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

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS

FACTUM OF THE RESPONDENTS
TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

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

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PART I – OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. Trinity Western University ("**TWU**") intends to open a law school and needed BC's Minister of Advanced Education's consent to grant *juris doctor* degrees.[1] As part of his criteria and detailed review, the Minister required that TWU graduates would be professionally certified. After the Federation of Law Societies of Canada gave its approval, the Minister consented.

2. The Benchers of the Law Society of British Columbia ("**LSBC**") carefully considered the *Charter* issues and whether there was a public interest reason to reject TWU graduates. They decided to accept the graduates. After considerable pressure from the profession, the Benchers then remitted the matter to a referendum. Based solely on the referendum results, the Benchers reversed themselves and rejected TWU graduates. As a result, the Minister revoked his consent for the *juris doctor* degree as graduates would no longer be professionally certified in BC.

3. The BC Court of Appeal unanimously determined that the Benchers improperly fettered their discretion by binding themselves to a vote of the membership. It also determined that there can only be one result: acceptance of TWU graduates. Rejection "would limit the engaged rights to freedom of religion in a significantly disproportionate way."[2]

4. The LSBC now attempts to redefine the religious beliefs and practices of the TWU community in an effort to minimize the impacts of its *Charter* breaches. Its arguments: (a) purport to tell TWU's community which of its religious precepts are important; and (b) are based on an assumption that TWU is obligated to justify its religiously grounded code of conduct, known as the Community Covenant (the "**Covenant**").[3] This is backwards. The LSBC is obligated to accommodate and protect the religious and associational rights of TWU's religious community. It is also obligated not to discriminate against TWU students based on religion. The LSBC failed to protect these *Charter* rights.

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[1] *Degree Authorization Act*, S.B.C. 2002, c. 24.
[2] *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 ("**BCCA Reasons**") at para. 192.
[3] BCCA Reasons, para. 13; Affidavit #1 of Dr. W. Robert Wood ("**Wood #1**"), paras. 65-69, Exhibit C **[AR, Vol. III, at 391-393, 401]**.

5. Religious communities such as TWU appeal to and attract those sharing their beliefs and practices. There will always be an exclusionary effect, which is protected by the *Charter*. The LSBC cannot attempt to "remedy"[4] that by attempting to impose a secular structure and secular values on TWU. This undermines the very *Charter* principles the LSBC purports to uphold. Put another way, this case "demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism can, if unchecked, impose its view on the minority in a manner that is in itself intolerant and illiberal."[5]

B. STATEMENT OF FACTS

1. Trinity Western University

6. TWU is the largest private Christian university in Canada, offering 42 undergraduate and 17 graduate degree programs that are all taught from an evangelical Christian perspective.[6] These include professional programs in education, nursing, business, and counseling, all with full professional certification and recognition.[7]

7. TWU's mission is to be an arm of the church and serve the evangelical community in Canada, which is a minority religious group.[8] Evangelicalism is a distinct expression of Christianity characterized by shared religious beliefs that include (a) acknowledging the Bible as a definitive source of moral authority; (b) conducting evangelism; and (c) spiritual formation and personal piety.[9]

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[4] The Factum of the Appellant The Law Society of British Columbia dated May 23, 2017 ("**LSBC Factum**"), para. 207.
[5] BCCA Reasons, para. 193.
[6] *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 ("**BCSC Reasons**") at paras. 3-4; Wood #1, para. 14, 15, 21 **[AR, Vol. III, at 380-381]**.
[7] Wood #1, paras. 22-24 **[AR, Vol. III, at 381]**.
[8] BCSC Reasons, para. 2; Wood #1, paras. 8, 48, 52-53 **[AR, Vol. III, at 379, 387-388]**; Affidavit #1 of Dr. Samuel Reimer ("**Reimer #1**"), paras. 23, 26-29 **[AR, Vol. II, at 243-245]**; Affidavit #1 of Dr. Jeffrey Greenman ("**Greenman #1**"), para. 39 **[AR, Vol. II, at 229]**.
Virtually identical versions of these affidavits, along with other affidavits filed in this proceeding by Dr. Gerald Longjohn Jr., William Taylor, Brayden Volkenant, Arend Strikwerda, Austin Davies, Iain Cook, and Natalie Hebert were also before the Benchers **[Respondents' Record ("RR"), Vol. III, at 4-6]** and are in the Record **[RR, Vol. IV, at 67-168 & Vol. V, at 1-91]**.
[9] Greenman #1, paras. 33-35, 41 **[AR, Vol. II, at 227-230]**; Reimer #1, paras. 23, 28 **[AR, Vol. II, at 243-244]**.

8. TWU is mandated by the British Columbia Legislature to provide "university education ... with an underlying philosophy and viewpoint that is Christian."[10] Evangelical education involves much more than the impartation of facts and knowledge. It is a holistic means of forming students' character and spirituality in a manner consistent with evangelical Christian beliefs.[11]

9. TWU's curriculum and educational environment are specifically designed to appeal to those who share its evangelical faith.[12] TWU's philosophy of providing Christian education is guided by its long-standing mission to "develop godly Christian leaders" with "thoroughly Christian minds."[13]

10. While TWU is open to all academically qualified people wishing to live and learn in its religious community, the vast majority of its students are Christian.[14] During its admissions process, TWU does not ask for or consider information regarding the sexual orientation of any of its student applicants.[15]

2. The Community Covenant

11. The belief that people reach their fullest potential by participating in a community committed to observing Biblical ethics and morality is foundational to TWU's approach to education.[16] As a means of preserving, enhancing, and strengthening their distinct religious identity, Christian communities commonly adopt codes of conduct that prescribe normative behavioural standards for community membership based on Biblical ethics and morality.[17]

12. The Covenant is a practical manifestation of evangelical religious beliefs: it "organize[s] the Bible's directions about how to live as a Christian with regard to many aspects of daily life as individuals and as members of a shared community."[18]

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[10] *Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2), as amended.
[11] Affidavit #1 of William Taylor ("**Taylor #1**"), para. 48 **[RR, Vol. I, at 165]**.
[12] Wood #1, paras. 7, 8, 16, 52-59, Exhibit B **[AR, Vol. III, at 378-380, 389-389, 399]**.
[13] Wood #1, para. 52 **[AR, Vol. III, at 388]**, Exhibit U **[RR, Vol. I, at 119]**; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [***TWU #1***] at para. 10.
[14] Wood #1, paras. 16, 67 **[AR, Vol. III, at 380, 392]**.
[15] Wood #1, para. 16 **[AR, Vol. III, at 380]**; Affidavit #1 of J. Epp Buckingham ("**Buckingham #1**"), para. 82 **[AR, Vol. III, at 466-467]**.
[16] Wood #1, para. 65 **[AR, Vol. III, at 391]**.
[17] Reimer #1, para. 34 **[AR, Vol. II, at 245]**.
[18] Greenman #1, para. 59 **[AR, Vol. II, at 237]**.

13. All students who choose TWU and wish to live and learn within its evangelical community adhere to the Covenant. It is similar to codes of conduct adopted by other Christian universities, including accredited American law schools.[19]

14. The Covenant is a significant means by which TWU maintains its religious character and fulfills its evangelical Christian mission and educational mandate. It creates a safe and welcoming environment for shared religious beliefs and practices, promotes individual and communal moral and spiritual growth, and attracts evangelical students, faculty, and staff who share religious values.[20]

15. The BC Court of Appeal concluded that "the evidence overwhelmingly supports the view that the Covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians."[21]

16. The LSBC now predominantly objects to one line of the Covenant, which addresses the commitment of TWU's community to observe standards of sexual conduct consistent with the evangelical Christian understanding of marriage.[22] The provision that calls on students to abstain from sexual intimacy outside of opposite-sex marriage reflects a number of "widely accepted contemporary evangelical" religious beliefs: that marriage is a sacred union between opposite-sex partners, that the Bible is the final source of authority on matters of human sexuality, and that evangelical communities should cultivate their members' faith and practice.[23]

17. The LSBC has faintly raised other *post facto* objections to the Covenant's religious content. For example, it now says the Covenant's expectation to "treat all persons with respect … from conception to death" in fact "limits reproductive choices" of women.[24] But there is no

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[19] Buckingham #1, paras. 73-77 **[AR, Vol. III, at 464-465]**, Exhibits EE, FF **[RR, Vol. III, at 62-80]**; Affidavit #1 of E. Phillips ("**Phillips #1**"), Exhibit N **[RR, Vol. II, at 85-109]**.
[20] Wood #1, paras. 67-69, 71, Exhibit X **[AR, Vol. III, at 392-393, 435]**; Taylor #1, para. 45 **[RR, Vol. I, at 164]**; Greenman #1, para. 59 **[AR, Vol. II, at 236-237]**; Affidavit #1 of Dr. G. Longjohn Jr. ("**Longjohn #1**"), Exhibit C, pp. 2-4 **[RR, Vol. I, at 43-45]**.
[21] BCCA Reasons, para. 103.
[22] LSBC Factum, paras. 38, 40-42.
[23] Wood #1, Exhibit C **[AR, Vol. III, at 403, 404]**. Greenman #1, paras. 13-16, 24-29, 58-60 **[AR, Vol. II, at 221, 224-226, 236-237, 245]**; Reimer #1, para. 32 **[AR, Vol. II, at 245]**.
[24] LSBC Factum, paras. 41-42. The Covenant asks students to "treat all persons with respect … from conception to death": BCCA Reasons, para. 13; Wood #1, Exhibit C **[AR, Vol. III, at 402]**.

evidence of how TWU applies those provisions and, as found by the BC Supreme Court, this was not considered by the Benchers or the LSBC membership.[25]

3. TWU's Law School

18. Opening a law school has been part of TWU's long-term plan for over 20 years.[26] To do so, TWU was required to obtain approval from BC's Minister of Advanced Education (the "**Minister**") and the Federation of Law Societies of Canada (the "**Federation**").[27] TWU's law school proposal was submitted to both of them in June 2012.[28] TWU also informed the Canadian Council of Law Deans, the British Columbia law deans, and the LSBC about its proposal.[29]

19. TWU required the Minister's consent under the *Degree Authorization Act* to grant law degrees.[30] The Minister comprehensively examined TWU's proposal as part of its approval process, which included review by the Degree Quality Assessment Board ("**DQAB**"), despite TWU ordinarily being exempt from this process.[31] An expert panel appointed by the DQAB recommended approving TWU's proposal, including its admissions criteria.[32]

20. The LSBC's reference to the expert panel's recommendation that TWU remove the requirement that all faculty members sign and adhere to the Statement of Faith and Community Covenant is inaccurate.[33] The recommendation suggested that the documents be applied to faculty as a non-exclusive preference, but this was related only to TWU attracting qualified instructors.[34] It had nothing to do with student admissions or equality concerns. TWU explained that the documents will not prevent recruiting sufficient faculty based, in part, on TWU's experience in other professional programs and having already received a considerable number of inquiries from interested applicants, despite not yet recruiting faculty.[35]

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[25] BCSC Reasons, para. 141.
[26] BCSC Reasons, para. 28; Buckingham #1, para. 14 **[AR, Vol. III, at 448]**.
[27] *Degree Authorization Act*, S.B.C. 2002, c. 24, s. 4(1).
[28] Buckingham #1, para. 24 **[AR, Vol. III, at 450-451]**.
[29] BCCA Reasons, para. 6.
[30] BCSC Reasons, para. 30.
[31] BCCA Reasons, para. 9.
[32] Buckingham #1, paras. 48, 52-54, Exhibit Q **[AR, Vol. III, at 458-460, 471, 481-482]**.
[33] LSBC Factum, para. 45.
[34] LSBC Factum, para. 45; Buckingham #1, Exhibit Q **[AR, Vol. III, at 484-487]**.
[35] Buckingham #1, Exhibits Q and R **[AR, Vol. III, at 484-487, 507-510, 532-535]**.

21. Many of the equality concerns now raised by the LSBC were specifically considered by the Federation as part of its detailed review process.[36] The Federation's Special Advisory Committee chaired by John Hunter, QC (now Justice Hunter of the BC Court of Appeal) concluded that there was no valid public interest reason to refuse approval or reject graduates.[37]

22. In December 2013, the Federation approved TWU's proposal. The Minister gave his consent for the law degree.[38]

4. The LSBC's Process

23. The LSBC regulates the legal profession in BC pursuant to the *Legal Profession Act* (the "***LPA***"). Under the *LPA*, practicing law in BC requires membership in the LSBC. Membership requires approval from the Benchers.[39]

24. A Canadian law school graduate must complete the Law Society Admission Program ("**LSAP**") in order to become a member of the LSBC.[40] To be enrolled in LSAP, an applicant must demonstrate appropriate "academic qualification."[41]

25. Prior to September of 2013, the LSBC rules provided that applicants with a bachelor of laws degree from a Canadian common law faculty have satisfactory academic qualification.[42]

26. Anticipating the Federation's approval of TWU, the LSBC changed its rules in September of 2013 to add Rule 2-27(4.1) (now rule 2-54(3)).[43] Now, graduates automatically meet the "academic qualification" requirement if their law school is approved by the Federation, unless the Benchers pass a resolution to the contrary.[44] The LSBC has not created any criteria upon which it would reject the Federation's approval.

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[36] BCCA Reasons, para. 7.
[37] BCCA Reasons, para. 7; BCSC Reasons, para. 33; Affidavit #2 of Timothy McGee ("**McGee #2**"), Exhibit C **[AR, Vol. VI, at 1038]**.
[38] BCSC Reasons, para. 33; BCCA Reasons, paras. 8-9.
[39] *Legal Profession Act*, S.B.C. 1998, c. 9, ss. 15, 19.
[40] BCSC Reasons, para. 31.
[41] BCSC Reasons, para. 31.
[42] BCSC Reasons, para. 31.
[43] BCSC Reasons, para. 32; BCCA Reasons, para. 11; Rule 2-27(4.1) can be found in the Appellant's Book of Authorities, **Vol. II, at 320**.
[44] BCSC Reasons, para. 32.

27. Following the Federation's approval, TWU graduates would be automatically admitted to LSAP.[45] On February 28, 2014, the Benchers circulated a notice of motion (the "**April Motion**") under Rule 2-27(4.1) to declare TWU's law program "not an approved faculty of law."[46]

28. The April Motion was to be decided by the Benchers on April 11, 2014 (the "**April Meeting**"). The LSBC investigated its disciplinary records, and made inquiries of the BC Human Rights Tribunal, the deans of three BC law schools, the Teacher Regulation Branch, and the College of Registered Nurses of BC to determine if TWU graduates engaged in discriminatory conduct.[47] No evidence of discrimination was discovered.

29. Prior to the April Meeting, the LSBC asked TWU if it would amend the Covenant to remove the religious beliefs on marriage.[48] TWU refused, explaining that the Covenant is "an expression of the religious beliefs of TWU and its community that is necessary for TWU to live out its purposes as a Christian university."[49]

30. During their April Meeting, the Benchers engaged in a thorough consideration of the *Charter* issues, numerous legal opinions, and submissions made by LSBC members and the general public.[50] After extensive debate, the Benchers defeated the April Motion by a 20-7 vote.[51] TWU's graduates would continue to be accepted by LSBC.

31. Some LSBC members were dissatisfied with this result, and requisitioned a Special General Meeting asking members to consider a resolution (the "**SGM Resolution**") that the Benchers reverse themselves. The SGM Resolution explicitly relied upon s. 28 of the *LPA* concerning promoting and improving practice standards for lawyers, but did not reference equal

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[45] The same is true in Alberta, Saskatchewan, Manitoba, PEI, and the Yukon – see BCCA Reasons, paras. 32-40; Buckingham #1, paras. 56-70 **[AR, Vol. III, at 460-463]**. New Brunswick's Law Society later voted to accept TWU graduates – see BCCA Reasons, para. 40; Buckingham #1, paras. 71-72 **[AR, Vol. III, at 463-464]**.

[46] BCSC Reasons, para. 35.
[47] BCCA Reasons, para. 17; Phillips #1, para. 24 **[AR, Vol. IV, at 588]**.
[48] BCCA Reasons, para. 19; Phillips #1, Exhibit Q **[RR, Vol. II, at 164]**.
[49] BCCA Reasons, para. 49; Phillips #1, Exhibit R **[RR, Vol. II, at 165-166]**.
[50] BCCA Reasons, para. 20; BCCA Reasons, para. 138; Phillips #1, para. 25, Exhibit P **[RR, Vol. II, at 114-163]**; McGee #2, Exhibit J **[AR, Vol. VII, 1138-1189]**.
[51] BCCA Reasons, paras. 20, 22.

access concerns or the *Charter* rights of TWU and its graduates.[52] Members of the LSBC passed the non-binding SGM Resolution on June 10, 2014.[53]

32. On September 26, 2014, the Benchers considered three motions and voted on two of them. The first motion was identical to the April Motion and was again defeated.[54]

33. The second motion (the "**Referendum Motion**") was to hold a binding referendum of the LSBC members. The Referendum Motion stipulated that the result would "be binding and will be implemented by the Benchers" if 2/3 of voting members approved.[55] It also stated that either result would not breach their statutory duties "regardless of the results of the Referendum."[56] It passed.[57]

34. The LSBC conducted the referendum by mail-in ballot in October, 2014.[58] On October 30, 2014, the LSBC released the results: 5,951 BC lawyers voted in favour and 2,088 voted against.[59] There were 5,311 eligible members who did not vote.[60]

35. The Benchers met the next day to consider the results. The Benchers treated the referendum results as binding and, by a vote of 25-1, with four abstentions, they voted to reject TWU graduates under Rule 2-27(4.1) (the "**Decision**"). There was no debate or substantive discussion, but one Bencher again suggested TWU amend the Covenant.[61]

36. On December 11, 2014, the Minister revoked his consent to TWU's *juris doctor* degree based solely on the Decision, since the LSBC would no longer recognize the academic credentials of TWU's graduates.[62]

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[52] BCCA Reasons, paras. 21, 141-142.
[53] BCCA Reasons, para. 24.
[54] BCCA Reasons, paras. 25, 27.
[55] BCSC Reasons, paras. 120-121; BCCA Reasons, paras. 25-27, 91.
[56] BCCA Reasons, para. 27.
[57] The third motion, that they wait until after court decisions had been made, was then withdrawn.
[58] BCSC Reasons, para. 47.
[59] BCCA Reasons, para. 28.
[60] BCCA Reasons, para. 28.
[61] BCSC Reasons, paras. 48, 119; BCCA Reasons, para. 30; Phillips #1, para. 52 **[AR, Vol. IV, at 594]**; McGee #2, Exhibit R **[AR, Vol. VII, at 1277]**.
[62] BCCA Reasons, paras. 31, 168; Buckingham #1, Exhibit R.1 **[AR, Vol. III, at 581-582]**.

5. Lower Court Decisions

37. The Decision was quashed on judicial review. Chief Justice Hinkson found that the Benchers wrongfully subdelegated, fettered their discretion, acted unfairly, and failed in their duty to consider the infringed *Charter* rights when they made the Decision.[63] The Chief Justice restored the result of the April Motion.[64]

38. A five-judge panel of the BC Court of Appeal unanimously upheld the lower court's findings that the Benchers had improperly fettered their discretion, breached their statutory duties, and disproportionately infringed the *Charter* rights of TWU and members of its religious community.[65] The Benchers had "abdicated" their duty to balance the objectives of the *LPA* with the *Charter* rights at stake.[66] The Decision was disproportionate and failed to protect the "fundamental religious and associative rights" of the TWU community.[67]

PART II – QUESTIONS IN ISSUE

39. The questions in issues are:

(a) Did the Benchers improperly fetter their discretion?

(b) Does the Decision infringe sections 2(a), 2(b), 2(d) or s. 15(1) of the *Charter*?

(c) Are the infringements proportionate given the statutory objectives of the *LPA*?

PART III – ARGUMENT

A. THE LSBC FETTERED ITS DISCRETION

1. Standard of Review for Questions of Fettering

40. As found by the BC Supreme Court, the standard of review on the issue of improper fettering is correctness.[68] Even if the standard of review is reasonableness, a decision that improperly restricts or disables discretion must be unreasonable. A decision produced by

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[63] BCSC Reasons, paras. 120, 125, 138, 145, 148, 151-152.
[64] BCSC Reasons, para. 156.
[65] BCCA Reasons, paras. 78, 85, 91, 145, 191-192.
[66] BCCA Reasons, para. 145.
[67] BCCA Reasons, paras. 190-191.
[68] BCSC Reasons, paras. 80-85, 90, 114.

discretion that has been improperly fettered "cannot fall within the range of what is acceptable and defensible" and therefore "must *per se* be unreasonable."[69]

2. The Benchers Improperly Fettered Their Discretion

41. The BC Court of Appeal found that the Benchers' discretion was "clearly" and "improperly" fettered.[70]

42. Fettering occurs when a decision-maker does not exercise its independent judgment, but binds itself to a policy, plebiscite, or the views of others.[71] Improper fettering occurred in *Oil Sands Hotel* when the decision-maker based a decision on a referendum of the community.[72] Acting upon a plebiscite allows "other bodies and individuals to exercise the authority committed to" the decision-maker, thereby disabling it "from exercising its own discretion."[73]

43. The Benchers held the referendum in order to dictate their decision. The Referendum Motion stated that the results "will be binding and will be implemented."[74] The referendum results were implemented by the Benchers the next day "without substantive discussion despite the fact that it was a complete reversal of the Benchers' vote just six months prior.[75]

44. The question is whether the fettering is authorized by law. While the BC Court of Appeal assumed "without deciding" that a binding referendum was permitted by the *LPA*, that does not end the matter.[76] The only section in the *LPA* that may potentially bind the Benchers is s. 13. This section expressly provides that a resolution of members "is not binding on the benchers" except if certain preconditions are met, provided that implementing it would not "constitute a breach of their statutory duties."

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[69] *Stemijon Investments Ltd. v. Canada (Attorney General)*, 2011 FCA 299 at para. 24; see also BCSC Reasons, paras. 98, 114.
[70] BCCA Reasons, paras. 66, 91, 145; BCSC Reasons, paras. 119-120.
[71] BCSC Reasons, paras. 97, 114.
[72] *Oil Sands Hotel (1975) Ltd. v. Alberta Gaming and Liquor Commission*, 1999 ABQB 218 [***Oil Sands Hotel***] at paras. 40-42.
[73] *Oil Sands Hotel*, at para. 42.
[74] This is provided the voting thresholds were reached: BCCA Reasons, para. 27.
[75] BCSC Reasons, paras. 43, 119.
[76] BCCA Reasons, paras. 77, 95(4).

45. The mandatory preconditions in s. 13 were clearly not met. Under s. 13(2), a petition of at least 5% of LSBC members was required to initiate the referendum if the Benchers had not implemented the resolution within twelve months.

46. The Benchers were also obligated to determine whether rejecting TWU graduates breached their statutory duties. Since the Decision clearly impacted the *Charter* rights of TWU and its community, deferring to a popular vote of the membership was inappropriate. Under the *LPA*, the Benchers are responsible for making rules regarding admission to the profession. Those rules are binding on the Benchers and all LSBC members under s. 11(3) of the *LPA*. Rule 2-27(4.1) required the Benchers to exercise their discretion and, in doing so, they were obligated to consider the *Charter* and the statutory objectives of the *LPA*. This is particularly so in this case, since they previously rejected two motions to "not approve" TWU graduates.

47. As found by the BC Court of Appeal, the Benchers "improperly fettered their discretion" "in a manner inconsistent with their statutory duties."[77] They "abdicated their duty as an administrative decision-maker" to consider the *Charter* issues and arrive at the decision that, in their view, best protected *Charter* rights without sacrificing important statutory objectives.[78]

48. While the unique circumstances of this case and the related appeal from the Ontario Court of Appeal should result in this Court providing the ultimate answer on the *Charter* issues, the question of fettering remains important. Administrative bodies should not be able to ignore their statutory duties to make decisions consistent with the *Charter*, later relying on legal arguments and *post facto* justifications in judicial review proceedings.

49. The LSBC cannot now ask the court to "reformulate [its] decision in a way that casts aside an unreasonable chain of analysis in favour of the court's own rationale for the result."[79] Allowing this to occur encourages tribunals to make politically expedient decisions, rather than engaging in a proper and fulsome consideration of their *Charter* and statutory obligations.

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[77] BCCA Reasons, paras. 91, 145.
[78] BCCA Reasons, paras. 89, 91, 145.
[79] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 54.

B. *CHARTER* BREACHES AND PROPORTIONALITY ANALYSIS

1. Standard of Review

50. Although the respondents do not agree that there are "competing *Charter* rights," they agree with the LSBC that there is a need for a "single, conclusive answer" on whether the Decision was proportionate.[80] The parties also agree with the BC Court of Appeal that the Court owes no deference to the LSBC on the *Charter* issues.[81] To be upheld, the Decision must be correct.

2. Proportionality Analysis

51. For the reasons set out in the respondents' factum filed in the related appeal on May 19, 2017 (the "**Ontario Factum**") there should only be one proportionality test for examining compliance with the *Charter* regardless of whether a right is infringed by a statute, regulation, or discretionary decision.

52. Just as the constitutional standard of review should not change from province to province,[82] it also should not depend on whether the Benchers made their decision by resolution (which is subject to a *Doré* analysis) or bylaw (which is subject to *Oakes*). Otherwise:

> A person's rights are not uniform but their content will depend in part on whether they are subject to interference by administrative decision or legislation. From the perspective of the rights-holder that makes little sense and it is not supported by the scheme of the *Charter*, which sets out rights held by every person….[83]

53. Accordingly, the Court should:

(a) first determine what *Charter* rights have been infringed; and then

(b) determine whether the Decision is proportionate given the relevant statutory objective(s). The Decision can only be proportionate if: (i) it is rationally connected to the relevant statutory objective(s); (ii) it minimally impairs the affected rights;

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[80] LSBC Factum, paras. 69, 80.

[81] LSBC Factum, paras. 83-86; BCCA Reasons, para. 147. See also the respondents' Ontario Factum at para. 40 and Donald Buckingham, "From *Dunsmuir* to *Doré* and Beyond: Why Administrative Law Matters in the Protection of Religious Freedom in Canada" in Dwight Newman, ed., *Religious Freedom and Communities* (LexisNexis, 2016) at pp. 191-192 **[Respondents' Book of Authorities ("RBoA"), Tab 1]**.

[82] LSBC Factum, para. 83.

[83] Tom Hickman, "Adjudicating Constitutional Rights in Administrative Law" (2016) 66 U Toronto LJ 121 at 166 **[RBoA, Tab 2]**.

and (iii) there is proportionality between its benefits and harmful effects.

C. THERE ARE NO CONFLICTING RIGHTS

1. The Analytical Framework of *TWU #1* Applies

54. The LSBC suggests that someone's rights would be infringed, regardless of whether it accepts TWU graduates. This is not correct. The scope of rights must be properly defined to determine whether they actually conflict.[84] Even if a *Charter* breach exists regardless of the outcome (which is not the case here), rights must be accommodated as much as possible. No right supersedes another.[85]

55. The parties agree that the analytical framework from *TWU #1* should apply, as confirmed in *N.S.* and *Reference re Same-Sex Marriage*,[86] but the LSBC incorrectly applies the analysis.

2. There are No Conflicting Rights

56. Applying the proper framework, and considering the context of the rights being reconciled,[87] shows there is no conflict of rights in this case.

57. In considering the impact of the Covenant on LGBTQ individuals, "one must consider the true nature of the undertaking and the context in which this occurs."[88] The LSBC is a public body, and TWU is a private and protected religious educational institution.

58. Because of TWU's private, voluntary nature, LGBTQ persons' legal rights are not breached by the Covenant and thus no conflict of rights arises.

59. The BC Court of Appeal applied this framework and correctly found that:

(a) The Decision infringes the *Charter* rights of TWU and its graduates;

(b) The *Charter* applies to the LSBC, but not TWU. TWU is protected by the *Charter* and *Human Rights Code*. Reconciling rights "must take into account the context of private religious institutions";[89] and

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[84] *TWU #1*, at para. 29.
[85] *TWU #1*, at para. 31; *R. v. N.S.*, 2012 SCC 72 at paras. 51-52.
[86] LSBC Factum, paras. 96 (fn. 52), 187 (fn. 93).
[87] LSBC Factum, para. 96.
[88] *TWU #1*, at para. 34.

(c) The rights of LGBTQ individuals are not infringed by the Covenant. The Covenant is lawful, does not breach the *Charter*, and cannot amount to "unlawful discrimination."[90]

3. *TWU #1*: Impact on LGBTQ Individuals

60. *TWU #1* is not distinguishable on the ground that the LSBC is being asked to approve a school with "discriminatory barriers" that creates a "harmful impact on LGBTQ people."[91]

61. Depending on the circumstances, discrimination against a practice can be discrimination based on one's identity.[92] Justice Rothstein in *Whatcott* cited Justice L'Heureux-Dubé's dissent on this aspect in *TWU #1* with approval, but carefully noted that she did not dissent "on this point."[93]

62. In *TWU #1*, this Court recognized the exclusionary impact of TWU's code of conduct for LGBTQ individuals and that it creates "unfavourable differential treatment" for LGBTQ students, who could only sign it "at a considerable personal cost."[94] However, the exclusionary impact is not discrimination as understood in our jurisprudence.[95] The identity/practice point does not change the outcome and does not make this case distinct from *TWU #1*.

4. *TWU #1*: Public Confidence and the Public Interest

63. The LSBC tries to distinguish *TWU #1* on the basis that it would be approving discriminatory practices in the justice system (which "performs an essential role" in our democracy) and that the LSBC must "protect the public interest and confidence."[96]

64. Similar arguments were made in *TWU #1*.[97] In terms of ensuring equality within a pluralistic, secular society, the context of the justice system cannot be of greater importance than the educational system, which impacts the youngest Canadians.

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[89] BCCA Reasons, para. 154.
[90] BCCA Reasons, paras. 151, 156.
[91] LSBC Factum, para. 95.
[92] *TWU #1*, at paras. 25, 34, 69.
[93] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 [***Whatcott***] at para 123; BCCA Reasons, para. 161.
[94] *TWU #1*, at paras. 23, 25, 34, 35.
[95] *TWU #1*, at para. 25.
[96] LSBC Factum, para. 97.

65. The BC College of Teachers ("**BCCT**") unsuccessfully argued that approving TWU would be contrary to the public interest by creating the "perception that the BCCT condones this discriminatory conduct."[98] The BCCT could consider "discriminatory practices," but only if there was "specific", "concrete" evidence that admitting TWU graduates would negatively affect public education.[99]

66. The context of the justice system does not justify rejecting TWU graduates. Public confidence was not an issue when the Benchers voted to accept TWU graduates. Even when they decided to hold a referendum, the Benchers were prepared to accept the same result if at least 1/3 of members agreed. It is illogical that the public interest allowed the admission of TWU graduates in April and September of 2014, but now demands that they be excluded. If anything undermines public confidence in this case, it was the inconsistent decisions made by the Benchers, first by accepting and then by rejecting TWU graduates.

67. Furthermore, there is simply no evidence that admitting TWU graduates "will negatively impact public confidence" in any way.[100]

68. The LSBC freely and openly admits individuals with law degrees from institutions with a code of conduct similar to TWU, or who have views reflected in such codes. Law schools such as Boston College[101] and Notre Dame,[102] require adherence to religiously based codes of conduct containing provisions similar to the Covenant. This evidence was before the Benchers when they made the April decision.[103]

69. Accepting TWU graduates does not communicate the LSBC's "approval" or acceptance of the Covenant or its exclusionary effect any more than admitting individuals to the bar represents approval of their personal religious beliefs and conduct.

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[97] *TWU #1*, at paras. 5, 13, 18.
[98] *TWU #1*, at para. 18 (see also 5, 11, 19).
[99] *TWU #1*, at paras. 26, 32, 33, 36, 38, 42.
[100] LSBC Factum, para. 107.
[101] Phillips #1, Exhibit N ("…sexual activity outside the bonds of matrimony may be subject to appropriate disciplinary sanctions") **[RR, Vol. II, at 94]**.
[102] Phillips #1, Exhibit N ("….students who engage in sexual union outside of marriage may be subject to referral to the University Conduct Process") **[RR, Vol. II, at 106, 108]**.
[103] Phillips #1, Exhibit N **[RR, Vol. II, at 18]**.

D. THE *CHARTER*

1. Equality Concerns

70. The LSBC says that one of the "*Charter* interests" engaged is the "equality interests" or "equality rights" of LGBTQ individuals.[104] It argues that approving TWU graduates would undermine the LSBC's interest in promoting equality and harm the equality rights of LGBTQ people by: (a) impacting the substantive equality guarantee in the *Charter*; and (b) impacting human rights and human dignity.[105] To the contrary, allowing TWU graduates to practice law does not impact anyone's equality rights.

(a) Promoting Equality

71. Any general interest the state has in promoting national values such as equality does not equate to the protection of rights guaranteed under s. 15 of the *Charter*.[106] "Equality in its abstract sense is distinct from equality as a legal claim."[107] If the state's promotion of equality can override *Charter* rights, equality is no longer understood as "equality before the law."[108] It becomes a "guarantee of equality…between individuals or groups within society in a general or abstract sense" and will "impose on [private] individuals and groups an obligation to accord equal treatment," which was never the purpose of s. 15.[109]

72. The Decision to reject TWU graduates and marginalize the TWU community does not promote equality before the law. It treats them unequally based on their shared religious beliefs, practices and values. When the state "marginalizes [a person's] religious community in some

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[104] LSBC Factum, paras. 127, 131, 137, 139 ("equality interests"); 32, 72, 109, 181, 195, 202, 203, 220 ("equality rights").
[105] LSBC Factum, paras. 113-120, 130, 212.
[106] LSBC Factum, paras. 110, 158, 212, 223; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12 [***Loyola***] at paras. 47-48.
[107] Blair A. Major, "TWU Law: The Boundaries and Ethos of the Legal Community" (May 17, 2017) Alberta Law Review, Vol. 55, No. 1 [Forthcoming] at p. 21 **[RBoA, Tab 4]**.
[108] When Justice Abella states "equality, human rights and democracy — are values the state always has a legitimate interest in promoting and protecting", it is supported by reference to the Bouchard-Taylor report which says a liberal state cannot be indifferent towards values such as "equality of all citizens before the law" (emphasis added): *Loyola*, at paras. 46-47.
[109] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [***Andrews***] at 163-164.

way … it is denying her or his equal worth."[110] The LSBC does not promote equality by marginalizing TWU and its graduates because of their religion.

73. In any event, the Benchers did not make the Decision to promote equality. They made the Decision to appease LSBC members, permitting the "tyranny of the majority" to prevail.[111]

(b) Impact on the *Charter*'s Equality Guarantee

74. The LSBC now says it made the Decision to enhance equal access in law school admission for LGBTQ persons.[112] Even though it acknowledges that the *Charter* does not apply to TWU, the LSBC seeks to impose *Charter* obligations on TWU.

75. If the *Charter* applied to religious organizations like TWU, each of them would breach the *Charter*. However, TWU's private religious nature means that the Covenant cannot offend *Charter* rights.

76. Section 15(1) of the *Charter* does not "impose on individuals or groups an obligation to accord equal treatment to others."[113] The *Charter* cannot impose obligations on TWU to alter its religious code of conduct to provide "equal opportunity" for anyone to attend TWU on their own terms. As in *TWU #1*, the Covenant does not interfere with the s. 15(1) rights of others.[114]

77. The *Charter* does not protect individuals from the policies (i.e., the Covenant) of private parties (i.e., TWU).[115] The LSBC does not promulgate the Covenant, does not control its content, and is not responsible for its exclusionary effect. The LSBC cannot breach s. 15(1) by accepting graduates who adhere to the religious precepts expressed in the Covenant while attending TWU.

78. The LSBC's arguments rest on a false premise that recognition of TWU and its graduates transforms private, non-*Charter* engaging activities at TWU into public, *Charter*-engaging activities of the state. None of the authorities relied upon by the LSBC support this proposition.

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[110] *Loyola*, at para. 44 (citing Richard Moon).
[111] *TWU #1*, at para. 28 (citing *Big M Drug Mart* at pp. 336-37).
[112] LSBC Factum, paras. 109, 111, 203, 211, 212, 215, 222.
[113] *Andrews*, at pp. 163-164.
[114] *TWU #1*, at paras. 35-36.
[115] *Sagen v. Vancouver Organizing Committee for the 2010 Olympic & Paralympic Winter Games*, 2009 BCCA 522 at paras. 49, 52-56, leave to appeal to S.C.C. refused, 33439 (Dec. 22, 2009).

79. The LSBC's reliance on *Vriend* is misplaced.[116] *Vriend* did not address "…the failure of state actors to combat discrimination imposed by private parties…"[117] It concerned the failure of the legislature to extend the equal protection and benefit of the law under s. 15(1) of the *Charter* to LGBTQ individuals in human rights legislation.[118]

80. This is not analogous, since TWU (a private party) is alleged to be depriving LGBTQ individuals of access to its law school by implementing the Covenant (a private activity).[119] This Court in *Vriend* was clear that the constitutional challenge in that case did "*not concern the acts of King's College or any other private entity or person*."[120] The LSBC does not deny equal protection to anyone by admitting TWU graduates.

81. This is true whether TWU's law school adds a significant or insignificant number of seats to the overall number available in BC, Canada, or around the world.[121] *The LSBC is not providing the benefit of law school spaces*. TWU, not the LSBC, creates these seats.[122]

82. It is not enough for the LSBC to argue that if TWU operates a faculty of law, there may be numerically fewer opportunities created by TWU for LGBTQ students, or others who are not willing to sign the Covenant and be educated in an evangelical religious community.[123]

83. The *Charter* was not meant to homogenize or reduce the diversity of *private* actors.[124] Unless the opportunities created by TWU amount to a "benefit of the law" to which s. 15(1) applies, any exclusionary impact cannot infringe the *Charter*.[125] The private context in which TWU operates was central to this Court's reasoning in *TWU #1*, as it was to the BC Court of Appeal's reasoning.[126]

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[116] LSBC Factum, paras. 119-124.
[117] LSBC Factum, paras. 119-120.
[118] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [***Vriend***] at paras. 8, 26, 55, 76-77, 80-81.
[119] LSBC Factum, para. 111.
[120] *Vriend*, at para. 66 (emphasis added).
[121] LSBC Factum, para. 112.
[122] BCCA Reasons, para. 175.
[123] LSBC Factum, para. 112.
[124] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 [***Saguenay***] at para. 74.
[125] *Auton (Guardian ad litem of) v. British Columbia (Attorney General)*, 2004 SCC 78 at paras. 27-28.
[126] BCCA Reasons, paras. 173, 176, 178; *TWU #1*, at para. 34.

84. This context is fundamentally different from the cases the LSBC cites, all of which involved the violation of an equality right.[127] *Andrews* addressed a discriminatory membership criterion implemented by the LSBC, arising from a public statute. *Meiorin* dealt with a discriminatory hiring condition implemented by the BC Government.[128] *O'Malley* involved discrimination that was prohibited by human rights legislation.[129]

85. Those contexts are markedly different since there is no legal right to attend TWU on terms similar to a public, secular institution. There is no legal right that demands or protects "equal access" to a private, *Charter*-exempt, religious law school. To impose that on TWU would undermine the very rights the *Charter* is meant to protect.

(c) Impact on Human Rights, the Rights of Others, and Human Dignity

86. Admitting TWU graduates would not negatively impact the human right to equality, the rights of others, or human dignity.[130] The LSBC's arguments do not explain how such rights could actually be interfered with by accepting TWU graduates.

87. This Court said that "[s]tudents attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others."[131] The LSBC's decision to admit a TWU graduate to the BC bar could not conceivably affect others' dignity or interfere with their rights in any way. Accepting TWU graduates does not result in anyone "being excluded" from the legal profession.[132]

88. As in *TWU #1*, the Covenant does not interfere with the rights of others.[133] There is no right to attend a private religious institution such as TWU on terms similar to that of a public secular institution.

89. Importantly, the LSBC does not cite the BC *Human Rights Code* as a public interest consideration, even though it must consider that legislation in determining what was in the public

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[127] LSBC Factum, paras. 135-138.
[128] *British Columbia (Public Service Employee Relations Commission) v. BCGSEU*, [1999] 3 S.C.R. 3 [***Meiorin***] at paras. 2, 83.
[129] *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 [***O'Malley***].
[130] LSBC Factum, paras. 26, 110, 113-119, 123, 130, 171.
[131] *TWU #1*, at para. 35.
[132] LSBC Factum, para. 143; BCCA Reasons, paras. 173-175.
[133] *TWU #1*, at paras. 25, 33-35.

interest.[134] The LSBC was required to consider "the place of private institutions in our society" and TWU's protections under the *Human Rights Code* and the *Charter* as previously recognized by this Court.[135] Pursuing secular values, such as equality and dignity must include respecting the right to "manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."[136]

90. TWU and the Covenant are protected by s. 41 of the *Human Rights Code*, a rights granting section that "accommodates religious freedoms" and protects religious association.[137]

91. The LSBC must also consider that s. 14 of the *Human Rights Code* prohibits it from discriminating by excluding "any person from membership" because of religion. The Decision clearly has an exclusionary impact based on religion. It discriminates against those who choose to be educated within an evangelical community.

92. In the context of a private, religious, educational community, the Covenant does not marginalize or injure the dignity of LGBTQ persons. The Covenant requires all members of TWU's community to "treat all persons with dignity, respect and equality, regardless of personal differences."[138] The evidence before the LSBC was that some LGBTQ persons choose to attend TWU.[139]

2. Section 2 *Charter* Freedoms

(a) Overview

93. The LSBC acknowledges that the Decision negatively impacts *Charter* rights, but says this occurs only at the "outer reaches" and "periphery" of the religious and associational rights of TWU and its religious community.[140] The LSBC presents an impoverished view of religious and

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[134] *TWU #1*, at paras. 27-35.
[135] *TWU #1*, at paras. 25, 29, 32, 34, 35, 42.
[136] *Loyola*, at para. 43.
[137] *Human Rights Code*, R.S.B.C. 1996, c. 210; *TWU #1*, at para. 28; *Caldwell v. Stuart*, [1984] 2 S.C.R. 603 at 626-628; *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 [***Vancouver Rape Relief Society***] at para. 84, leave to SCC refused, 31633 (Feb. 1, 2007).
[138] Wood #1, para. 75, Exhibit C **[AR, Vol. III, at 394, 401-405]**.
[139] Affidavit #1 of Iain Cook ("**Cook #1**") **[RR, Vol. V, at 66-75]**; Affidavit #1 of Arend Strikwerda ("**Strikwerda #1**") [**RR, Vol. V, at 145-153]**; Affidavit #1 of Austin Davies ("**Davies #1**") **[RR, Vol. V, at 8-17]**.
[140] LSBC Factum, paras. 7, 9, 21, 146, 162, 182, 219 (see also 6, 22, 162, 202, 203, 214).

associational rights. It is based on an incorrect understanding of the beliefs and practices at TWU. It also incorrectly presupposes that, as a state actor, it can determine what is and what is not religiously significant within the TWU community.

(b) Sincere Religious Beliefs and Practices

94. In order to be protected by s. 2(a) of the *Charter*, a claimant is only required to have a practice or belief that "calls for a particular line of conduct," irrespective of whether that practice or belief is "mandatory or perceived-as-mandatory."[141]

95. Arguments about what beliefs and practices are "necessary" or "required" within TWU's religious community are misguided and contrary to our *Charter* jurisprudence.[142] Even if adhering to the Covenant is reduced to something that evangelicals "*may prefer*", (which is contrary to the evidence) it does not mean constitutional protection is lost or diminished.[143]

96. The Covenant "reflects the core teachings of evangelical Christian theology."[144] Consistent with these historic and current beliefs, evangelical educational communities expect their members to abstain from intimacy outside of opposite-sex marriage as an act of obedience to God.[145] The sincere beliefs of evangelical Christians include "the belief in the importance of being in an institution with others who either share that belief or are prepared to honour it in their conduct."[146] This is not an optional add-on to education at TWU. It is core to the "religious beliefs and way of life advocated by TWU and its community of evangelical Christians."[147]

(c) Interference with Religious Freedom, Expression, and Association

97. For the reasons set out in the Ontario Factum, the Decision breaches s. 2(a), s. 2(b) and s. 2(d) of the *Charter*. The Decision (a) not only impedes, but categorically denies, TWU graduates

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[141] *Syndicat Northcrest v. Amselem*, 2004 SCC 47 [***Amselem***] at paras. 47-50, 56.
[142] LSBC Factum, paras. 15, 17, 37, 148-149, 157-158, 163, 209.
[143] LSBC Factum, para. 158 (emphasis added).
[144] BCCA Reasons, para. 103; Greenman #1, paras. 58-60 **[AR, Vol. II, at 236-237]**.
[145] Greenman #1, paras. 24, 42, 43, 54, 61 **[AR, Vol. II, at 224, 230-231, 235, 237]**; Reimer #1, paras. 28, 32, 54, 55 **[AR, Vol. II, at 244-245, 250-251]**; BCCA Reasons, para. 176; BCSC Reasons, para. 24.
[146] *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 [**NSSC Reasons**] at para. 235.
[147] BCCA Reasons, para. 103.

certification as practicing lawyers, and (b) requires TWU to change its religious character and abandon the Covenant in order for its graduates to access the legal profession.

The Threshold for an Impact

98. Any burden "capable of interfering with religious belief or practice" infringes s. 2(a).[148] This includes a state measure that "increases the cost" of a religious belief or practice, including coercion, constraint, "money, tradition or inconvenience," as well as indirect measures that "limit alternative courses of conduct available to others."[149] The Decision denies the generally available recognition and professional certification because of TWU's religious character.[150]

99. The LSBC minimizes, or ignores altogether, the significant and negative impact on members of the TWU religious community as a result of their commitment to live in accordance with shared religious precepts.

The Impact on Students

100. Students mainly attend law school to become lawyers.[151] Most choose TWU because of shared beliefs. In attending TWU, they adhere to shared religious beliefs and practices. The Decision penalizes them for it. Forfeiting the "state-granted privilege"[152] of practicing law is a "severe" impact for attending TWU's law school.[153]

101. Freedom of religion protects evangelical students who share religious beliefs; those students and non-evangelicals who choose to associate with TWU are protected by freedom of association. They are also penalized for TWU's expression of its religious beliefs and commitments through the Covenant. These freedoms "should be respected."[154]

102. The Decision "places a burden on members of a particular religious group … [and prevents] them from expressing freely their religious beliefs and associating to put them into

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[148] *Saguenay*, at para. 85 (citing *Edwards Books*).
[149] *Amselem*, at para. 58; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 [***Hutterian Brethren***] at para. 95; *Loyola*, at para. 58 (citing *Big M Drug Mart*).
[150] *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. ____ (2017).
[151] BCCA Reasons, para. 169.
[152] *R. v. N.S.*, at para. 93 (Abella J., dissenting).
[153] BCCA Reasons, paras. 168, 191.
[154] *TWU #1*, at para. 36.

practice."[155] The Decision impairs the ability of the TWU community and its members to freely and openly teach and practice their beliefs "without fear of hindrance or reprisal."[156] Being forced to choose between a religiously grounded education and being qualified to practice law is not a "meaningful choice" at all.[157]

The Impact on TWU and its Community

103. The LSBC admits the Decision affects TWU's ability to maintain its religious perspective on marriage, but says the impact is "minimal."[158] It wrongly says that because the Covenant seeks to control the "behaviour of LGBTQ students *outside* of the law school," *Charter* protections are only peripherally affected.[159] The LSBC would restrict *Charter* protection to only certain private religious practices like "prayers and basic sacraments."[160]

104. These arguments reflect an impoverished view of s. 2(a) and do not account for the communal aspects of religion. The LSBC ignores that the alleged "discriminatory barrier"[161] is the concrete embodiment of TWU's religious beliefs by which its members associate and collectively practice and express their religious identity. It also ignores the evidence about the significance of the Covenant to TWU, its mission as an arm of the church and its religiously-based education. It is artificial and improper to suggest that certain beliefs can be separated and treated in isolation from the broader communal religious commitments expressed in the Covenant.

105. Additionally, the LSBC disregards the same identity/practice distinction for evangelicals that the LSBC says it is obliged to respect for LGBTQ people.[162] Excluding all TWU graduates because of their commitment to, and association with, a religious educational community with evangelical beliefs about marriage cannot be distinguished from rejecting them on the basis of religion.

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[155] *TWU #1*, at para. 32.
[156] *TWU #1*, at para. 28 (citing *Big M Drug Mart* at pp. 336-37); *Whatcott*, at para. 159.
[157] LSBC Factum, paras. 21, 142, 192.
[158] LSBC Factum, paras. 22, 146, 219.
[159] LSBC Factum, paras. 21, 151 (emphasis in original) (see also 14, 161, 172).
[160] LSBC Factum, paras. 170-171.
[161] LSBC Factum, para. 173.
[162] LSBC Factum, para. 179 (see also 25, 33, 115, 117).

106. The Decision, as well as the LSBC's actions to improperly pressure and convince TWU to change the Covenant, interferes with the manner in which TWU and its community teach and learn in an evangelical Christian environment.[163]

107. TWU should not be compelled to abolish or change its Covenant to appease a portion of the LSBC membership. This will not magically make TWU graduates worthy of entering the bar. Attending TWU is already optional. The LSBC is not permitted to tinker with the codes of conduct that govern religious communities. It can reject graduates when there is specific evidence they would be unfit or ill-prepared for the profession or if it is shown that accepting them would cause discernable harm, based on concrete evidence. Otherwise the state would be remaking religious communities in its own image.[164]

108. It is not the state or the Court's role to determine the parameters of religious belief and practice. The state is not "the arbiter of religious dogma."[165] It is improper for the LSBC to presume to determine what religiously based conduct is unacceptable.[166] "A single objectionable belief cannot be surgically targeted without publicly condemning and, to some extent marginalizing, the entire religious community."[167] As with the BCCT's focus on "discriminatory practices," this is an improper and "disturbing" focus on TWU's "sectarian nature."[168]

109. Freedom of religion encompasses the right to establish and maintain autonomous communities of faith, "'an issue at the very heart of protection' of freedom of religion."[169]

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[163] BCCA Reasons, para. 19; Wood #1, para. 67 **[AR, Vol. III, at 392]**; Reimer #1, paras. 34-54 **[AR, Vol. II, at 245-250]**.

[164] Mark A. Witten, "Tracking Secularism: Freedom of Religion, Education, and the Trinity Western University Law School Dispute" (2016) 79:2 Sask L Rev 215 ("**Witten**") at 262 **[RBoA, Tab 7]**.

[165] *Amselem*, at para. 50.

[166] The LSBC urges the Court to consider the Covenant's impact on women and their reproductive rights based on their interpretation of a nonspecific provision of the Covenant (LSBC Factum, paras. 41, 61, fn. 2).

[167] Witten, at 262.

[168] *TWU #1*, at para. 42.

[169] *Loyola*, at para. 93 (citing *Hutterian Brethren*); *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [***Mounted Police***] at para. 64; *Hutterian Brethren*, at para. 131 (Abella J., dissenting).

110. Autonomy is about independence, not isolation. Private communities and societies are held together and strengthened by mutually observed rules to which members voluntarily adhere. In a free and democratic society, the right to establish standards for admission and membership belongs solely to those communities.[170] Self-regulation of group membership is at the heart of religious group autonomy; there is no general right to join a religious organization.[171]

111. By joining a religious body, a person voluntarily accepts that community's shared religious standards. The Covenant, like other religious codes of conduct, sets expectations for appropriate conduct within the TWU community. It is central to its character and identity, and is part of how education is delivered in a Christian context at TWU.[172] "[N]othing in it is marginal to evangelical moral concerns."[173]

112. The evidence before the LSBC showed that codes of conduct benefit religious communities such as TWU by: (a) providing members with a sense of meaning and belonging; (b) increasing the strength of the evangelical religious group; (c) facilitating, encouraging, and supporting students' moral and spiritual growth; and (d) fostering a campus atmosphere that integrates faith and learning.[174]

113. Evangelicals believe they should carry their beliefs into educational communities, among other areas of life, as part of transmitting and strengthening commitment to those beliefs and

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[170] John Locke, *A Letter Concerning Toleration*, 3d ed. by J.W. Gough (Oxford: Basil Blackwell, 1966) at 132 (the right to make rules "belong to none but the society itself") **[RBoA, Tab 3]**; *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165 at 168, 192 ("The courts are slow to exercise jurisdiction over the question of membership in a voluntary association, especially a religious one….We also must remember that voluntary associations are meant largely to govern themselves, and to do so flexibly.").

[171] Norton, Jane Calderwood, *Freedom of Religious Organizations* (Oxford: Oxford University Press, 2016) ("**Norton**") at pp. 29, 30, 37-38 **[RBoA, Tab 5]**.

[172] BCCA Reasons, para. 103 (see also 104-105).

[173] BCCA Reasons, para. 103; Greenman #1, paras. 58, 59 **[AR, Vol. II, at 236-237]**.

[174] Longjohn #1, Exhibit C at 24-25 **[RR, Vol. I, at 49-50]**; Reimer #1, paras. 38-40 **[AR, Vol. II, at 246-247]**; BCCA Reasons, paras. 104-105. See footnote 8, *supra*.

values. As found by Chief Justice Hinkson, TWU's educational approach is to "educate the whole person, including students' characters" with a Christian ethos.[175]

114. Religious communities with behavioural expectations have "greater strength and vitality" because they are distinctive.[176] The Decision, with its emphasis on requiring TWU to abandon the Covenant, interferes with the character and vitality of TWU's religious community. "Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom."[177]

115. Unless TWU amends or abandons its Covenant, there will be no ability to form a religious community to study law.[178] The ability to form and maintain a self-defined religious community is at stake. Not, as argued by the LSBC, an ability to avoid "exposure to other beliefs, viewpoints or practices."[179] Such arguments misunderstand both the nature of religious communities and the nature of the *Charter* infringements.

116. The Decision hinders and interferes with the ability of members of TWU's community to practice and strengthen their religious commitments at law school. Individuals (including some LGBTQ persons) attend TWU specifically because TWU and its community, through the Covenant: (a) provides a supportive and safe learning environment to practice, develop, and remain faithful to their religious convictions; (b) allows students to better pursue their educational and spiritual goals; and (c) respects their minority evangelical beliefs without being ridiculed for them.[180]

117. LGBTQ evangelicals find that TWU is a unique environment in which they can strengthen their religious beliefs, find self-acceptance, and reconcile their sexuality and faith in a hospitable environment.[181]

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[175] BCSC Reasons, para. 25; Taylor #1, para. 48 **[RR, Vol. I, at 165]**.
[176] Reimer #1, paras. 45, 50 **[AR, Vol. II, at 248, 250]**.
[177] *Loyola*, at para. 67; *Mounted Police*, at para. 64.
[178] *TWU #1*, at paras. 32, 35.
[179] LSBC Factum, para. 153.
[180] Affidavit #1 of Sabrina Ferrari ("**Ferrari #1**"), paras. 23-25 **[RR, Vol. I, at 5]**; Strikwerda #1, paras. 18-19 **[RR, Vol. I, at 148]**; Davies #1, paras. 16, 20-21, 30-33, 36 **[RR, Vol. I, at 11-15]**; Cook #1, paras. 19-20 **[AR, Vol. II, at 210]**.
[181] Strikwerda #1, paras. 18-19 (see also 17, 20-23) **[RR, Vol. I, at 148-149]**. See also Cook #1, paras. 19, 22-25 **[AR, Vol. II, at 210-211]**.

118. The Decision hinders and interferes with the shared expression of religious beliefs, the ability of all members of TWU's religious community to practice and strengthen their religious commitments, and the association they have created on the basis of those commitments.

(d) State Neutrality

119. The state must not condemn, hinder, or take a position on religious matters. The LSBC violates state neutrality in attempting to convince, pressure, and condemn the TWU community to abandon its religious perspective and practices on marriage in order for TWU to gain acceptance of its graduates.

120. Before making its initial decision in April, the LSBC pressured TWU to change its Covenant.[182] When the Decision was made, the Bencher who initiated the motion to reject TWU graduates suggested that TWU amend the Covenant.[183] After the Decision was made, the LSBC defended its rejection of TWU graduates based on its "disapproval" and "condemnation" of the religious foundations of TWU and its view that the TWU community's shared religious beliefs are "disrespectful", "derogatory", and "harmful."[184] Ultimately, it called the law school "tainted" by the Covenant.[185]

121. This is not neutrality. The LSBC did not "abstain from taking any position" on religious beliefs.[186] The LSBC is not being respectful or "neutral," but penalizing the TWU community for its religious character and the expression of its religious beliefs and commitments.

3. Section 15(1) of the *Charter*

122. The LSBC does not address its own obligations under s. 15(1) of the *Charter* to the members of the TWU community. The Decision's impact on the equality of rights of TWU

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[182] BCCA Reasons, para. 19; Phillips #1, Exhibit Q **[RR, Vol. II, at 164]**.
[183] BCCA Reasons, paras. 30, 176; McGee #2, Exhibit R **[AR, Vol. VII, at 1277]**.
[184] LSBC BCSC Written Argument filed August 5, 2015, paras. 401, 430, 482, 540 **[RR, Vol. V, at 96-99]**; LSBC Amended Response to Petition, para. 253 **[Appellant's Supplementary Record ("ASR") at 41]**.
[185] LSBC Amended Response to Petition, para. 183 **[ASR at 183]**.
[186] *Saguenay*, at paras. 72, 73.

graduates is inconvenient to, and contradicts, the LSBC's argument that it acted to ensure "equality of opportunity to participate in the legal profession."[187]

123. As set out in the Ontario Factum, the LSBC is not providing equal opportunity and equal benefit of the law to TWU graduates. Rejecting TWU graduates because they earned their degree from a religious school infringes s. 15(1). TWU's students' dignity is harmed when they are "marginalized, ignored, or devalued" by the LSBC.[188] But for adhering to the religious beliefs contained in the Covenant, these graduates would be admitted to LSBC membership.

E. PROPORTIONALITY

124. The breaches of the respondents' *Charter* rights cannot be justified using a robust proportionality analysis. It is not the Covenant that needs to be justified,[189] but the infringement of the rights of TWU's community. For the reasons stated herein and in the respondents' Ontario Factum, a decision to exclude TWU graduates from the bar is disproportionate.

1. Statutory Objective

125. Identifying the relevant statutory objective involves considering the objectives in the *LPA* that are relevant in the context of the Decision.

126. In context, the relevant statutory objectives under the *LPA* are competence, academic qualification, and professional preparedness. More specifically, under the LSBC's binding rule, the Decision is only about whether TWU graduates have satisfactory "academic qualifications" to enter the bar. It is about the quality of a graduate's education. The LSBC accepts that TWU graduates are qualified to become lawyers; otherwise it would never have made the April decision to accept them. There is nothing deficient in TWU's program.

127. The LSBC's rule derives from the Benchers' authority in ss. 20 and 21 of the *LPA* to set "academic requirements" for applicants. The public interest in the administration of justice is upheld by ensuring and maintaining the competence of lawyers (s. 3(b) and (c)). To the extent the public interest informs the statutory objective, it is with respect to ensuring that the public is

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[187] LSBC Factum, para. 126.
[188] *Law v. Canada (Minister of Employment and Immigration)*, [1999] 1 S.C.R. 497 at para. 53.
[189] LSBC Factum, para. 15 ("These admission and disciplinary policies cannot be justified…").

served by a competent and professional bar.[190] Indeed, the legal opinion received by the LSBC was that "…under Rule 2-27(4.1), the [LSBC] is confined to acting on grounds that are related to the academic qualification to be offered by the proposed law program and it is not authorized to impose the community covenant condition on unrelated grounds."[191]

128. The LSBC no longer argues that it made the Decision pursuant to the *LPA*'s objective in s. 3(a) of the *LPA* to uphold the public interest by "preserving and protecting the rights and freedoms of all persons", because this justification is untenable.[192] The LSBC cannot achieve the objective of upholding rights by breaching rights.

129. The LSBC now identifies different public interest objectives of "ensuring public confidence that the legal system is open to everyone without discrimination," and advancing equal opportunity to attend law schools.[193]

130. Neither of these objectives appears in the *LPA*. Under the *LPA*, the LSBC is the regulator of the *legal profession* in BC. It is not the regulator of law schools or "the legal system." An objective that claims authority over law school policies is not a *statutory* objective.

131. The LSBC's duty to treat individuals equally is met when applicants are not discriminated against when applying to the LSBC. The LSBC has no statutory duty to ensure that its membership reflects particular proportions of individuals based on race, gender, religion, sexual orientation, or any other personal characteristic.

132. It also has no duty to ensure "equal access" within educational institutions. To become a lawyer, one must complete high school, attend an undergraduate university program, and then complete law school. At each stage, those wishing to become lawyers may choose to attend a private religious school which, by its nature, excludes those not sharing its religious ethos. This

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[190] *Pierce v. The Law Society of British Columbia*, 1993 CanLII 765 at para. 48 (p. 24-25, 27-28), 103 D.L.R. (4th) 233 (B.C.S.C.).
[191] Affidavit #1 of K. Jennings ("**Jennings #1**"), Exhibit A **[RR, Vol. III., at 113]**.
[192] This had been argued in the courts of the lower levels (see Amended LSBC Response to Petition, paras. 1, 8, 115, 248, 319 **[ASR at 2, 3, 19, 40, 50]**; LSBC BCSC Written Argument filed August 5, 2015, paras. 2, 4, 274, 626 **[RR, Vol. V, at 94-95, 100]**; BCCA Reasons, para. 165).
[193] LSBC Factum, paras. 6, 101, 102.

does nothing to undermine their education. Neither does it permit the LSBC to deny their credentials when they arrive at the LSBC as applicants for admission to the bar.

133. There is no overriding public interest justification to breach the *Charter*. The public interest cannot require that TWU cease to exist as a religious institution, based on its shared religious commitments. TWU is *mandated* to provide Christian university education by the same authority that delegated its power to the LSBC: the BC legislature.[194] The BC legislature also protects the Covenant under the *Human Rights Code*. Parliament, through the *Civil Marriage Act*, has declared that diverse views of marriage (including evangelical views) are not contrary to the public interest.[195] The Federation and this Court have also recognized that there are no public interest reasons to deny TWU graduates based on a religious belief about marriage.[196] "Acting in the 'public interest' does not mean making a decision with which most members of the profession or public would agree."[197]

2. Rational Connection

134. Excluding graduates based on protected grounds – for reasons unrelated to merit – is arbitrary, and does not achieve the objective of ensuring a competent bar.[198] No one has suggested that TWU graduates should not become lawyers, or that there would be anything deficient in legal education at TWU.

135. Even if there were an obligation to ensure "equality of opportunity" in private law schools, rejecting TWU graduates based on their adherence to religious practices is inimical to this aim.[199] The state cannot be permitted "to justify a discriminatory distinction on the basis of presumptions which are, themselves, discriminatory."[200] The LSBC cannot remedy discrimination by discriminating.

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[194] *Trinity Western University Act*, S.B.C. 1969, c. 44, s. 3(2), as amended.
[195] *Civil Marriage Act*, S.C. 2005, c. 33, Preamble, s. 3.1; *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras. 50-54.
[196] *TWU #1*, at para. 35; BCSC Reasons, at para. 33; McGee #2, Exhibit C **[AR, Vol. VI, at 1037-1038]**.
[197] BCCA Reasons, para. 165.
[198] *Roncarelli v. Duplessis*, [1959] S.C.R. 121 at 141 (Rand J.), 183-184 (Abbott J.).
[199] LSBC Factum, paras. 101, 126.
[200] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 569 (L'Heureux-Dubé, dissenting).

136. This is also why the Decision does not achieve an alleged objective of "ensuring public confidence that the legal system is open to everyone *without discrimination*."[201]

137. The Decision is arbitrary. The LSBC already accepts graduates of: (a) religious U.S. law schools with policies similar to the Covenant;[202] and (b) TWU's undergraduate programs, since the national requirement requires two years of undergraduate studies.[203]

138. Further, as found by the Federation and accepted by the BC Court of Appeal:[204] (a) TWU will be an attractive option for some students, irrespective of their sexual orientation; (b) accepting TWU graduates will not result in fewer choices or opportunities for anyone or, put another way, rejecting TWU graduates benefits no one; and (c) an overall increase in law school spaces is certain to expand choices for all students. There is simply no evidence that a negative impact on access to the profession would result.

139. In any event, the LSBC's arguments are inconsistent as to whether any exclusionary impact is acceptable. In some instances, the LSBC says that it is.[205] Other times, it says that TWU can maintain the Covenant provided there is no exclusion.[206] This inconsistency arises because the LSBC targets only parts of the Covenant, without an appreciation for the fact that the religious foundation of TWU (or any other religious community) necessarily results in an exclusionary impact on religious and other grounds. If no exclusionary impact is permissible, religious communities will be significantly undermined.

3. Minimal Impairment

140. The LSBC is obligated to demonstrate that it is impairing *Charter* rights as little as possible. It has not done so.

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[201] LSBC Factum, para. 6 (emphasis added).
[202] NSSC Reasons, paras. 41-43; Buckingham #1, paras. 73-77 **[AR, Vol. III, at 464-465]**, Exhibits EE, FF [**RR, Vol. III, at 62-80]**; Phillips #1, para. 24, Exhibit N **[AR, Vol. IV, at 588; RR, Vol. II, at 85-109]**.
[203] Jennings #1, Exhibit B at 47 **[RR, Vol. III, at 133]**.
[204] BCCA Reasons, para. 174.
[205] LSBC Factum, paras. 191 and 193.
[206] LSBC Factum, paras. 214(b), 214(c).

141. For the reasons given in the Ontario Factum, a complete ban on admitting TWU graduates is not minimally impairing. The LSBC has not demonstrated that "*only a full prohibition* will enable it to achieve its objective."[207]

142. *Charter* rights must be "limited no more than is necessary" to achieve the relevant statutory objective.[208] Rejecting TWU graduates is not necessary or even helpful to achieve the goal of developing competent lawyers fit to practice law or protecting public confidence in the administration of justice. The *Charter*, the *Human Rights Code*, and the equality concerns raised do not require the LSBC to exclude TWU graduates. Indeed, the fact that LSBC admits students from other law schools with similar codes of conduct to TWU undermines any assertion that the Decision is necessary to achieve those objectives.

143. The Benchers' decisions from April and September show that the Decision does not give effect "as fully as possible" to the rights of TWU's graduates. Their decision to accept and admit TWU graduates shows that it is not contrary to the public interest under the *LPA* to do so. As such, it is not necessary to breach *Charter* rights for the LSBC to "uphold and protect the public interest in the administration of justice."[209]

144. The fact that the Benchers would have accepted either outcome of the referendum also shows that accepting TWU graduates was consistent with the public interest. It cannot be *required*[210] to infringe upon TWU and its community's *Charter* rights if the Benchers had determined that either outcome was reasonable.[211] The LSBC cannot now say that pursuing its statutory objectives requires overriding religious, expressive, and associational freedom.

145. The Decision excludes the ability of TWU graduates to practice law, which is a significant infringement.[212] Their rights are not "meaningfully protected."[213] They are not protected at all.

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[207] *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199 at para. 163 (emphasis added).
[208] *Loyola*, at para. 4.
[209] *LPA*, s. 3.
[210] LSBC Factum, para. 207.
[211] BCCA Reasons, paras. 27 (either result "does not constitute a breach of their statutory duties, regardless of the results of the Referendum"), 86, 90.
[212] *Andrews*, at pp. 201, 204.

146. There are other ways the LSBC can pursue equality in the legal profession. Graduates of TWU's law school will be required to swear the Barristers' and Solicitors' Oath, just like every other lawyer, promising to "uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and the province of British Columbia."[214] Graduates of TWU will be bound by all of the same professional rules governing the practices of lawyers, including those related to discrimination. The LSBC has an Equity Ombudsman that works with the LSBC to reduce discrimination within the profession.[215]

147. The LSBC flips the notion of accommodation of rights on its head. It suggests TWU must change its religious character in order to win acceptance for its graduates.[216] It now says that religious beliefs "can be accommodated" if TWU amends the Covenant and does not create "unequal barriers" to law school.[217] This misunderstands the LSBC's legal obligations. The LSBC has a duty to accommodate religious beliefs, practices and communities. TWU does not have a reciprocal duty to accommodate.[218]

148. That evangelicals can attend other law schools does not mean the Decision accommodates the infringed religious rights.[219] The Decision prohibits evangelicals from practicing law if they obtain a degree from the one law school many of them would prefer for religious reasons. This is not accommodation. Neither does it recognize the associational rights of the TWU community. Their "freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society."[220]

4. Proportionality

149. The Decision was disproportionate. The severe impact on TWU and its students outweighs any perceived benefits of the Decision.

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[213] LSBC Factum, para. 215.
[214] Affidavit #1 of Jeffrey G. Hoskins, Exhibit D **[RR, Vol. V, at 92]**; Affidavit #1 of N. Hebert ("**Hebert #1**"), paras. 19-20 **[RR, Vol. I, at 143-144]**.
[215] Phillips #1, Exhibit N **[RR, Vol. II, at 17, 50-51]**.
[216] LSBC Factum, para. 214(b) and (c).
[217] LSBC Factum, para. 190.
[218] *R. v. N.S.*, at paras. 51, 52.
[219] LSBC Factum, paras. 183-185.
[220] *TWU #1*, at para. 35.

Impact on TWU and its Community

150. As found by the BC Court of Appeal, the deleterious effects of the Decision are significant. TWU graduates "could not apply to practise law in this province."[221] The Minister's revocation of his consent for the *juris doctor* degree as a result of the Decision "represents at this time a complete bar to TWU operating a law school."[222]

151. The LSBC argues that the impacts on religious association are minimal. For example, it states that the terms of the Covenant are not grounded in religious beliefs,[223] which is contrary to the uncontroverted evidence and the findings of the lower courts.[224]

152. The LSBC's arguments are also based on its own redefinition of what is religiously important or significant within the TWU community. Its arguments about the lack of impact on religious practices, "exposure to other beliefs," the relevance of conduct within the TWU community and what it means to "teach law from a religious perspective"[225] are grounded in the LSBC's secular judgment of what is important to TWU's religious community. TWU and its community are entitled to determine what their shared religious beliefs require of them. The LSBC is not entitled to make such judgments.

Failure to Consider Rights

153. The Decision was not proportionate because the Benchers failed to consider the rights affected.[226] A decision is disproportionate if there was no balancing or weight given to the *Charter* rights engaged by it.[227] Unlike at the April Meeting, in October the Benchers did not even consider the *Charter* when they made the Decision.

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[221] BCCA Reasons, para. 168.
[222] BCCA Reasons, para. 168.
[223] LSBC Factum, para. 165.
[224] BCCA Reasons, para. 103.
[225] LSBC Factum, paras. 153, 164, 170-171, 173.
[226] Phillips #1, Exhibits P, R, and AA **[RR, Vol. II, at 114-163, 165-166, 182-194]**; Affidavit #2 of Earl Phillips, Exhibit A **[RR, Vol. IV, at 67-168, Vol. V, at 1-90]**.
[227] *Loyola*, at para. 68; *TWU #1*, at para. 33.

Endorsing or Condoning Discrimination

154. Allowing TWU graduates to become lawyers would not harm the dignity of LGBTQ people (or anyone else) by "endorsing or facilitating discrimination" or "sending a message" that the Covenant's "exclusionary impact" is "accepted, condoned, or even encouraged."[228]

155. The LSBC's position is incongruous. It is prepared to accept TWU graduates if the Covenant is amended, even though some students "would feel 'unwelcome'" learning in a religious school.[229] But according to the LSBC's logic, this would mean the LSBC would be endorsing and condoning an exclusionary impact.

156. The endorsement argument is inconsistent with the LSBC's obligation to be neutral in matters of religion. State neutrality requires the LSBC to neither endorse nor reject TWU's sectarian nature. It is not permitted to approve or endorse the Covenant, so regulatory acceptance of TWU graduates cannot be reasonably understood as an endorsement.

157. Even if TWU amended the Covenant's clause on marriage as demanded by the LSBC so that its graduates can be admitted to the bar, the LSBC's arguments would mean that it is still endorsing or condoning the Covenant's other aspects. Allowing TWU graduates to become lawyers is not an endorsement or encouragement of any of the religious beliefs in the Covenant.[230] It would be absurd to conclude that the LSBC would endorse TWU's position that the Bible is "divinely inspired" or that individuals should "make personal choices according to biblical priorities" simply by admitting its graduates.[231] It is equally unreasonable to argue the LSBC endorses TWU's religious views on marriage by doing so.

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

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[228] LSBC Factum, paras. 40-42, 119, 193 (see also 106, 117).
[229] LSBC Factum, para. 191.
[230] BCCA Reasons, para. 183.
[231] Wood #1, Exhibit C **[AR, Vol. III, at 401, 404]**.

159. This argument was unsuccessful in *TWU #1*.[232] It also failed at the BC Court of Appeal because the ramifications in a free and pluralistic society are unacceptable:

> If regulatory approval is to be denied based on the state's fear of being seen to endorse the beliefs of the institution or individual seeking a license, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question.[233]

160. Accepting TWU graduates would not harm anyone's dignity. Conversely, barring TWU graduates will not protect anyone's dignity, but rather causes harm to the dignity of evangelical Christians.

Private Religious Associations

161. The nature of TWU as a private association is an important consideration. Saying that a voluntary private community cannot result in exclusion misunderstands the nature of private associations.[234] Private communities and societies, like religious ones with codes of conduct, consist of individuals voluntarily opting in (and others opting out). Freedom of association necessarily includes freedom from association.[235] When the state interferes with the criteria on which individuals join religious groups, it interferes with the forming of religious associations.[236]

162. The notion that the *Charter* could be used in a manner that constrains private actors and associations contradicts the idea of constitutionally constrained government. The *Charter* is "not intended to cover activities by non-governmental entities created by government for legally facilitating private individuals to do things of their own choosing..."[237] It is important that private associations be given the freedom and autonomy to govern themselves, without having *Charter* obligations imposed on them indirectly.

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[232] *TWU #1*, at paras. 18, 25 (see also 12, 32, 36, 38).
[233] BCCA Reasons, para. 184.
[234] LSBC Factum, para. 214(c).
[235] *R. v. Advance Cutting & Coring Ltd.*, 2001 SCC 70; *Vancouver Rape Relief Society*, at para. 84 (Southin J.).
[236] Norton, at p. 38 **[RBoA, Tab 5]**.
[237] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 269.

163. This case is not like the American case of *Bob Jones University v. United States*.[238]

164. *Bob Jones* involved state financial support (i.e., a tax exemption) for a school. TWU is not seeking financial assistance or other support. It seeks only recognition for its graduates.

165. In *Bob Jones*, a penalty was imposed on the school for conduct of the university. No one refused to recognize its graduates' qualifications. That case does not support a principle "that discretionary decision-makers should deny public benefits to private applicants."[239]

166. In any event, the anti-miscegenation, segregationist ethos reflected in *Bob Jones* is not comparable to evangelical beliefs on marriage. TWU and its community hold beliefs that are long-standing and protected in Canadian law, unlike those in *Bob Jones*. Unlike anti-miscegenation rules, the purpose of evangelical beliefs and rules were not to "[force] segregation on an oppressed minority."[240] TWU's beliefs about marriage are widely held and have been inherent in the Christian and Western legal tradition for thousands of years and are recognized in the *Civil Marriage Act*.[241] The *Income Tax Act* also protects the status of religious charities for exercising their religious position on marriage, which alone distinguishes *Bob Jones*.[242]

The Extent of the Differential Impact

167. The LSBC says LGBTQ students would be unequally impacted "compared to heterosexual students."[243] This is without evidentiary foundation and an overstatement.

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[238] LSBC Factum, paras. 198-200. The status of *Bob Jones* in U.S. jurisprudence is unclear: see *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. __ (2017) at p. 15 ("The State has pursued its preferred policy to the point of expressly denying a qualified religious entity a public benefit solely because of its religious character. Under our precedents, that goes too far.").

See also Mary Anne Waldron QC, "Analogy and Neutrality: Thinking about Freedom of Religion" in Dwight Newman, ed., *Religious Freedom and Communities* (LexisNexis, 2016) **[RBoA, Tab 6]**.

[239] BCCA Reasons, para. 182.

[240] BCCA Reasons, para. 178.

[241] Greenman #1, para. 13 **[AR, Vol. II, at 221; RR, Vol. IV, at 74]**; *Reference re: Section 293 of the Criminal Code of Canada*, 2011 BCSC 1588 at para. 228. *Civil Marriage Act*, S.C. 2005, c. 33, Preamble, s. 3, and s. 3.1.

[242] *Income Tax Act*, RSC 1985, c 1 (5th Supp.), s. 149.1(6.21).

[243] LSBC Factum, para. 24.

168. As found by the BC Court of Appeal, any unequal impact that results from the Covenant relates to married LGBTQ students and not LGBTQ individuals generally.[244] All unmarried students (heterosexual and LGBTQ) must follow the same behavioural expectation to abstain from sexual intimacy until they are married. For married students, the Covenant impacts same-sex couples differently than opposite-sex couples, since the Christian conception of marriage embodied in the Covenant only recognizes opposite-sex marriage.

Equal Access to Law Schools and the Legal Profession

169. According to the LSBC, LGBTQ persons are harmed by denying them "equal access to a legal education," and thus "unequal access to the considerable personal, professional, and societal advantages that come with a law degree."[245]

170. Married LGBTQ people are in no worse position with a TWU law school than without it. Indeed, some LGBTQ evangelicals choose to attend TWU and would benefit from a law school.[246]

171. The Decision restricts access to legal education and access to the bar. As found by the Federation, TWU's law school would only *expand* choices and there is no evidence it would "result in any fewer choices for LGBT students."[247] There is no evidence to undermine this conclusion, which the BC Court of Appeal held was entitled to deference.[248]

The Benefits of the Decision are Minimal

172. The LSBC must demonstrate the *Charter* infringements arising from the Decision are justified based on evidence of demonstrable harm.[249] It has not done so.

173. As required by *TWU #1*, there is no "concrete" or "specific" evidence that religious practices will have a detrimental effect on the quality of education or foster discrimination in the

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[244] BCCA Reasons, para. 15.
[245] LSBC Factum, para. 121.
[246] Cook #1 **[AR, Vol. II, at 207-214; RR, Vol. V, at 66-75]**; Strikwerda #1 [**RR, Vol. I, at 145-153; RR, Vol. V, at 47-55]**; Davies #1 **[RR, Vol. I, at 8-17; RR, Vol. V, at 56-65]**.
[247] BCCA Reasons, para. 174; McGee #2, Exhibit C **[AR, Vol. VI, at 1034 (para. 53)]**.
[248] BCCA Reasons, para. 174.
[249] The LSBC makes passing reference to the requirement that infringements to religious freedom may be justifiable based on "demonstrable harm" (LSBC Factum, para. 204).

practice of law.[250] There is no evidence that admitting TWU graduates into the legal profession would harm anyone's dignity. Indeed, TWU undergraduates already practice law.[251] That TWU asks students to abide by the Covenant, even if this comes at a "considerable personal cost," is not enough.[252]

174. As recognized in *TWU #1*, few LGBTQ individuals would apply to TWU.[253] Here, "very few" of those who are differentially impacted by the Covenant – married LGBTQ people – would be likely to apply to study in one of TWU's 60 seats (out of the 2,500 at common law schools in Canada), even without the Covenant.[254]

175. "For those who do not share TWU's beliefs, there are many other options."[255] For evangelicals, this is the only Canadian school that caters to their beliefs.

F. CONCLUSION

176. The Decision was disproportionate. The LSBC acted illiberally and intolerantly in rejecting TWU graduates and interfering with TWU's religious character.[256]

177. The LSBC had to decide who will be admitted to the bar. The Benchers had to consider the "academic qualifications" of future TWU graduates in making a decision under Rule 2-27(4.1). That is not what they, or the LSBC members, did. Instead, they made a decision based on the LSBC membership's disagreement with a now unpopular religious belief embedded in the Covenant, which has no impact on a graduate's ability to practice law. It does not harm or interfere with the rights of anyone to admit them to the bar.

178. The religious beliefs of the TWU community as articulated in the Covenant do not in any way impair the relevant statutory objectives in a proportionate and minimally impairing manner. The Decision therefore interferes with the TWU community "significantly more than is

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[250] *TWU #1*, at paras. 26, 28, 32, 36, 38.
[251] See for example Ferrari #1, para. 1 **[RR, Vol. I, at 1]**; Hebert #1, para. 1 **[RR, Vol. I, at 139; RR, Vol. V, at 83]**.
[252] *TWU #1*, at para. 25.
[253] *TWU #1*, at para. 25.
[254] BCCA Reasons, paras. 176, 179.
[255] BCCA Reasons, para. 178.
[256] BCCA Reasons, para. 193.

reasonably necessary."[257] This is contrary to the LSBC's statutory duty of "protecting the rights and freedoms of all persons."[258]

PART IV – COSTS

179. If the appeal is dismissed, the respondents seek an order for the payment of the costs of the court appealed from, of the court of original jurisdiction, and of the appeal under section 47 of the *Supreme Court Act*. In the alternative, if the appellant's appeal is allowed, they seek an order that there be no costs of the court appealed from, of the court of original jurisdiction, or of the appeal given that the issues in dispute on this appeal are of public importance and in light of the breach of the Benchers' statutory duties.

PART V – ORDERS SOUGHT

180. The respondents seek an order: (a) dismissing the appeal; (b) declaring that the Decision is invalid and unjustifiably infringes upon the *Charter*; and (c) in the nature of *mandamus* approving TWU's proposed law school for the purposes of Rule 2-54(3) (formerly Rule 2-27(4.1), as there is no merit in returning the matter to the LSBC and there is only one constitutionally permissible outcome.[259] Mandamus was ordered in *TWU #1* "because the only reason for denial of certification was the consideration of discriminatory practices."[260]

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 14th DAY OF JULY, 2017.

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Kevin L. Boonstra
Lawyer for the Respondents

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[257] BCCA Reasons, para. 192.
[258] *LPA*, s. 3(a).
[259] *Judicial Review Procedure Act*, R.S.B.C. 1996, c. 241, s. 2(2); *Loyola*, at para. 165; *Canada (Attorney General) v. PHS Community Services Society*, 2011 SCC 44 at para. 150.
[260] *TWU #1*, at para. 43.

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