutrality that neither favours *nor hinders* particular beliefs.[31] They are also inconsistent with the notion that neither the state nor the courts have a role in assessing the validity of religious beliefs.[32] Since the law societies, as state actors, are not entitled to condone, sanction or approve of TWU's religious beliefs and practices, accepting TWU graduates cannot be seen as such.

30. Ultimately, the intervener arguments are an attempt to do indirectly what cannot be done directly: impose *Charter* obligations upon TWU, denuding it of its unique, Christian character. The rich diversity of Canadian society would not survive such an approach to state regulation.

The Law Societies Directly Discriminate

31. The arguments that law societies cannot *indirectly* discriminate mask the fact that they *directly* discriminate against TWU graduates. The interveners advancing such arguments do not apply the same standard to the law societies they apply to TWU.

32. For example, they argue law societies should not accept TWU graduates because:

(a) TWU imposes "discriminatory barriers" on accessing legal education;[33]

(b) discriminatory barriers to the legal profession on protected grounds are "an evil in itself";[34]

(c) TWU's admission policy is arbitrary and irrelevant to entering the bar;[35]

(d) the law societies cannot condone discrimination;

(e) accepting TWU graduates would send a discriminatory message;[36]

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[30] William A. Galston, *Liberal Pluralism* (New York: Cambridge University Press, 2002) at 20 **[Reply BOA, Tab 1]**.
[31] *Saguenay*, paras. 72, 132-134, 137.
[32] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 47-50.
[33] Egale, para. 22; Attorney General of Ontario, para. 7.
[34] Canadian Bar Association, para. 15.
[35] Attorney General of Ontario, paras. 7, 24.

(f) the *Human Rights Code* mandates "equal treatment with respect to membership in self-governing professions;"[37] and

(g) accepting TWU graduates would undermine equality.[38]

33. These arguments and criticisms apply directly to the Decisions of the law societies but they are misapplied to TWU. TWU does nothing unlawful and does not have the *Charter* obligations of the law societies.[39] Only the state wields the coercive power of law, and it must do so carefully:

> If we insist that each civil association mirror the principles of the overarching political community, then meaningful differences among associations all but disappear; constitutional uniformity crushes social pluralism…..[and] runs the risk of interfering with morally legitimate individual and associational practices.[40]

34. These intervener arguments are based on the faulty premise that opportunities created by groups within their private communities are discriminatory in an illegal and unconstitutional sense. TWU's private nature permits its community to maintain the Covenant, whereas the law societies' public nature means the *Charter* prohibits them from rejecting TWU graduates on grounds related to religion.

The Covenant is Not Against the Public Interest

35. Some interveners suggest that the Court should defer to the law societies' Decisions because the will of the legislature in creating and delegating to them ought to be respected.[41]

36. But the BC legislature incorporated TWU with religious purposes. It endowed TWU with the authority to grant degrees with an underlying Christian viewpoint. It protects religious association under the *Human Rights Code*, allowing TWU to lawfully maintain the Covenant. The religious beliefs concerning marriage and sexuality in the Covenant are expressly not against the public interest as set out in the *Civil Marriage Act*.[42]

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[36] BC LGBTQ Coalition, para. 22.
[37] Start Proud and Outlaws, para. 16.
[38] Advocates' Society, para. 2.
[39] *TWU #1*, para. 25.
[40] William A. Galston, *Liberal Pluralism* (New York: Cambridge University Press, 2002) at 20 **[Reply BOA, Tab 1]**.
[41] Attorney General of Ontario, para. 4; United Church of Canada, para. 10.
[42] S.C. 2005, c. 33, Preamble and s. 3.1.

37. If the government authorizes a university to grant degrees having taken into account the religious foundations and policies of that university and the community it serves, it is inconsistent for another statutory body to cite the "public interest" in taking away that benefit based on those very same foundations.[43] Government decisions should be interpreted to achieve consistency, fairness, and predictability.

D. TWU

Interference with Freedom of Religion

38. Some interveners say the Decisions do not breach freedom of religion, or if they do, the impact is "minimal."[44] They too narrowly define TWU's religious beliefs and practices, and misconstrue the nature of the infringement.

39. These arguments rest on two flawed assumptions. The first assumption is that protected religious belief and practice is strictly a matter of private thought that does not engage with public conduct. This enables some to argue that the protection afforded to TWU's community should be lessened because "[a]ttending law school is not a religious rite or practice, but a secular activity."[45] But religion is not just what happens inside of a church during corporate worship. Religion is "a normative frame for the lives of individuals and communities, shaping meaning, belonging, conduct, and identity."[46] It permeates private *and public* behaviour. Religious communities like TWU facilitate and inculcate that behaviour through shared religious practice. When understood this way,

> the division between conduct and belief becomes unstable: not only does conduct "manifest" belief but, as critical religious studies scholarship shows, beliefs are often themselves shaped and constituted by practices.[47]

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[43] *TWU #1*, para. 32.
[44] See, for example, Advocates' Society, paras. 21-22; Attorney General of Ontario, para. 21; Criminal Lawyers' Association, para. 28; Canadian Secular Alliance, para. 22; Lawyers' Rights Watch Canada, para. 30; United Church of Canada, para. 38; West Coast LEAF, paras. 25, 30.
[45] Canadian Secular Alliance, para. 22.
[46] Benjamin L. Berger, "Freedom of Religion" in *Oxford Handbook of the Canadian Constitution*, eds. N. Des Rosiers, P. Macklem and P. Oliver, (Oxford: Oxford University Press, 2017) Forthcoming <https://ssrn.com/abstract=3027752> at p. 4.
[47] Berger, "Freedom of Religion", p. 18.

40. The second flawed assumption is that freedom of religion is not engaged because of a distinction between religious identity and religious conduct. Interveners argue law societies may "condemn a practice central to the identity of a protected and vulnerable minority" – i.e., religious practices about marriage – "without thereby discriminating against its members and affronting their human dignity and personhood."[48] This cannot be correct.

41. State condemnation of the Covenant discriminates against and affronts the dignity of the members of TWU's evangelical community who adhere to it as a shared commitment that binds them together.

42. The notion that *Charter* rights are unaffected by the Decisions because students can still attend TWU's law school, or attend another law school, is misconceived.[49] The Decisions undermine TWU's ability to sustain the Covenant and train lawyers, which is a law school's main function.[50] The rejection is based, expressly and admittedly, on the religious foundations of TWU's evangelical community. This is a significant burden. These arguments are the same as the one made by the BCCT that TWU students could attend a public university to obtain a teaching certification, which submission was rejected by this Court.[51]

43. Attending a public law school does not cure students of anything, because nothing is wrong with TWU law school graduates. There is nothing to be gained from their rejection, other than for the law societies to express their disapproval of the religious foundations of TWU's community, which is itself contrary to the *Charter*.

TWU is Voluntary

44. It is simply incorrect to suggest TWU "compels" or "coerces" anyone to join its religious community, or "force[s] ideological conformity" on them.[52] This Court has already rejected the

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[48] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 123 (citing L'Heureux-Dubé J., dissenting (though not on this point) in *TWU #1*, para. 69).
[49] Attorney General of Ontario paras. 18, 22, 31; Criminal Lawyers' Association, para. 28; West Coast LEAF, para. 30.
[50] *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 at para. 169.
[51] *TWU #1*, paras. 38, 43.
[52] Attorney General of Ontario, para. 13; Canadian Secular Alliance, para. 6; United Church of Canada, paras. 16, 31.

notion that TWU's code of conduct alone interferes with the rights of others.[53]

45. These arguments also ignore the communal aspects of the freedom of religion and association. Private associations are established *because* individuals who join them share common values or beliefs. By deciding to become a member of a private community, a person voluntarily accepts and adheres to that community's shared values, beliefs and practices. An English-speaking adult who voluntarily enrolls in a private French-immersion school is not "coerced" to speak French. Churches, mosques, and synagogues do not compel religious compliance by establishing and maintaining religious standards among the people who choose to become adherents.

46. Similarly, Loyola High School did not compel students to receive Catholic instruction. Parents and students "voluntarily selected an education infused with Catholic beliefs and values," whose norms may be rejected by those outside Loyola's community.[54] This conclusion is more applicable here than with Loyola, where the choice to attend TWU is only made by post-secondary students. If these interveners are correct, private organizations with membership criteria and behavioural expectations are engaging in "compulsion," disentitling them to state recognition or protection. This is another argument that, if successful, would seriously undermine the ability of private groups to operate and would diminish Canadian diversity.

Protecting Group Rights

47. Several interveners argue that religious organizations are not protected under s. 2(a) of the *Charter*.[55] The law societies do not dispute that they must respect the rights of TWU and the members of its religious community. Whether the approach adopted by the majority or minority in *Loyola* is applied, TWU's evangelical community is protected and a serious breach of s. 2(a) is established.

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[53] *TWU #1*, paras. 25, 29, 35.
[54] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 at para. 158.
[55] See the factums of British Columbia Humanist Association, United Church of Canada, and Faith, Fealty & Creed Society.

"Compelling" Accreditation

48. This case is not about whether the *Charter* "compels" the law societies to approve of TWU.[56] It is about whether the law societies can lawfully prohibit TWU graduates from practicing law and whether they are required to accommodate TWU's religious community in exercising their statutory powers.

49. The *Charter* obligates the state to protect minority rights. TWU does not have to prove its Covenant is "justifiable";[57] the onus is on the law societies to demonstrably justify with compelling evidence why TWU graduates ought to be excluded from the bar in our free and democratic society.

State Support

50. The Canadian Bar Association says the law societies cannot offer "state support" to TWU. It cites the US cases of *CLS v. Martinez*, *Bob Jones*, and *Norwood v. Harrison* to suggest that "state support of discriminatory policies cannot be tolerated" (para. 23).[58]

51. These cases are not applicable. They all relate to institutions claiming financial assistance or an exemption from paying into the public purse: *Martinez* involved a group seeking a "state subsidy" (p. 15); *Bob Jones* was about a tax-exemption; *Harrison* was about the state providing "tangible financial assistance" to students (p. 458).

52. Subsidizing an institution is completely different than the state recognition and the accommodation of religious belief and practice.[59] No one rejected the graduates of Bob Jones University. It cannot properly be said that the state's recognition of the rights of TWU and evangelical students to enter the legal profession conflicts with the rights of anyone.

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[56] Attorney General of Ontario, para. 16; see also LGBTOUT, paras. 1, 6.
[57] Canadian Bar Association, para. 17.
[58] Cases like *Martinez* and *Grutter v. Bollinger*, 539 U.S. 306 (2003) are examples where the U.S. Supreme Court deferred to the policies of law schools. In *Grutter*, the US Supreme Court said that the public law school's judgment with respect to its admission policies "is one to which we defer" (Justice O'Connor for the majority, at 328 [**LSBC Book of Authorities, Vol. 1, Tab 5, at 211**]).
[59] *R. v. N.S.*, 2012 SCC 72 at para. 51.

Equality Rights

53. One intervener says s. 15(1) of the *Charter* adds nothing to the claim because the Decisions were a neutral policy choice like *Hutterian Brethren*.[60] This is not so. *Hutterian Brethren* examined the incidental effects of a law of general application that inadvertently captured a religious group. Here, the law societies made a discretionary decision that directly targeted a specific group because of its religious beliefs and practices.

54. Some interveners suggest that evangelicals are not discriminated against because they can go to a secular, public school just like everyone else.[61] This argument fails to recognize the severe impacts on the entire TWU religious community. Its underlying logic is particularly strained since it ignores that LGBTQ persons are also free to attend other institutions.[62] While TWU is not engaging in coercion, the law societies are. Even if TWU were guilty of coercion, the *Charter* and human rights legislation protects it, while they preclude the law societies from doing so.

55. The violation of the equality rights of members of TWU's community demonstrates the hollowness of the assertion that the Decisions protect equal access to the legal profession. If that were so, TWU graduates would have equal access to the Ontario and BC bar without regard to the religious foundations of the Christian law school they chose to attend. Cutting down the equality rights of some groups in the public sphere to prefer the equality claims of others in the private sphere does not enhance equality as "understood in our s. 15 jurisprudence."[63]

TWU #1

56. The 2001 decision in *TWU #1* is not distinguishable because the law societies made their decision on the basis of the effects of the "*mandatory* nature of the Covenant."[64] Like the law societies, the BCCT rejected TWU and its graduates because of the "*requirement* for students to

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[60] Attorney General of Ontario, para. 23.
[61] Attorney General of Ontario, para. 31; United Church of Canada, para. 3; Start Proud and Outlaws, para. 19. See also Advocates' Society, para. 22.
[62] Attorney General of Ontario, para. 13; United Church of Canada, para. 16; Start Proud and Outlaws, para. 6.
[63] *TWU #1*, para. 25.
[64] Canadian Secular Alliance, para. 19.

sign [TWU's code of conduct]."[65] TWU's code of conduct was improperly deemed by the BCCT to be contrary to public policy because of its "effect of excluding [LGBTQ] persons", and the perception the BCCT condoned discrimination.[66] These are the same arguments made by many of the interveners.

The Attorney General of Ontario

57. The Attorney General of Ontario has the same duty of state neutrality as the law societies. State neutrality "requires that the state abstain from taking any position" on a particular religious belief.[67] The Attorney General takes a non-neutral position by dismissing the importance of TWU's religious beliefs, characterizing TWU's community religious values as compulsion,[68] and diminishing the importance of religious freedom.[69] This negates the important rights of TWU's community and is contrary to the jurisprudence that there is no "hierarchy of rights."[70]

E. NEW ISSUES RAISED AND SPECULATION BY INTERVENERS

58. Interveners were ordered not "**to raise new issues or to adduce further evidence or otherwise to supplement the record of the parties.**"[71]

59. Despite that, several interveners have raised matters not in issue in these proceedings. These include whether TWU faculty have academic freedom[72] and the content and quality of education at a TWU law school, including whether students would be exposed to appropriately varied perspectives.[73] The law societies have accepted that TWU graduates would be prepared for legal practice and the quality of the education has never been in issue.

60. Several interveners have speculated, without evidence, about TWU disciplining students in relation to the Covenant. One intervener has speculated about the possibility of TWU

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[65] *TWU #1*, para. 6 (emphasis added).
[66] *TWU #1*, paras. 5, 6, 18, 34.
[67] *Saguenay*, para. 72.
[68] Attorney General of Ontario Factum, para. 13.
[69] See also Start Proud and Outlaws, paras. 11-16.
[70] *Reference re Same-Sex Marriage*, 2004 SCC 79 at para. 50.
[71] Order by Chief Justice McLachlin, July 31, 2017 (bold in the original); Order by Justice Wagner, July 27, 2017.
[72] Canadian Association of University Teachers, paras. 1-28.
[73] Advocates' Society, paras. 11-14; Attorney General of Ontario, para. 32; United Church of Canada, para. 8.

disciplining graduates of the law school, *after graduation*.[74] There is simply no basis for such an argument and no evidence to support it.

61. One intervener based most of its argument on its speculation about TWU's position on abortion. There is no evidence that the Covenant includes a "prohibition on abortion"[75] and this was not an issue on which the law societies based their Decisions to reject TWU graduates.

62. Several interveners have also relied on evidence that was not before the law societies or part of the record in these proceedings.[76]

F. CONCLUSION

63. The diversity of Canadian society is enhanced when state bodies tolerate, accept and accommodate private religious communities. Religious groups can adhere to beliefs and practices that the state cannot. The fact that some feel excluded should not undermine tolerance and acceptance of a religious community. Neither should it be a justification for withholding state recognition of education offered within a religious community. Otherwise, the "tyranny of the majority"[77] will prevail, to the detriment of all of Canada's diverse communities.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 21st DAY OF September, 2017.

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Counsel for Trinity Western University
and Brayden Volkenant

[74] Canadian Civil Liberties Association, paras. 21-27.
[75] West Coast LEAF, para. 16.
[76] Egale, fn. 19; Lawyers' Rights Watch Canada, fn. 26, 28; Canadian Association of University Teachers, fn. 16.
[77] *R. v. Big M Drug Mart*, at p. 337.

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