

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

BETWEEN:

THE LAW SOCIETY OF BRITISH COUMBIA

APPELLANT  
(Appellant)

AND

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS  
(Respondents)

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**FACTUM OF THE INTERVENER  
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**  
*(Pursuant to Rules 37 and 42 of the Rules of the Supreme Court of Canada)*

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## Part I – Overview and Statement of Facts

1. This appeal concerns the Law Society of British Columbia’s (“LSBC”) resolution that the proposed Trinity Western University (“TWU”) law school is not an approved faculty of law for the purposes of the LSBC’s admission program (the “Decision”).<sup>1</sup> TWU requires all students and staff to sign its Covenant which prohibits them from engaging in sexual activity outside of heterosexual marriage and restricts women’s reproductive rights.<sup>2</sup>
2. West Coast Women’s Legal Education and Action Fund (“West Coast LEAF”) adopts the facts set out in the LSBC’s factum. West Coast LEAF agrees with the LSBC’s position regarding the discriminatory impact of the Covenant on LGBTQ individuals and women. The focus of West Coast LEAF’s intervention is on the substantive equality analysis and the effect of the Covenant on women’s equality rights, with a particular focus on women’s reproductive rights. The Covenant is discriminatory on the basis of sex (pregnancy), sexual orientation and marital status. It may also discriminate against individuals on these multiple intersecting grounds thereby compounding the discrimination.
3. West Coast LEAF submits that the LSBC could not endorse the serious disadvantage the Covenant creates through accreditation. The LSBC is subject to the *Canadian Charter of Rights and Freedoms* and is charged with safeguarding and fostering confidence in the administration of justice in British Columbia.<sup>3</sup> As such, it was required to protect the substantive equality rights of disadvantaged groups, including women, who would be excluded from access to a law school position at TWU.
4. The British Columbia Court of Appeal’s decision fails to appreciate the severity of the discrimination and instead adopts an outdated and formalistic view of s. 15 of the *Charter* and the equality interests at stake in this case. The LSBC’s Decision was correct given the significant impact of the Covenant on the substantive equality rights of women.

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<sup>1</sup> Affidavit #2 of Timothy McGee, Exhibit R [AR, Vol. VII, at 1277-1278].

<sup>2</sup> TWU Community Covenant Agreement (the “Covenant”), Affidavit #1 of Dr. W. Robert Wood, Exhibit C [AR, Vol. III at 402-403]. The Covenant provides that all signatories must “treat all persons with respect and dignity, and uphold their God-given worth from conception to death”.

<sup>3</sup> [Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11 [the “**Charter**”]; [Legal Profession Act](#), S.B.C. 1998 c. 9 [s. 3](#).

## Part II – Position with Respect to Appellant’s Questions on Appeal

5. The LSBC states that the Court of Appeal erred in concluding the Decision did not represent the proper balancing of the relevant *Charter* rights and values. It submits that the Decision appropriately balances the *Charter* interests engaged and thereby best achieves the statutory objective of ensuring public confidence in the legal system in British Columbia. West Coast LEAF concurs with this position.

## Part III – Statement of Argument

### A. The Substantive Equality Analysis

6. Formal equality (treating everyone the same) ignores many types of discrimination and has been repeatedly rejected by this Court.<sup>4</sup> This is an unduly narrow conception of equality and does not fulfil the purposes of the *Charter*.<sup>5</sup> In addition, the "separate, but equal" reasoning that was historically used to justify discrimination has been "majestically discarded" and courts should not adopt reasoning that reintroduces that approach.<sup>6</sup>

7. In protecting substantive equality, government actors (such as the LSBC) must avoid indirect, as well as direct, discrimination.<sup>7</sup> They must recognize "that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and [seek] to prevent conduct that perpetuates those disadvantages".<sup>8</sup> Substantive equality often requires differential treatment to "ameliorate the actual situation of the claimant group",<sup>9</sup> as identical treatment may produce serious inequality.<sup>10</sup>

8. Since *Withler*, the law has evolved away from a rigid discrimination analysis towards one that requires the courts to consider the alleged discrimination contextually to determine whether the government has perpetuated disadvantage for a protected

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<sup>4</sup> [Andrews v. Law Society of British Columbia](#), [1989] 1 S.C.R. 143 ["**Andrews**"] at paras 26-34; [R. v. Kapp](#), 2008 SCC 41 ["**Kapp**"] at paras 15 and 27.

<sup>5</sup> [Andrews](#) at paras 26-34; [Withler v. Canada \(Attorney General\)](#), 2011 SCC 12 ["**Withler**"] at para 2.

<sup>6</sup> [Moore v. British Columbia \(Education\)](#), 2012 SCC 61 ["**Moore**"] at para 30.

<sup>7</sup> [Withler](#) at para 64 (see also paras 2, 39, 55, and 64 and [Kapp](#) at paras 14-16, 22 and 27).

<sup>8</sup> [Kahkewistahaw First Nation v. Taypotat](#), 2015 SCC 30 ["**Taypotat**"] at para 17.

<sup>9</sup> [Withler](#) at para 39. See also [Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation 25, On article 4, paragraph 1, on Temporary Special Measures](#), UN Doc. HRIIGEN/1/Rev.7 at 282 (2004).

<sup>10</sup> [Taypotat](#) at para 17, citing [Andrews](#) at para 26; [Kapp](#) at para 27.

group.<sup>11</sup> Section 15 "requires a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*".<sup>12</sup> The test is whether:

- a. On its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground; and
- b. The impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.<sup>13</sup>

9. In other words, "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory".<sup>14</sup> This is what TWU's admission policy does: its discriminatory elements deny a benefit and reinforce the disadvantage of LGBTQ individuals and women. The LSBC could not wash its hands of its obligations to protected groups excluded by the Covenant in considering whether to accredit TWU's law school. Although the LSBC did not create the discriminatory elements of the Covenant, the Covenant forms a crucial part of the TWU program the LSBC was asked to accredit and it was obligated to consider its discriminatory impact.

## **B. The Restriction on Women's Reproductive Rights**

10. The Covenant restricts women's reproductive rights. This limitation on the reproductive choice of women is discrimination based on pregnancy which is discrimination based on sex.<sup>15</sup> This issue is addressed in the LSBC's factum and is an important and live issue before this Court.<sup>16</sup>

11. At para 17 of its factum TWU says the limitation on women's reproductive rights "was not considered by the benchers or LSBC membership".<sup>17</sup> However, the record

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<sup>11</sup> [Quebec \(Attorney General\) v. A](#), 2013 SCC 5 ["[Quebec v. A](#)"]; [Withler](#) at para 65.

<sup>12</sup> [Taypotat](#) at para 16, citing [Quebec v. A](#) at para 331 (emphasis in [Taypotat](#)).

<sup>13</sup> [Taypotat](#) at paras 19 and 20.

<sup>14</sup> [Quebec v. A](#) at para 332.

<sup>15</sup> [Brooks v. Canada Safeway Ltd.](#), [1989] 1 S.C.R. 1219; [Inglis v. British Columbia \(Minister of Public Safety\)](#), 2013 BCSC 2309 at para 547.

<sup>16</sup> LSBC Factum at footnote 2 and paras 41, 61 and 121.

<sup>17</sup> TWU Factum at para 17.

demonstrates that this issue was before the LSBC.<sup>18</sup> Although the British Columbia Supreme Court held that it saw “no indication that this issue was considered” by the LSBC membership or benchers when they voted,<sup>19</sup> this is distinct from a finding that the reproductive rights issue was not considered by any of those who voted.

12. In the parallel Ontario proceedings, the Covenant’s discrimination against women was recognized as part of the rights balancing exercise that must be considered on judicial review. As stated by the Ontario Divisional Court:

...While much attention in this case was directed at the discriminatory effect of TWU’s Covenant on LGBTQ persons, the reality is that the discrimination inherent in the Covenant extends not only to those persons, but also to women generally; to those persons of any gender who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage; and to those persons who have other religious beliefs.<sup>20</sup>

13. West Coast LEAF submits that the substantive equality rights of women must be taken into account in considering the lawfulness of the LSBC’s Decision. The Covenant has a substantial impact on women by restricting their reproductive rights. Not only is this important to proper consideration of the issues in this appeal, but this issue has been raised before the LSBC and every level of court in this proceeding. The British Columbia courts’ failure to consider this aspect of the discrimination is troubling, and it is crucial that this Court give due consideration to this significant sex discrimination issue.

14. The right to access abortion is a fundamental aspect of respect for female bodily integrity. In *Morgentaler*, this Court found that a state prohibition on access to abortion violated women’s s. 7 *Charter* rights. As Dickson C.J. and Lamer J. held, forcing a woman to carry a foetus to term “is a profound interference with a woman’s body and thus an infringement of security of the person”.<sup>21</sup> Having resolved the issue under s. 7, this Court did not address the s. 15 arguments raised. However, *Morgentaler* is instructive on the importance of the interests at stake and the discriminatory impact that restrictions on

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<sup>18</sup> Submission to LSBC from UBC faculty, staff and students, March 2, 2014 [AR, Vol VIII at 1350, 1354-1355, 1358, 1363]; Submission to LSBC from West Coast LEAF, March 3, 2014, [AR, Vol VIII at 1385-1388].

<sup>19</sup> *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 at para 141.

<sup>20</sup> *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at para 104.

<sup>21</sup> *R. v. Morgentaler*, [1988] 1 S.C.R. 30 [“*Morgentaler*”] at para 24.

reproductive choice have on women. As Wilson J. stated in her concurring reasons, the right to abortion also engages women's liberty: "The right to reproduce or not to reproduce... is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being".<sup>22</sup>

15. Although the Covenant does not impose criminal sanctions, female TWU members are uniquely subject to penalty, including discipline or expulsion from TWU for exercising autonomy over their own bodies. As only a woman can become pregnant, males at TWU do not experience the same obligations and risks. Such punitive responses to women's choice to exercise their constitutionally protected reproductive rights have serious implications for women's health, education, employment and livelihood. Attempting to control or restrict women's constitutionally protected reproductive rights constitutes sex discrimination and is a violation of women's equality rights.

16. Similarly, the Covenant's prohibition on abortion fosters discriminatory views of female personal autonomy. All TWU faculty, staff, and students must affirm and commit to promoting the view that it is wrong for a woman to exercise her constitutionally protected reproductive rights and access lawful healthcare services regardless of her own personal aspirations and circumstances. This undermines her dignity and autonomy. Female TWU members are also uniquely subject to monitoring of their personal health care and physical autonomy as the Covenant mandates that violations be reported.<sup>23</sup> This compounds the discrimination by isolating and stigmatizing these women.

17. The Covenant discriminates against women by impeding access to TWU and a coveted law school position. Any woman who is unwilling to relinquish her reproductive rights, or any person who believes in reproductive choice for women, will not have access to TWU as signing the Covenant would be antithetical to their beliefs. Further, any woman who has an unwanted pregnancy while attending TWU will face an unconscionable restriction on her autonomy in having to continue with that pregnancy or face expulsion or other discriminatory sanction for accessing legal abortion services. For unmarried women, the repercussions of this decision may be compounded, given the Covenant's

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<sup>22</sup> [Morgentaler](#) at para 242.

<sup>23</sup> See the Covenant, Affidavit #1 of Dr. W. Robert Wood, Exhibit C [**AR, Vol. III at 405**].

restriction of sex outside of marriage. For some women, this issue will not arise until they have partially completed their degrees; the fact of being pregnant can change after admission to law school.

### **C. The BCCA Decision Does Not Reflect a Substantive Equality Analysis**

18. West Coast LEAF submits that the British Columbia Court of Appeal's equality analysis reflects an out-dated and formalistic understanding of equality. Likewise, TWU frames the equality issue in a manner that incorporates a formal (not substantive) equality analysis and argues that accepting TWU graduates does not interfere with the rights of others or exclude anyone from the legal profession.<sup>24</sup> This approach fails to fulfill the promise of substantive equality in s. 15 of the *Charter*.

19. The British Columbia Court of Appeal's reasoning failed to appreciate that accreditation would "widen the gap" and perpetuate women's and LGBTQ persons' historical disadvantage. First, while the Court of Appeal acknowledged that the "separate, but equal" doctrine has been discredited,<sup>25</sup> its decision adopts this approach. The Court of Appeal held that failing to recognise TWU does not enhance accessibility to law school<sup>26</sup> and that the addition of a TWU law school "is likely to result in an enhancement of opportunities for all students".<sup>27</sup> This approach represents an outdated and formalistic understanding of the *Charter's* equality protections. Creating seats that exclude women and LGBTQ significantly undermines equality. The danger of the Court of Appeal's reasoning is clear: if this reasoning were applied to a school admissible to "Caucasians only", such a school would be *Charter* complaint. There should be no question that government endorsement of such a school would violate the *Charter*.

20. Second, the Court of Appeal undervalued the discriminatory impact on protected groups. The court focused on the fact that TWU's proposed law school was small and thus concluded the impact was insignificant.<sup>28</sup> However, equality is not a numbers game. Its purpose is to protect groups that have historically been relegated to the sidelines in

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<sup>24</sup> TWU Factum at paras 86, 87 and 88.

<sup>25</sup> [Trinity Western University v. The Law Society of British Columbia](#), 2016 BCCA 423 at para 178 ["**BCCA Decision**"].

<sup>26</sup> [BCCA Decision](#) at para 175.

<sup>27</sup> [BCCA Decision](#) at para 179.

<sup>28</sup> [BCCA Decision](#) at para 179.

Canadian society. Often these groups will be minorities and by definition will be small. The number of people affected bears no relationship to the severity of the discrimination they suffer. It does not matter if there are one, 60 or 200 law school seats that are exclusionary on discriminatory grounds. The equality analysis would not be different if TWU sought to offer a much larger law school than currently proposed. The substantive equality analysis asks whether individuals are excluded for discriminatory reasons because any exclusion for discriminatory reasons is impermissible. This analysis does not change based on the number of seats.

21. The LSBC is subject to s. 15 of the *Charter* and is charged with promoting the public interest by, *inter alia*, preserving and protecting the rights and freedoms of all persons.<sup>29</sup> This consideration includes what this Court has recognized as “[a]n insistence on substantive equality”.<sup>30</sup> Yet, the Court of Appeal’s analysis fails to give due weight to the fact that accreditation would perpetuate disadvantage for *Charter* protected groups. The result is that the court failed to appreciate the significant discriminatory impact of the Covenant that the LSBC was obligated to consider in deciding whether to accredit TWU’s proposed law school. Just as it would be discriminatory for the LSBC to endorse a law school that excluded all women, it would be discriminatory for the LSBC to endorse a law school that restricts women's reproductive rights.

#### **D. Intersecting Grounds of Discrimination**

22. In addition to discrimination on the basis of sex, the Covenant also discriminates on the grounds of sexual orientation and marital status. This intersection of *Charter* protected characteristics will compound the discriminatory impact some people suffer.

23. As this Court recognized in *Miron v. Trudel*, marital status is an analogous ground because unmarried partners have suffered historical disadvantage and prejudice and because an "individual's freedom to live life with the mate of one's choice in the fashion of one's choice" is a "matter of defining importance to individuals".<sup>31</sup>

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<sup>29</sup> [Legal Professions Act](#), S.B.C. 1998, c. 9. [s. 3](#).

<sup>30</sup> [Kapp](#) at para 15.

<sup>31</sup> [Miron v. Trudel](#), [1995] 2 S.C.R. 418 at paras 151-153.

24. Equality rights for women and LGBTQ individuals do not exist in silos. For example, a pro-choice woman who wants to attend law school in Canada may be unmarried, sexually active, and bisexual. She would be excluded from TWU based on her sexual orientation, marital status and sex. Exclusion from an avenue to a career in law based on membership in one of these groups is an arbitrary disadvantage; exclusion based on membership in two or three groups is even more profound.<sup>32</sup>

### **E. Freedom of Religion is Not Unjustifiably Infringed**

25. West Coast LEAF submits that the Decision did not infringe religious freedoms. But if it did, any impact on religious freedoms is minimal whereas the impact on women's equality is significant.

26. Even at the s. 2(a) analysis stage, freedom of religion is not absolute. It allows every individual to:

...be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.<sup>33</sup>

27. The right to discriminate claimed by TWU is not protected by freedom of religion. The Covenant is not simply an expression of belief; rather, adherence is mandatory and TWU members are called upon to police observance. This is discriminatory action that has a direct detrimental impact on the rights of women and LGBTQ individuals. The discriminatory aspects of the Covenant "conflict with or harm overriding public interests"<sup>34</sup> and perpetuate inequality and disadvantage of other *Charter* protected groups.<sup>35</sup>

28. In *S.L.*, this Court recognised limits of fundamental freedoms in the public sphere and held that mandatory attendance at a public school Ethics and Religious Culture class did not interfere with the religious freedoms of Catholic parents and their children.<sup>36</sup> Similarly in *Loyola*, this Court found it was permissible for the Minister to require a Catholic

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<sup>32</sup> See the discussion in [Inglis](#) at para 518.

<sup>33</sup> [R. v. Big M Drug Mart Ltd.](#), [1985] 1 S.C.R. 295 at para 123.

<sup>34</sup> [Loyola High School v. Quebec \(Attorney General\)](#), 2015 SCC 12 at para 43 [*"Loyola"*].

<sup>35</sup> See [Reference re Same-sex Marriage](#), 2004 SCC 79 at para 46: "the promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster."

<sup>36</sup> [S.L. v. Commission Scolaire des Chenes](#), 2012 SCC 7.

school to teach about the ethics of *other* religions in a neutral manner.<sup>37</sup> Religious freedom must be understood within the context the state's role in promoting equality:

These shared values -- equality, human rights and democracy – are values the state always has a legitimate interest in promoting and protecting.... Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.<sup>38</sup>

29. If this Court determines that s. 2(a) is infringed, West Coast LEAF submits that requiring equal access to a legal education in order to receive the LSBC's endorsement does not interfere disproportionately with freedom of religion. The analysis should also be undertaken in light of s. 28 of the *Charter* which reads, "Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons".<sup>39</sup>

30. The Decision does not prevent TWU members from holding, professing and practicing their beliefs; it does limit TWU's ability to exclude equality seeking groups if it wants accreditation for a law school in British Columbia. Consequently, any impact on religious freedoms is minimal whereas the impact on women's equality is significant. As stated by the Ontario Divisional Court, "TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education".<sup>40</sup>

31. Abortion is a deeply personal medical decision. Taking that decision out of a woman's hands is a severe and discriminatory incursion into her personal autonomy. The LSBC was entitled to deny accreditation in the face of the Covenant's impact on women. The harm caused is concrete and includes both physical and psychological harm.

## **F. Conclusion**

32. The LSBC must consider the equality interests of all prospective members. The state is not required to endorse a discriminatory Covenant; rather, it is required to protect equality seeking groups. Accrediting a law school at TWU, an institution that excludes

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<sup>37</sup> [Loyola](#) at para 71.

<sup>38</sup> [Loyola](#) at para 47.

<sup>39</sup> [Charter](#), s. 28

<sup>40</sup> [Trinity Western University v. The Law Society of Upper Canada](#), 2015 ONSC 4250 at para 117.

historically disadvantaged groups through the imposition of a mandatory discriminatory Covenant, would negatively affect public confidence in the administration of justice and would be a step backwards in achieving greater representation and equality in the legal profession. If a law school sought to exclude all women or all religious or ethnic minorities, the LSBC could not endorse it without violating s. 15 of the *Charter*. The same analysis applies here.

33. It is no answer to say that LGBTQ persons or women may attend TWU's law school if they agree to not engage in sexual intimacy or compromise their reproductive rights. This intrusion into a highly intimate sphere is an unacceptable cost of admission to join the British Columbia bar. The exclusion of protected groups from TWU perpetuates their historical disadvantage. Any impact on religious freedom caused by the Decision is significantly outweighed by the harm avoided.

#### **Part IV – Submissions on Costs**

34. West Coast LEAF does not seek costs and asks that none be awarded against it.

#### **Part V – Nature of the Order Requested**

35. West Coast LEAF does not request any orders.

All of which is respectfully submitted this \_\_\_\_ day of September, 2017.

SIGNED BY:

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Robyn Trask and Jessica Lithwick

Counsel for the Intervenor,  
West Coast Women's Legal Education and Action Fund

## Part VI – List of Authorities

Authorities	Paragraph(s)
<a href="#"><i>Andrews v. Law Society of British Columbia</i></a> , [1989] 1 S.C.R. 143	6, 7,
<a href="#"><i>Brooks v. Canada Safeway Ltd.</i></a> , [1989] 1 S.C.R. 1219	10,
<a href="#"><i>Inglis v. British Columbia (Minister of Public Safety)</i></a> , 2013 BCSC 2309	10, 24
<a href="#"><i>Kahkewistahaw First Nation v. Taypotat</i></a> , 2015 SCC 30	7, 8,
<a href="#"><i>Loyola High School v. Quebec (Attorney General)</i></a> , 2015 SCC 12	27, 28
<a href="#"><i>Miron v. Trudel</i></a> , [1995] 2 S.C.R. 418	23
<a href="#"><i>Moore v. British Columbia (Education)</i></a> , 2012 SCC 61	6,
<a href="#"><i>Quebec (Attorney General) v. A</i></a> , 2013 SCC 5	8, 9
<a href="#"><i>R. v. Big M Drug Mart Ltd.</i></a> , [1985] 1 S.C.R. 295	26
<a href="#"><i>R. v. Kapp</i></a> , 2008 SCC 41	6, 7, 21
<a href="#"><i>R. v. Morgentaler</i></a> , [1988] 1 S.C.R. 30	14
<a href="#"><i>Reference re Same-sex Marriage</i></a> , 2004 SCC 79	27
<a href="#"><i>S.L. v. Commission Scolaire des Chenes</i></a> , 2012 SCC 7	28

<a href="#"><u>Trinity Western University v. The Law Society of British Columbia</u></a> , 2015 BCSC 2326	11
<a href="#"><u>Trinity Western University v. The Law Society of British Columbia</u></a> , 2016 BCCA 423	19, 20
<a href="#"><u>Trinity Western University v. The Law Society of Upper Canada</u></a> , 2015 ONSC 4250	12, 30
<a href="#"><u>Withler v. Canada (Attorney General)</u></a> , 2011 SCC 12	6, 7, 8
<b>Statutes</b>	
<a href="#"><u>Legal Profession Act</u></a> , S.B.C. 1998 c. 9	3, 21
<b>Others</b>	
<a href="#"><u>Convention on the Elimination of All Forms of Discrimination against Women, General Recommendation 25, On article 4, paragraph 1, on Temporary Special Measures</u></a> , UN Doc. HRIIGEN/1/Rev.7 at 282 (2004).	7