File Number:

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicant
(Appellant)

– and –

LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent)

MEMORANDUM OF ARGUMENT

OF TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT – APPLICANTS (APPELLANTS)

(Pursuant to Section 40 of the *Supreme Court Act*, R.S.C. 1985, c. S-26, as amended, and Rule 25 of the *Rules of the Supreme Court of Canada*, SOR/2002-156)

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PART I – OVERVIEW AND STATEMENT OF FACTS

Overview

1. Trinity Western University (**TWU**) intends to open a law school. Unlike other law societies in Canada, the Law Society of Upper Canada (**LSUC**) decided it will not recognize TWU law school graduates as licensees. A majority of LSUC benchers found the provision in TWU's religious code of conduct (the **Covenant**) permitting "sexual intimacy" only within "the sacredness of marriage between a man and woman" to be discriminatory.

2. In 2001, this Court held that TWU could not be denied accreditation of its teacher education program because of a perception that the provision of its code of conduct about same-sex relationships was discriminatory, or a perception that the B.C. College of Teachers (the **BCCT**) "condone[d] this discriminatory conduct."[1] The LSUC made the same error as the BCCT by refusing to accredit TWU in the name of the "public interest" because of a belief that TWU's religious code of conduct is discriminatory.

3. The errant result in this case arises, in part, from an overly expansive and inconsistent articulation of the LSUC's "public interest" mandate. This case is a matter of significant public and national importance because of the national standards for lawyers' self-regulation, the inconsistent results among Canadian jurisdictions, and the similar "public interest" powers granted to other self-regulating professions in Canada.

4. The LSUC decided that upholding the *Charter* value of equality justifies breaching the applicants' religious, associational, and equality rights. The effect is to compel a private entity to comply with *Charter* obligations.

5. As in *TWU v. BCCT*, properly defining the scope of the rights raised in this case avoids a conflict of rights. TWU is not subject to the *Charter* and the Covenant does not breach any human rights legislation. Accepting TWU's graduates as articling students and lawyers by "accrediting" TWU's law school does not breach anyone's *Charter* rights. Conversely, the applicants' rights under sections 2 and 15 of the *Charter* are infringed by the LSUC's decision.

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[1] *Trinity Western University v. College of Teachers (British Columbia)*, 2001 SCC 31 [*TWU v. BCCT*] at para. 18.

6. This case also presents an opportunity for the Court to revisit and clarify its decisions in *Doré* and *Loyola*, particularly with respect to requiring a self-governing professional body to justify a decision that breaches the *Charter*.

Statement of Facts

A. The Applicants

7. TWU is a private, post-secondary institution in Langley, B.C. TWU is an evangelical Christian community founded on religious principles, functioning as an arm of the Christian church.[2] TWU's enabling statute, the *Trinity Western University Act*, mandates it to offer post-secondary education with "an underlying philosophy and viewpoint that is Christian".[3] TWU has professional programs in nursing, teaching, business, and counselling psychology.[4]

8. The evangelical Christian community that TWU primarily serves is a minority religious subculture in Canada.[5] Evangelical Christian institutions commonly establish and maintain codes of conduct based on their shared understanding of Biblical teaching.[6] With the Covenant (known as the Community Covenant Agreement), TWU is no different. The Covenant reflects core evangelical beliefs relating to personal and community morality.[7]

9. Brayden Volkenant is an evangelical Christian graduate of TWU. He wanted to study law at TWU, but is now enrolled at the University of Alberta because TWU has been unable to open its law school. Mr. Volkenant is interested in practicing law in Ontario.[8]

B. *TWU v. BCCT*

10. In *TWU v. BCCT* this Court held that the BCCT could not reject TWU's teaching program or its graduates because TWU required students to abide by the Covenant's predecessor that

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[2] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 4, 6, 8 [ONSC Reasons]; *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 at paras. 15, 16, 20. [ONCA Reasons].
[3] ONCA Reasons, para. 16; *Trinity Western University Act*, S.B.C. 1969, c. 44 (as amended).
[4] ONCA Reasons, para. 18.
[5] ONSC Reasons, paras. 6, 8, 10; ONCA Reasons, paras. 21-22.
[6] ONSC Reasons, para. 11.
[7] ONSC Reasons, paras. 8-14, 16; ONCA Reasons, paras. 21-25.
[8] ONCA Reasons, para. 29.

restricted same-sex sexual activity. The BCCT denied accreditation on the basis that TWU's "proposed program follows discriminatory practices" by requiring students to sign its code of conduct, which the BCCT considered "contrary to the public interest and public policy" and that created a "perception that the BCCT condones this discriminatory conduct".[9] This Court held that the code of conduct was not sufficient to establish discrimination and the BCCT acted unlawfully by considering the religious precepts of TWU instead of specific evidence of the harmful impact of these beliefs on the school environment (there was none).[10]

11. The Court specifically found that the purported conflict between religious freedom and equality was avoided through "a proper delineation of the rights and values involved."[11] The Court upheld an order for mandamus requiring the BCCT to accredit TWU's teacher program.[12]

C. TWU's Law School

12. In June 2012, TWU submitted a proposal for a new law school to the Federation of Law Societies of Canada's (the **Federation**) Canadian Common Law Program Approval Committee.[13] All Canadian law societies agreed to delegate the review and approval of new Canadian law school programs to the Federation to ensure students graduate with standard competencies. The Federation also approves foreign educated graduates.[14]

13. The Federation reviewed TWU's law school proposal and the Covenant, determining there was "no public interest reason to exclude future [TWU] graduates" from admission to the bar.[15]

14. In December 2013, the Federation granted preliminary approval for TWU's law school.[16] The Minister of Advanced Education for British Columbia then consented to TWU issuing *juris*

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[9] *TWU v. BCCT*, paras. 5, 6, 18, 43.
[10] *TWU v. BCCT*, paras. 25, 38, 43.
[11] *TWU v BCCT*, paras. 28-29.
[12] *TWU v BCCT*, para. 43.
[13] ONCA Reasons, para. 37.
[14] ONCA Reasons, para. 36.
[15] ONCA Reasons, para. 39.
[16] ONCA Reasons, para 37. There were only two levels of approval available to TWU through the Federation: "preliminary approval" and "not approved".

doctor degrees under the *Degree Authorization Act*.[17] The Minister's consent was later revoked in October 2014 solely due to the Law Society of British Columbia's decision to reject TWU graduates.[18]

D. The Law Society of Upper Canada and Its Decision

15. The LSUC is the exclusive regulator and gatekeeper of the legal profession in Ontario under the *Law Society Act* (***LSA***).[19]

16. Like the BCCT, a majority of the benchers objected to specific religious beliefs expressed in the Covenant, which require members of TWU's evangelical community to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."[20] TWU does not refuse admission to LGBTQ individuals and there is no evidence of students being suspended or expelled because of this provision.[21]

17. The LSUC "accredits" law schools, but only for the purpose of admitting their graduates to the Ontario bar. Under LSUC Bylaw 4, applicants seeking a Class L1 Licence (which entitles a licensee to practice law in Ontario) must have one of the following:

> 9. (1) 1....i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.
>
> ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.[22]

18. An "accredited law school" is defined in LSUC's bylaws simply as a Canadian law school that is accredited by LSUC.[23]

19. On April 24, 2014, LSUC's benchers voted 28 to 21 to exclude all individuals with a TWU law degree from practicing law in Ontario.[24]

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[17] *Degree Authorization Act*, S.B.C. 2002, c. 24.
[18] *Trinity Western University v. Law Society of British Columbia*, 2016 BCSC 2326 at para. 49 [BCSC Reasons].
[19] *Law Society Act*, R.S.O. 1990, c. L.8; ONCA Reasons, para. 34.
[20] ONCA Reasons, para. 23.
[21] ONCA Reasons, para. 27.
[22] Ontario, LSUC, *By-Law 4 – Licensing*, s. 9(1).
[23] Ontario, LSUC, *By-Law 4 – Licensing*, s. 7.
[24] ONCA Reasons, paras. 47, 49.

E. Ontario Divisional Court Decision

20. On May 26, 2014, the applicants sought judicial review of LSUC's decision. The Divisional Court dismissed the application on July 2, 2015. The court found the LSUC's decision infringed the religious freedom of the applicants,[25] but that it exercised its statutory authority reasonably.[26]

F. Ontario Court of Appeal Decision

21. The LSUC did not oppose the applicants' application for leave to appeal to the Ontario Court of Appeal.[27]

22. The Ontario Court of Appeal found that the rights of TWU students under section 2(a) of the *Charter* had been infringed[28] since the individual choice to attend TWU was "fundamentally a religious one that manifests their evangelical Christian religious beliefs".[29] The court also found an infringement of TWU's section 2(a) rights, since the LSUC's decision created an "increased burden [for TWU] in attracting students to its law school."[30]

23. In concluding that the LSUC's decision was proportionate, the Court of Appeal:

(a) first identified the LSUC's statutory objective as "ensuring the quality of those who practice law in Ontario", but later stated it as "ensuring equal access to the profession" and then "non-discrimination";[31]

(b) characterized the decision as one "necessarily" involving a "collision" of rights between religious freedom and equality;[32]

(c) stated that it had "no hesitation saying that TWU's admission policy...discriminates against the LGBTQ community on the basis of sexual

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[25] ONSC Reasons, para. 81.
[26] ONSC Reasons, paras. 116, 123-124.
[27] Affidavit of Kelly McPhie sworn September 27, 2016 ("Supporting Affidavit"), Exhibit M.
[28] ONCA Reasons, para. 101.
[29] ONCA Reasons, para. 91.
[30] ONCA Reasons, para. 99.
[31] ONCA Reasons, paras. 109, 110, 120.
[32] ONCA Reasons, paras. 4, 12, 113.

orientation contrary to s. 15 of the *Charter* and s. 6 of the [*Human Rights Code*]";[33] and

(d) did not reference the LSUC's obligation under *Loyola* to ensure that the applicants' *Charter* rights were "limited no more than is necessary" or that a proportionate balancing gives effect, "as fully as possible", to the *Charter* protections at stake.[34]

24. The Court of Appeal also did not address the applicants' submissions that their freedom of association, freedom of expression, and equality rights were also infringed.[35]

G. Other Law Societies

25. Outside of Ontario, only two law societies have specifically voted to reject TWU graduates: Nova Scotia and British Columbia. The decisions made in each of these cases have been overturned by the courts on judicial review.[36] The decision of the British Columbia Supreme Court is under appeal.

PART II – QUESTIONS IN ISSUE

26. This application for leave to appeal raises issues of national and public importance.

27. Courts in three provinces have reached conflicting decisions. Law societies across Canada have adopted different approaches to whether TWU law school graduates will be accepted as articling students and lawyers.

28. The LSUC and Ontario Court of Appeal decisions raise the issue of whether a public body can impose *Charter* obligations on a private entity.

29. The LSUC and Ontario Court of Appeal decisions also raise the issue of the scope of the "public interest" mandate of self-regulating professional bodies, and whether that mandate can be used to deny professional recognition for members of a discrete religious community.

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[33] ONCA Reasons, para. 115.
[34] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [*Loyola*] at paras. 4, 39.
[35] ONCA Reasons, para. 53.
[36] BCSC Reasons; *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 [NSCA Reasons].

30. This case provides an opportunity for this Court to revisit and clarify the justification of *Charter* breaches under *Doré* and *Loyola*.

31. These issues are of constitutional significance for all private entities and, in particular, are related to the protection of religious communities and their members.

PART III – ARGUMENT

A. Conflicting Decisions are an issue of Public and National Importance

32. Determining who gets to practice law is an issue of public importance. The courts have reached conflicting conclusions in the jurisdictions in which a law society's decision to reject TWU graduates has been judicially reviewed.

33. Contrary to Ontario, the Nova Scotia Supreme Court held that the Nova Scotia Barristers Society (**NSBS**) had unjustifiably breached the *Charter*.[37] That decision was upheld by the Court of Appeal.[38] Before deciding to remake its admission rules, the NSBS has indicated they are waiting to consider the outcome of court proceedings in this Court and in British Columbia.[39]

34. Chief Justice Hinkson of the BC Supreme Court found that the Law Society of British Columbia's decision breached the *Charter*, but set it aside on several grounds, including that the benchers did not attempt to resolve the "collision of the competing *Charter* interests".[40] He ordered that the prior decision of the Law Society of British Columbia to accept TWU graduates be restored. The BC Court of Appeal heard an appeal from June 1-3, 2016.[41] A decision from that appeal is pending.

35. The Law Society of Newfoundland and Labrador has held the matter in abeyance pending further guidance from the courts.[42]

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[37] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [NSSC Reasons] at paras. 237, 266, 270.
[38] NSCA Reasons, paras. 102-103.
[39] Supporting Affidavit, Exhibits A and B.
[40] BCSC Reasons, para. 156.
[41] ONCA Reasons, para. 9.
[42] Supporting Affidavit, Exhibit C.

36. Law societies in Alberta, Saskatchewan, Manitoba, PEI, and Yukon are relying on the determination made by the Federation to approve TWU's law school for bar admission purposes.[43] New Brunswick's law society has independently voted to accept TWU graduates.[44]

37. Some law societies are anticipating an authoritative decision from the courts.[45] For example, the President of the Alberta Law Society has said it "would welcome a judicial determination that would have national application."[46]

38. This case also raises an important national mobility issue. All Canadian law societies have signed agreements to accept lawyers admitted to each other's bars and federal and provincial laws require professional associations to accept qualifications from other provinces.[47] However, a TWU graduate called to the bar in another province would be excluded from the Ontario bar.[48] The Ontario decision did not consider the effect of the LSUC's decision on those agreements and laws.

B. There are No Conflicting *Charter* Rights

39. This case demonstrates how a cursory identification of relevant *Charter* rights can lead to the incorrect imposition of *Charter* obligations on a private entity. It also highlights the problems with an overly broad articulation of the "public interest" jurisdiction of self-regulating professions in Canada.

40. Determining whether a *Charter* right is actually engaged is necessary prior to any proportionate balancing under *Doré* and *Loyola*. This follows this Court's approach in *TWU v. BCCT* and subsequent cases.[49] While accepting TWU graduates breaches no one's rights, the LSUC's decision breaches the *Charter* rights of TWU and the members of its religious community.

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[43] Supporting Affidavit, Exhibits D, E, F, G, I, K.
[44] Supporting Affidavit, Exhibit L.
[45] Supporting Affidavit, Exhibits B (Nova Scotia), C (Newfoundland), D (Yukon), H (Manitoba).
[46] Supporting Affidavit, Exhibit J.
[47] The Law Society of Upper Canada, Inter-Jurisdictional Mobility of Lawyers in Canada, Tab 245, Record of Proceedings.
[48] The Law Society of Upper Canada, Inter-Jurisdictional Mobility of Lawyers in Canada, Tab 245, Record of Proceedings.
[49] *Reference Re Same-Sex Marriage*, 2004 SCC 79 at para. 52; *R. v. N.S.*, 2012 SCC 72 at paras. 30-32, 52-54.

1. Whose Rights are Engaged?

41. Instead of carefully considering whose rights are actually engaged on the facts, Ontario's Court of Appeal presumed an actual conflict of *Charter* rights between religious freedom and equality. The Ontario Court of Appeal stated that the "crux of the appeal involves a collision between freedom of religion and equality".[50] The BC Supreme Court accepted the Ontario lower court's finding on this point without analysis.[51]

42. In contrast, the Nova Scotia Supreme Court was correct in finding that s. 15 of the *Charter* was not engaged and there were no rights in actual conflict.[52]

43. The failure to properly apply the *Charter* to the LSUC, and not TWU, led to the incorrect pronouncement, which the Ontario Court of Appeal had "no hesitation" in finding, that TWU's Covenant discriminates contrary to the *Charter* and Ontario *Human Rights Code*[53] (even though the *Charter* does not apply to TWU and despite later implying TWU was not subject to the *Code*).[54]

44. TWU's law school program is not a governmental activity, nor does the Covenant amount to "unequal treatment under the law" capable of engaging s. 15 of the *Charter*.[55] Had the Ontario Court of Appeal properly applied the *Charter* guarantees of equality and religious freedom, it would have seen there is no conflict of rights for the same reasons stated in *TWU v. BCCT*, where this Court held TWU's code of conduct is lawful and does not "establish discrimination as it is understood in our s. 15 jurisprudence".[56]

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[50] ONCA Reasons, para. 12.
[51] BCSC Reasons, paras. 137, 145, 153.
[52] NSSC Reasons, para. 239.
[53] ONCA Reasons, para. 115.
[54] ONCA Reasons, para. 133.
[55] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624 at para. 44 [*Eldridge*]; *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at para. 27.
[56] *TWU v. BCCT*, para. 25.

2. Impact on the Freedom of Private Entities

45. The Ontario Court of Appeal incorrectly imposed *Charter* obligations on TWU, a private entity that the *Charter* was designed to protect. This decision is of significant concern to many private entities subject to state regulation in Canada.

46. The LSUC and the Ontario courts' reasoning creates doubt over how this Court's direction that administrative discretion be exercised consistently with "*Charter* values" should be applied in regulating private entities. Rather than using *Charter* values to determine the "extent of any given infringement,"[57] the failure to properly assess how the *Charter* applies resulted in the LSUC imposing *Charter* obligations on a religious community.

47. The LSUC argued, and the Ontario courts accepted, that the LSUC itself would be discriminating contrary to human rights legislation and the *Charter* merely by recognizing a private party whose activities could be discriminatory if it were subject to these laws.[58] In the LSUC's words, the fact that TWU was *Charter*-exempt was "irrelevant";[59] since TWU "discriminates", and approving TWU would necessarily "violate [the LSUC's] obligations of equality under the *Charter* and the *Code*".[60] Far from being "irrelevant", this Court stated TWU's exemption under the *Charter* and human rights legislation was "important".[61]

48. This approach effectively applies the *Charter* to private entities and erodes s. 32(1) of the *Charter*:

> 32. (1) This Charter applies
>
> (*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
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> (*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

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[57] *Loyola*, para. 36.
[58] ONSC Reasons, para. 116 ("Condoning discrimination can be ever much as harmful as the act of discrimination itself.").
[59] LSUC ONCA Factum, para. 59.
[60] LSUC ONCA Factum, paras. 7, 9, 57.
[61] *TWU v. BCCT*, para. 25.

49. The LSUC and Ontario Court of Appeal approach allows public bodies to evaluate the religious policies of a private educational community for *Charter* compliance. This contradicts this Court's reasoning in *TWU v. BCCT*, as well as *McKinney* and ensuing cases that deliberately insulate private activities from the purview of the *Charter*. As stated in *McKinney*, this exclusion was a "deliberate choice which must be respected."[62]

50. Non-governmental actors, such as TWU, are only required to conform to *Charter* norms if they are carrying out inherently governmental actions or implementing specific governmental policies.[63] Universities – even public ones – are generally free from *Charter* obligations. The LSUC and the Ontario Court of Appeal decisions circumvent this jurisprudence, by permitting governmental actors to impose *Charter* obligations even though they are not government, or involved in the provision of any government activity. Resolving this question is profoundly important to the many *Charter*-exempt actors across Canada who might be denied regulatory approval if it would implicate the government in a *Charter* breach.

51. Freedom of belief, conduct, and contract will be hindered if public bodies can coerce individuals and private organizations into conforming to select state and *Charter* values. As held by the Nova Scotia Supreme Court:

> But the NSBS argues that in deciding to accept a law degree from TWU the NSBS, as a state actor must comply with the *Charter* and that indirectly implicates TWU in *Charter* compliance considerations. That would have potentially very significant implications. Most directly it would apply the *Charter* to private religious institutions that sought any government recognition of their actions. It would transform it into a tool in the hands of the state to enforce moral conformity with approved values.[64]

52. If a government body responsible for granting any number of governmental licenses or approval is compelled to *de facto* apply the *Charter* to a private entity's statement of beliefs or practices, few private organizations could ever obtain regulatory approvals. The application of the *Charter* could be extended to private religious bodies merely by the government deciding to regulate a previously unregulated activity. As stated in *McKinney*, "[t]o open up all private and

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[62] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [*McKinney*] at para. 22.
[63] *Eldridge*, para. 42.
[64] NSSC Reasons, para. 222.

public action to judicial review could strangle the operation of society" and curtail the freedoms of private individuals and entities.[65]

C. The Statutory Objective of "Public Interest"

53. The Ontario Court of Appeal first identified a proper statutory objective as ensuring "the quality of those who practise law in Ontario."[66] However, the Court then adopted the LSUC's "stated objective of ensuring equal access to the profession", despite this not appearing in the statute.[67] It then recast these objectives as "promoting a legal profession based on merit and excluding discriminatory classifications."[68] The Court then later appeared to balance freedom of religion with the "objective of non-discrimination."[69] These latter articulations of the statutory objective appear to be grounded in the phrase "public interest" in s. 4.2 of the *LSA*[70] and go well beyond the clear objective of the statute for the LSUC to protect the public interest in ensuring the quality and professionalism of those who practice law in Ontario.

54. This is problematic. Most law societies have "public interest" clauses within their statutes.[71] Similar "public interest" clauses are found in dozens of statutes governing self-regulating professions across Canada, including medicine, engineering, teaching, and other professions.[72]

55. It is of note that the BCCT also relied on the words "public interest" in its statute to justify rejecting TWU and its graduates.[73] This Court held that the BCCT could consider "equality concerns pursuant to its public interest jurisdiction", but those concerns were not

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[65] *McKinney*, para. 22.
[66] ONCA Reasons, para. 109.
[67] ONCA Reasons, para. 110.
[68] ONCA Reasons, para. 112.
[69] ONCA Reasons, para. 120.
[70] ONCA Reasons, para. 103.
[71] *Law Society Act*, R.S.O. 1990, c. L. 8, s. 4.2(3); *Legal Profession Act*, S.B.C. 1998, c. 9, s. 3; *Legal Profession Act*, S.Y. 2004, c.14, s.2(3); *Legal Profession Act*, S.N.S. 2004, c. 28, s. 4.1; *Legal Profession Act*, S.S. 1990-91, c. L-10.1, s. 3.1; *Legal Profession Act*, C.C.S.M. c. L107, s. 3(1); *Law Society Act*, S.N.B. 1996, c. 89, s. 5; *Legal Profession Act*, S.P.E.I., 1992, c. L-6.1, s. 4; *Law Society Act*, S.N.L. 1999 c. L-9.1, s. 18(1.1).
[72] Non-exhaustive examples include the *Ontario College of Teachers Act*, 1996, S.O. 1996, c. 12, s. 3(2); *Engineers and Geoscientists Act*, R.S.B.C. 1996 c. 116, s. 4.1(1); *Health Professions Act*, R.S.A. 2000, c. H-7, s. 3(1); *Nova Scotia Veterinary Medical Act*, S.N.S. 2001, c. 13, s. 4; *Pharmacy Act*, 2012, S.N.L. 2012, c. P12.2.
[73] *TWU v. BCCT*, paras. 5-6.

sufficient to make a decision that is inconsistent with freedom of conscience and religion.[74] The legislative decisions made in the *Trinity Western University Act* and the B.C. *Human Rights Code*, which protect TWU and its Covenant, must also be respected.[75]

56. In this case, it is of significant national importance whether the "public interest" allows these regulators to reject individual graduates and future applicants for admission for reasons unrelated to the quality of the graduates, their preparedness for practice or their conduct when in practice. The LSUC decision places a burden on TWU students and graduates, "preventing them from expressing freely their religious beliefs and associating to put them into practice."[76]

57. The words "public interest" do not turn all statutory professional bodies into *de facto* human rights commissions. Here, the LSUC decided that protecting equality rights in a private context, in circumstances where they are not breached under any law, was justified under a broad articulation of the "public interest". This was done without reference to its specific statutory role in regulating lawyers and ensuring the quality and professionalism of those who practice law in Ontario. It also conflicts with this Court's decision in *TWU v. BCCT*.

58. It is concerning that a statutory body such as the LSUC could use the "public interest" to find a collision of rights that is not there at law, and impose its view of a hierarchy of such rights. To the extent it was not already answered in *TWU v. BCCT*, professional bodies need the Court's guidance on the boundaries of such "public interest" powers.

D. Applicable Standard of Review to Justify *Charter* Breaches

59. This case also presents the Court with an opportunity to revisit the proportionality test in *Doré/Loyola* and clarify its application where an administrative body breaches *Charter* rights.

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[74] *TWU v. BCCT*, paras. 25, 26, 28.
[75] *TWU v. BCCT*, paras. 28, 32.
[76] *TWU v. BCCT*, para. 32.

60. It is unclear who bears the onus at various stages of *Doré/Loyola*.[77] The state must ensure *Charter* breaches are "demonstrably justified" under s. 1, whereas litigants have the onus to show a decision is unreasonable on judicial review.

61. Under *Doré/Loyola*, a decision-maker must balance the interference with the *Charter* in light of the statutory objectives.[78] But there is uncertainty over identifying the proper statutory objective in this analysis. *How* is the statutory objective ascertained? And *who* ultimately identifies it? The decision-maker? The court? This problem is accentuated in this case given the Ontario Court of Appeal's shifting articulations of the applicable statutory objective based on the "public interest."

62. Decision-makers are presumed to have deference in interpreting their home statutes.[79] But "constitutional questions" are reviewed on a correctness standard.[80] In *Mouvement laïque québécois v. Saguenay (City)*[81] this Court applied a correctness standard on the scope of religious freedom.[82] In *Loyola*, this Court placed limits on deference in the *Doré* analysis, noting that a balancing of statutory objectives with *Charter* rights requires that the rights be protected "as fully as possible."[83] This case raises the important question of whether the determination, and balancing of, legislative objectives with the *Charter* is a constitutional question and what standard of review should be applied.

63. This Court's description of a proportionate outcome under a *Doré/Loyola* analysis as "reasonableness"[84] has led to confusion with a "reasonableness" review from *Dunsmuir*.[85]

64. Since *Doré* and *Loyola*, some courts reviewing whether a decision breached the *Charter* have granted a decision-maker the same wide reasonableness deference described in *Dunsmuir*.[86]

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[77] C. D. Bredt and E. Krajewska, "Doré: All That Glitters Is Not Gold" (2014) 67 S.C.L.R. (2d) 339 at 357.
[78] *Doré v. Barreau du Québec*, 2012 SCC 12 [*Doré*] at para. 56.
[79] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39.
[80] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at paras. 30, 43.
[81] 2015 SCC 16 [*Saguenay*].
[82] *Saguenay*, paras. 47-52.
[83] *Loyola*, para. 39.
[84] *Doré*, paras. 7, 45; *Loyola*, para. 32.
[85] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 47; see also Iryna Ponomarenko, "Tipping the Scales in the Reasonableness-Proportionality Debate in Canadian Administrative Law" (2016) 21 Appeal 125.
[86] See for example: *Taylor-Baptiste v. Ontario Public Service Employees Union*, 2015 ONCA 495 at para. 73; *Canadian Broadcasting Corporation v. Warden of Bowden Institution*, 2015 FC 173 at paras. 51, 59.

This error was also made by the Ontario Court of Appeal.[87] This development is concerning, since the *Doré/Loyola* test is, and ought to be, a more stringent one than *Dunsmuir*.

65. The concern is amplified where, as in this case, the Ontario Court of Appeal suggested it should defer to the LSUC in identifying its statutory objectives.[88] But the LSUC never created reasons, so the statutory objective was only identified after-the-fact during litigation.

66. The courts should not defer to an administrative body's interpretation of the *Charter* any more than when a court assesses the constitutionality of legislation.[89] Doing so would help "immunize the decisions of [administrative] bodies from effective judicial review" and disrupt the courts' role as the final "interpreters of the Constitution."[90] Public bodies are required to ensure their decisions minimally impair a right, consistent with this Court's approach in *Loyola*.

67. Here, the Ontario Court of Appeal did not require the LSUC to accommodate the infringed rights "if at all possible",[91] give effect "as fully as possible to the *Charter* protections at stake", and limit them "no more than is necessary."[92]

68. Courts do not defer to a public body's characterization of the pressing and substantial objective under *Oakes*. Unfairness results where administrative decision-makers can identify statutory objectives *post-facto* and justify their decisions with the benefit of hindsight. This concern is significant here, since the LSUC elected to pass a motion (subject to a *Doré/Loyola* review) rather than a bylaw setting a standard (subject to the stricter *Oakes* test), as attempted by the Nova Scotia Barristers' Society.

69. If a court must defer in the context of *Doré/Loyola*, clear limitations should be placed on the degree of deference regarding the articulation and achievement of statutory objectives.

70. This case provides the Court with an opportunity to clarify the standard of review applicable to the articulation of relevant statutory objectives, particularly regarding the interplay

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[87] ONCA Reasons, paras. 67-68, 105, 129, 143-145.
[88] ONCA Reasons, para. 105.
[89] Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66 U. Toronto L.J. 121 at 165-166.
[90] *Dunsmuir v. New Brunswick*, 2008 SCC 9 at paras. 127 (Binnie J.), 58 (Bastarache and Lebel JJ.).
[91] *R. v. N.S.*, 2012 SCC 72 at para. 54.
[92] *Loyola*, paras. 4, 39, 41.

with minimal impairment justifications as explained in *Loyola*. This also raises the question of whether the *Doré/Loyola* test has a "rational connection" component like *Oakes*. If so, the LSUC would fail it, as excluding TWU graduates for affirming a religious belief is antithetical to the alleged statutory objectives of merit and non-discrimination. A court should not defer to a statutory decision maker when it purports to breach one right to protect another.

E. Impact on Religious Communities and Their Members

1. Access to the Bar for those in Religious Communities

71. The question of whether graduates of institutions observing a religious code of conduct can become lawyers is an issue of public and national importance.

72. Religious educational communities differ from secular ones because they have their own distinct beliefs and moral standards. Public institutions of learning must be secular. Private religious ones are established by their communities to advance a specifically religious educational experience and worldview. Such communities make religious judgments concerning moral issues. Many such judgments are not permissible by public institutions, but are necessary and constitutionally protected in private religious communities.

73. The LSUC made its "accreditation" decision in the context of determining if individual graduates like Mr. Volkenant would be qualified to enter the bar. It has erected a barrier for TWU graduates in accessing the bar merely for affirming the practices of a religious community, without regard to their individual merit. The LSUC's decision is irreconcilable with its purported position that merit be the sole criteria for bar admission.[93]

74. The Ontario Court of Appeal concluded that the LSUC's decision "denies a public benefit [to TWU] because of the impact of that religious belief on others."[94] But that says nothing about TWU's graduates. Admitting graduates from religious institutions does not conflict with the rights of anyone.[95]

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[93] ONSC Reasons, paras. 96-97.
[94] ONCA Reasons, paras. 138, 143.
[95] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras. 45-46.

75. Public benefits should not be denied to individuals because of their association with a distinctive religious community. The state must remain neutral on affirming or discouraging religious beliefs to maintain "a free space in which citizens of various beliefs can exercise their individual rights."[96]

76. If the LSUC can exclude such individuals from the bar, it is also authorized to exclude potential lawyers who have attended religious institutions with beliefs similar to TWU, such as high schools, universities, churches or other communities of worship.[97]

77. It is an important question whether a public body can lawfully do so in the interest of "protecting the public interest" or being "informed by the values found in the *Charter* and [*Human Rights Code*]".[98]

2. Impact on All Religious Communities

78. The LSUC's disqualification of TWU's graduates is a threat to a free, pluralistic society, and the *Charter*'s protection of religious freedom. In *Big M Drug Mart*, Dickson J. (as he then was), said that "[a] truly free society is one which can accommodate a wide variety of...codes of conduct" and that the "*Charter* safeguards religious minorities from the threat of 'tyranny of the majority'."[99] This Court said that passage "presaged the very situation" in *TWU v. BCCT*, as it does in this one.[100]

79. If the LSUC and the Ontario courts are correct, the *Charter* does not fully protect religious codes of conduct established by faith communities. This jeopardizes the ability of all religious educational communities to obtain the state approvals and recognition necessary to carry out their private activities in the context of their protected religious beliefs.

80. The implications for religious educational organizations are particularly significant. Approval of degrees granted for other TWU professional programs, including those for nurses

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[96] *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 10.
[97] *TWU v. BCCT*, para. 33 ("Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in denial of accreditation to members of a particular church.").
[98] ONCA Reasons, para. 111.
[99] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94, 96.
[100] *TWU v. BCCT*, para. 28.

and teachers who secured the right to be licenced in *TWU v. BCCT*, could be called into question. Degrees issued by other evangelical educational organizations, where similar codes of conduct are prevalent, could similarly be refused because they originate from institutions with "discriminatory" admissions policies.[101]

81. The religious beliefs manifested in the Covenant are not unique to evangelicals.[102] Other religious institutions, including the Roman Catholic Church which also provides faith-based education across Canada, treat certain sexual activity as sinful and forbid same-sex marriage.[103] There is no principled reason the Ontario decisions could not be extended to justify refusal of credentials from these institutions also. As stated by one commentator:

> But if every accrediting decision implies complicity with the values of the program that is licensed, then there is no possibility for diversity of values in any field that requires state approval. Religious education, for instance, would be permitted only when religious doctrine is perfectly congruent with the ethos of the state.... If this is the intent of advocates of congruence, then they should bite the bullet and license only "good" churches to set up educational institutions, or just prohibit religious education altogether. [104]

82. Faith-based and denominational schools open opportunities for, and serve, specific religious groups that are entitled to tolerance and respect. This Court recently said that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection of freedom of religion".[105] Far from reinforcing the importance of public bodies accommodating the needs of religious communities, the Ontario decision permits statutory decision-makers to deny public benefits based on disapproving religious beliefs and practices, instead of focusing on the quality of their programs and the competence and professionalism of their graduates.

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[101] ONSC Reasons, para. 16.
[102] NSSC Reasons, paras. 259-260.
[103] NSSC Reasons, paras. 259-260.
[104] Victor M. Muñiz-Fraticelli, "The (Im)possibility of Christian Education" (2016) 75 S.C.L.R. (2d) 210 at 220 (forthcoming).
[105] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 131 (Abella J., dissenting).

3. The Scope of Freedom of Association for Religious Communities

83. Despite this Court recently confirming the historical connection between the freedom of association and protecting minority religious communities,[106] this Court has not considered a case dealing directly with the place of s. 2(d) in protecting the lawful associational activities of religious communities.

84. The s. 2(d) arguments raised by the applicants were not considered by the Ontario Court of Appeal. The Divisional Court focused narrowly on the fact that the LSUC's decision did not prohibit TWU from establishing a law school.[107] However, s. 2(d) guarantees more than the bare right to associate; it protects associational activity and participation without interference, penalty, or reprisal from the state.[108] No consideration was given to this Court's statement that the BCCT's decision burdened TWU's religious community by preventing them from associating to put their beliefs into practice.[109]

85. The Divisional Court also held that s. 2(d) did not protect the right of TWU and its graduates to create a law school separate from other law schools in Canada.[110] Surely, the survival of distinct minority religious communities may require the freedom to operate separate, and independent from, their secular counterparts without receiving burdensome differential treatment from the state.

86. This case is an opportunity for the Court to clearly recognize the autonomy of minority religious communities and protect a space for them to freely operate within Canada.

PART IV – COSTS

87. The applicants seek costs of this application, and ultimately of the appeal here and throughout the courts below.

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[106] *Mounted Police Association of Ontario v. Canada (Attorney General*, 2015 SCC 1 at paras. 48, 56, 64 [*Mounted Police*].
[107] ONSC Reasons, para. 142.
[108] *Mounted Police*, para. 54.
[109] *TWU v. BCCT*, para. 32.
[110] ONSC Reasons, para. 142.

PART V – ORDERS SOUGHT

88. TWU and Brayden Volkenant respectfully seek an Order granting them leave to appeal the decision of the Ontario Court of Appeal dated June 29, 2016, with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 27TH DAY OF SEPTEMBER, 2016.

Counsel for the Applicants
Robert W. Staley and Kevin L. Boonstra

PART VI – TABLE OF AUTHORITIES

PART VII – STATUTES RELIED ON

Charter of Rights and Freedoms (*The Constitution Act*, 1982, Part I, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11)

GUARANTEE OF RIGHTS AND FREEDOMS

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

2. Everyone has the following fundamental freedoms:

(*a*) freedom of conscience and religion;

(*b*) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(*d*) freedom of association.

EQUALITY RIGHTS

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

APPLICATION OF CHARTER

32. (1) This Charter applies

(*a*) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(*b*) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

GARANTIE DES DROITS ET LIBERTES

1. La *Charte canadienne des droits et libertés* garantit les droits et libertés qui y sont énoncés. Ils ne peuvent être restreints que par une règle de droit, dans des limites qui soient raisonnables et dont la justification puisse se démontrer dans le cadre d'une société libre et démocratique.

LIBERTES FONDAMENTALES

2. Chacun a les libertés fondamentales suivantes :

a) liberté de conscience et de religion;

b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;

d) liberté d'association.

DROITS A L'EGALITE

15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur, la religion, le sexe, l'âge ou les déficiences mentales ou physiques.

APPLICATION DE LA CHARTE

32. (1) La présente charte s'applique :

a) au Parlement et au gouvernement du Canada, pour tous les domaines relevant du Parlement, y compris ceux qui concernent le territoire du Yukon et les territoires du Nord-Ouest;

b) à la législature et au gouvernement de chaque province, pour tous les domaines relevant de cette législature.

***Degree Authorization Act*, S.B.C. 2002, c. 24**

Granting of degrees and use of "university" restricted

3 (1) A person must not directly or indirectly do the following things unless the person is authorized to do so by the minister under section 4:
(a) grant or confer a degree;
(b) provide a program leading to a degree to be conferred by a person inside or outside British Columbia;
(c) advertise a program offered in British Columbia leading to a degree to be conferred by a person inside or outside British Columbia;
(d) sell, offer for sale, or advertise for sale or provide by agreement for a fee, reward or other remuneration, a diploma, certificate, document or other material that indicates or implies the granting or conferring of a degree.

Consent of minister

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

***Engineers and Geoscientists Act*, R.S.B.C. 1996, c. 116**

Duties and objects of the association

4.1 (1) It is the duty of the association

(a) to uphold and protect the public interest respecting the practice of professional engineering and the practice of professional geoscience,

***Health Professions Act*, R.S.A. 2000, c. H-7**

College's role

3 (1) A college

(a) must carry out its activities and govern its regulated members in a manner that protects and serves the public interest,

ONTARIO

Law Society Act, R.S.O. 1990, c. L.8

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

3. The Society has a duty to protect the public interest.

4.2 Lorsqu'il exerce ses fonctions, obligations et pouvoirs en application de la présente loi, le Barreau tient compte des principes suivants :

3. Le Barreau a l'obligation de protéger l'intérêt public.

NEW BRUNISWICK

Law Society Act, S.N.B. 1996, c. 89

5 It is the object and duty of the Society

(a) to uphold and protect the public interest in the administration of justice,

5 Le Barreau a pour mission:

(a) de défendre et de proteger l'intérét public dans l'administration de lajustice;

MANITOBA

Legal Profession Act, C.C.S.M. c. L107

3(1) The purpose of the society is to uphold and protect the public interest in the delivery of legal services with competence, integrity and independence.

3(1) La Société a pour objet de défendre et de protéger l'intérêt public relativement à la prestation de services juridiques d'une manière compétente, intègre et indépendante.

YUKON

Legal Profession Act, S.Y. 2004, c.14, s.2

3 It is the object and duty of the society

(a) to uphold and protect the public interest in the administration of justice by...

3 Le Barreau a pour mission :

(a) de défendre et de protéger l'intérêt public dans l'administration de la justice :

BRITISH COLUMBIA

Legal Profession Act, S.B.C. 1998, c. 9

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

NOVA SCOTIA

Legal Profession Act, S.N.S. 2004, c. 28,

4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

SASKATCHEWAN

Legal Profession Act, S.S. 1990-91, c. L-10.1

3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:

(a) to act in the public interest;

PRICE EDWARD ISLAND

Legal Profession Act, SPEI, 1992, c. L-6.1

4. The objects of the society are

(a) to uphold and protect the public interest in the administration of justice;

NEWFOUNDLAND

Law Society Act, S.N.L.1999 c. L-9.1

18. (1.1) The benchers have the authority to regulate the practice of law and the legal profession in the public interest.

***Nova Scotia Veterinary Medical Act*, S.N.S. 2001, c. 13**

Objects of Association

4 The objects of the Association are to serve and protect the public interest by

(a) regulating the practice of veterinary medicine through the establishment of registration, professional-conduct and facilities-inspection processes as set out in this Act, the regulations and the by-laws;

(b) establishing and promoting standards of professional practice and a Code of Ethics; and

(c) subject to clauses (a) and (b), advancing and promoting the practice of veterinary medicine.

***Ontario College of Teachers Act*, 1996, S.O. 1996, c. 12**

Objects	*Objets*
Duty **3** (2) In carrying out its objects, the College has a duty to serve and protect the public interest.	*Obligation* 3 (2) Dans la poursuite de ses objets, l'Ordre est tenu de servir et de protéger l'intérêt public.

***Pharmacy Act*, 2012, S.N.L. 2012, c. P12.2**

Objects

7. (1) The board shall regulate the practice of pharmacy and the pharmacy profession in the public interest.

***Trinity Western University Act*, S.B.C. 1969, c. 44 (as amended)**

Society continued

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