Court File No.: 250/14

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

FACTUM OF THE RESPONDENT, THE LAW SOCIETY OF UPPER CANADA

[Application for Judicial Review returnable June 1, 2015]

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Part I – Statement of Facts

A. Overview

1. Trinity Western University ("TWU") seeks to have this Court compel the Law Society of Upper Canada (the "Law Society") to accredit a new law school yet to be established. As a condition of admission to the proposed law school, TWU will require students to agree to and sign a "Community Covenant".

2. The terms and requirements of the Community Covenant are discriminatory. The Community Covenant imposes conditions of admission to TWU's proposed law school that would exclude many potential students on prohibited grounds. Specifically, the Community Covenant discriminates on the basis of sexual orientation and marital status as it requires students to refrain from sexual activity outside of heterosexual marriage. It discriminates against women because it rejects the rights of self-determination with regard to reproduction. It discriminates on the basis of religion with respect to people who cannot sign the Covenant because of their religious beliefs.

3. The Law Society does not dispute that TWU, as a private institution, may have the right to teach law while restricting admissions on discriminatory grounds. Nor does the Law Society take issue with TWU's curriculum for its proposed law courses. The Law Society also does not allege that TWU graduates would engage in discriminatory conduct if admitted to practice law.

4. As the regulator of the legal profession in Ontario, the Law Society is responsible for determining admission into the profession. The issue in this application is whether the Law Society, as the gatekeeper to the legal profession, can be compelled to accredit TWU's law school that would result in discrimination in respect of entry into the Law Society's licensing process.

5. By statute, the Law Society is responsible for regulating the legal profession in Ontario, including setting the process and the standards for obtaining a licence to practice law. As part of its licencing process, it has adopted a by-law which entitles it to accredit law schools for licensing purposes. None of the 20 law schools currently accredited by the Law Society have discriminatory admissions policies.

6. The Law Society has a broad discretion whether to accredit a particular law school. Neither the *Law Society Act* nor the by-laws enacted thereunder limit the Law Society's discretion to considering only the proposed curriculum. To the contrary, the Law Society must exercise its broad discretion to accredit within its over-arching statutory mandate to regulate the legal profession in the public interest. As a public institution, the Law Society's decisions must also conform to the *Charter of Rights and Freedoms* (the "*Charter*") and Ontario *Human Rights Code* (the "*Code*").

7. Because of its public interest mandate and the need to conform to the *Charter* and the *Code*, the Law Society cannot engage in discriminatory practices. Indeed, the Law Society's by-laws and policies enshrine its commitment to equality and diversity, and prohibit discriminatory policies. Thus, if the Law Society were operating a law school itself, as it did until 1969, it would not be able to impose discriminatory admission requirements, such as those found in the Community Covenant. Nor could the Law Society deny admission to the bar admission course on the basis of a discriminatory policy.

8. If the Law Society is ordered to accredit TWU, it will be forced to incorporate discriminatory law school admissions conditions into its licencing process. The Law Society will be compelled to do indirectly what it cannot do directly, namely adopt a discriminatory restriction

on who may become a lawyer. This discrimination would be deeply offensive to excluded minorities and the public served by lawyers.

9. Compelling the Law Society to accredit TWU would result in discrimination against those who wish to apply to law school but are not able to conduct themselves as required by the Community Covenant. There are far more qualified applicants for law school admission than there are places available. The TWU policy would impose conditions on law school entry on discriminatory grounds. Those students prepared to sign the Community Covenant would have access to a greater number of law school positions and thus be in a preferred position, with the result that the pool of potential licensees to practice law in Ontario would be skewed.

10. The Law Society's decision to refuse accreditation does not violate the freedom of religion of either TWU or Mr. Volkenant. While TWU, as a private entity, may be entitled to teach law while having an admissions policy that is consistent with their individual beliefs, Applicants' rights do not extend to compelling the Law Society, a public institution, to incorporate into its licencing regime the conditions for admission of that school when those conditions are discriminatory. To the extent that there is any conflict between the two sets of rights, the Law Society's discretionary decision to not accredit based on its public interest mandate, as well as the *Charter* and the *Code*, was reasonable and must prevail.

11. The Law Society's decision to refuse accreditation is not inconsistent with the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers* ("*2001 BCCT*"). That case concerned the unproven allegations that graduates from TWU's college of teachers programme might discriminate in the course of their professional duties. No similar allegation is made in this case. The Law Society's decision in this case is not premised on the

conduct of TWU's proposed graduates in the future. Instead, the issue is the harm that would flow from the Law Society incorporating a discriminatory practice as part of its licensing regime. Doing so would be corrosive of public confidence in the legal profession and the administration of justice, offensive to both excluded minorities and the public and have the effect of skewing the equality of access for potential applicants to the licensing process.

12. Currently, no one is denied access to an accredited Canadian law school because of their gender, marital status, religion, or sexual orientation. The Law Society's decision to ensure that there is no discrimination in admissions to accredited law schools is mandated by its governing statute, the *Charter* and the *Code*. This Court should not interfere with a decision that is not only reasonable, but is actually correct.

B. Background Facts and Legislative Scheme

1. The Law Society is a public interest regulator committed to equality and diversity

13. The Law Society was created in 1797 to provide the province with a "learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province."[1]

14. The Law Society regulates the legal profession in the public interest and exercises discretionary public law powers.[2]

15. Section 4.2 of the *Law Society Act* states, *inter alia*:

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

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[1] *An Act for the better regulating the Practice of Law*, 37th George III. A.D. 1797, c. XIII, s. I.
[2] *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562, at para. 14, Book of Authorities BOA, Tab 34.

> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.[3]
>
> [...]

16. The Supreme Court of Canada has recognized that equality, diversity and human rights values properly form part of the determination of what constitutes the public interest.[4] Additionally, the Law Society is bound by the *Charter* and the *Code*.

17. The Law Society's duty to protect the public interest, which it can neither abandon nor relinquish, includes an obligation to be neutral and rigorous in exercising its judgment as gatekeeper to the profession in the licencing process. This duty is cast upon it as a self-governing body.[5] It must maintain its reputation and sustain public confidence in the integrity of the profession.[6]

18. The Law Society has long considered that (i) diversity in the legal profession and (ii) equality of access to the legal profession are of central importance to its mandate as a public interest regulator.

19. As part of the Law Society's mandate to advance the cause of justice, protect the public interest and ensure access to justice, the Law Society advances the principles of equity and

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[3] *Law Society Act*, R.S.O. 1990, c. L.8, s. 4.2.
[4] See, for example, *Trinity Western University v. College of Teachers,* [2001] 1 S.C.R. 772 ["*2001 BCCT*"] at para. 26, Book of Authorities BOA Tab 3.
[5] *The Law Society v. Shore*, [2007] L.S.D.D. No. 42 at para. 58, BOA, Tab 35; overturned on costs only the Law Society, Shore, 2008 ONLSAP 0006; *the Law Society v. Kelly*, [2009] L.S.D.D. No. 103, at para. 152, BOA, Tab 36.
[6] See *Bolton v Law Society*, [1994] 1 W.L.R. 512 at para. 15, BOA, Tab 37.

diversity in its policies, programs and procedures. The Law Society seeks to take measures that advance the goal of having a legal profession that is reflective of all people of Ontario.[7]

20. The Law Society has, as part of its public interest mandate and in accordance with the values and obligations of the *Charter* and the *Code*, actively sought to redress the evils of discrimination. Indeed, the principles of equity and diversity are at the heart of the Law Society's governance of the legal profession in Ontario.

21. In 1991, the Law Society adopted a Statement of Policy in which it affirmed that every member of the Law Society has a right to equal treatment with respect to conditions of employment without discrimination because of, *inter alia*, race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, gender, sexual orientation and marital status.[8]

22. In April 1995, Convocation adopted the following Statement of Values:

> The Law Society of Upper Canada declares that the legal profession in Ontario is enormously enriched by, and values deeply, the full participation of men and women in our profession regardless of age, disability, race, religion, marital or family status or sexual orientation.[9]

23. In 1997, the Law Society unanimously adopted the Bicentennial Report and Recommendations on Equity Issues in the Legal Profession ("Bicentennial Report"). In the Bicentennial Report, the Law Society recognized its commitment to the promotion of equality and diversity in the legal profession and the elimination of discriminatory practices. The first Recommendation of the Bicentennial Report provided: "the Law Society should ensure that the

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[7] Affidavit of Josee Bouchard, sworn October 23, 2014 ["Bouchard Affidavit"], *Respondent's Application Record* ["*RAR*"], Vol. 1, Tab 3, p. 68.
[8] Bouchard Affidavit, para. 9, *RAR*, Vol. 1, Tab 3, p. 68.
[9] Bouchard Affidavit, para. 10, *RAR*, Vol. 1, Tab 3, p. 68.

policies it adopts (a) actively promote the achievement of equity and diversity within the profession and (b) do not have a discriminatory impact."[10]

24. The Law Society also provides a range of services and programs to lawyers, law firms and students-at-law to promote equity and diversity in the legal profession.[11]

25. In addition to recognizing the unique obligation it holds in promoting equality and diversity to advance the rule of law and the advancement of justice, the Law Society has also imposed in its *Rules of Professional Conduct* the same obligation on its members to promote equality and recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.[12]

26. Thus, the Law Society's commitment to the promotion of equality and diversity in the public interest is all encompassing and informs all of its powers and duties.

2. The Law Society has exclusive authority to set the conditions for admission to the Ontario bar

27. Courts have held that the scope of the phrase "public interest" must be "interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used."[13]

28. Since its formation in 1797, the Law Society has been the sole authority for determining who could practice law in Ontario, and the requirements associated therewith.[14]

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[10] Bouchard Affidavit, para. 11, *RAR*, Vol. 1, Tab 3, p. 69.
[11] Bouchard Affidavit, para. 15, *RAR*, Vol. 1, Tab 3, p. 70.
[12] Law Society of Upper Canada, *Rules of Professional Conduct,* Toronto: Law Society of Upper Canada, 2014, r. 6.3.1-1, 5.04, Commentary ["*Rules of Professional Conduct*"], BOA, Tab 38; Bouchard Affidavit, *supra* at para. 19, *RAR*, Vol. 1, Tab 3, p. 71.
[13] *Stewart v. Canadian Broadcasting Corp*, 1997 CanLII 12318 (ONSC), at para. 229, BOA, Tab 6; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815, at paras. 50 and 53, BOA, Tab 7.

29. In 1833, the legislature of Upper Canada abolished the requirement that persons called to the Bar take a religious oath as a qualification for admission to the Bar, thereby ending discrimination barring Roman Catholics and non-conformists from entering the legal profession in Upper Canada.[15]

30. Until 1957, the Law Society, through the operation of Osgoode Hall Law School, maintained a monopoly on legal studies that led to being admitted to the bar. Although universities were free to teach law – and several universities taught law as an academic subject – the Law Society did not officially adopt law degree programs in other institutions as part of the licensing process in Ontario. University law students did not receive special credit towards admission to practice.[16] However, whatever practical barriers to entry may have existed, the Law Society never maintained formal bars to the admission of candidates as students-at-law.[17]

31. In 1949, the Dean of Osgoode Hall Law School, along with almost all the faculty, resigned because of differences with the Law Society benchers over approaches to legal education. This event triggered a review of how lawyers were trained and admitted to the bar. Following discussions between the Law Society and universities it was agreed, in 1957, that Ontario universities would be able to develop an LLB program (with a pre-requisite of two undergraduate

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[14] See the Law Society's original enabling statute, *An Act for the better regulating the Practice of Law*, *supra*, s. V, BOA, Tab 39. which provided: no person other than the present Practitioners, and those hereafter mentioned, shall be permitted to practise at the bar of any of His Majesty's Courts in this Province, unless such person shall have been previously entered of and admitted into the said Society as a Student of the Laws, and shall have been standing in the books of the said Society for and during the space of five years, and shall have conformed himself to the rules and regulations of the said Society, and shall have been duly called and admitted to the practice of the law as a Barrister, according to the Constitutions and establishment thereof [...].

[15] R.E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?", *34 N.J.C.L.*, forthcoming, at 1, BOA, Tab 39.

[16] Moore, C., *The Society of Upper Canada and Ontario's Lawyers 1797-1997* ["Moore"], pp. 165, 166-167, 169, Exhibit B, Bouchard Affidavit, *supra* at *RAR*, Vol. 1, Tab 3, pp. 76-243.

[17] Charney, *supra* at 37 BOA, Tab 39.

years). For the first time, the Law Society recognized the degrees of law schools other than its own as satisfying a core licensing requirement.[18]

32. In 1959, the Law Society established the Bar Admission Course (consisting of an articling period, classroom instruction and examinations). Admission to the Bar Admission Course required some undergraduate university training and an LLB.[19]

33. In 1968, the Law Society transferred Osgoode Hall Law School to York University, and thereafter ceased to offer courses leading to the grant of a law degree. The Law Society continued to maintain a bar admission course.[20]

34. While universities were allowed to provide academic legal education, the power to set conditions for the issuance of licences to practice law in Ontario remained within the exclusive jurisdiction of the Law Society.

35. The *Law Society Act* vests the Law Society with control over licensee education, admission, discipline and unauthorized practice.[21] No person can "practice law in Ontario" without a licence[22] and the Law Society has exclusive authority to establish the requisite classes of licence:

> 27. (1) The classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and any terms, conditions, limitations or restrictions imposed on each class of licence shall be as set out in the by-laws.
>
> (2) It is a requirement for the issuance of every licence under this Act that the applicant be of good character.
>
> (3) If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that

[18] Moore, *supra* at pp. 250-262, Exhibit C to Bouchard Affidavit, *supra* at *RAR*, Vol. 1, Tab 3C, pp. 244-291.
[19] Moore, *supra* at pp. 259-260, Exhibit C to Bouchard Affidavit, *supra* at *RAR*, Vol. 1, Tab 3C.
[20] Moore, *supra* at p. 263, Exhibit C to Bouchard Affidavit, *supra* at *RAR*, Vol. 1, Tab 3C, p. 244.
[21] *Law Society Act*, *supra* at s. 33-35, 62(0.1) 4, 4.1, 21, 23.
[22] *Law Society Act*, *supra* at s. 26.1(1).

> class of licence, the Society shall issue a licence of that class to the applicant.[23]

36. Under the *Law Society Act*, the Law Society has the exclusive authority to prescribe the qualifications and requirements to obtain a licence to practice law:

> 62. (0.1) Convocation may make by-laws, [...]
>
> 4. prescribing the classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence;
>
> 4.1 governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence; [...][24] [emphasis added]

37. Further, it has retained the authority to provide such education and authority. It is obvious that to the extent that the Law Society exercises any of these powers, it could not do so in a discriminatory way.[25]

38. Pursuant to its by-law making powers, the Law Society introduced accreditation of law schools as part of its licensing process. By-Law 4 prescribes, *inter alia,* the requirements for the issuance of a Class L1 licence:

> 1. The applicant must have one of the following:
>
> i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.
>
> ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.
>
> 2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society by not later

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[23] *Law Society Act*, *supra* at s. 27(1)-(3).
[24] *Law Society Act*, *supra* at s. 62(0.1)4, 4.1.
[25] *Law Society Act*, *supra* at s. 62(0.1)21, 23.

> than two years after the end of the licensing cycle into which the applicant was registered.[26] [emphasis added]

39. An "accredited law school" is defined as a "law school in Canada that is accredited by the Law Society".[27]

40. The word "accredit" as an element of the licensing process is not defined in the Law Society's enabling statute or by-laws. The ordinary meaning of the word is "to give or lend credit to, to promote as or show to be credible… to vouch for, sanction, or countenance".[28]

41. Pursuant to the *Law Society Act*, the statutory obligation to act in the public interest must be part of its decision when deciding whether to accredit a law school. Thus, the decision to accredit encompasses more than merely considering the adequacy of the applicant law school's curriculum. Indeed, the accreditation relates to the "law school", not only its curriculum.

42. Law schools, even accredited ones, are not empowered in any way to vary, add to or subtract from the conditions to practice law that may be imposed by the Law Society. The *Law Society Act* and the Law Society's by-laws set the terms and conditions for entry to the bar. Moreover, the Law Society must comply with the *Charter* and the *Code* in exercising those duties and is prohibited from conditioning the license to practice law on discriminatory grounds.

3. The Law Society has the power to consider the admissions policy of any law school applying for accreditation

43. In determining whether to accredit a law school, the Law Society must act in accordance with its statutory mandate. It must decide whether accreditation of a law school is in the public

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[26] By-Law 4, *supra* at s. 9(1). The applicant must also have "experiential training" (s. 9(1), BOA, Tab 38.
[27] By-Law 4, *supra* at s. 7, BOA, Tab 38. The By-Law provides that a graduate of an accredited law school is entitled to be licenced to practice law if they complete the licensing examinations, complete an articling/law practice program and show good character.
[28] "Accredit", online: Oxford English Dictionary <http://www.oed.com/view/Entry/1224>, BOA, Tab 40.

interest, advances the cause of justice and the rule of law, and facilitates access to justice for the people of Ontario.

44. The Law Society must exercise this wide discretionary power by reference to section 4.2 of the *Law Society Act*, as well as in conformity with section 6 of the *Code* and section 15 of the *Charter*. It follows that the Law Society must consider the potentially discriminatory admissions policy of an applicant for accreditation.

45. This duty is consistent with the Supreme Court of Canada's conclusion in the *2001 BCCT* case to the effect that a public regulator acting in the public interest must consider "all features of the education program at [the university]", including the institution's admission policy.[29]

46. As explained above, at one time, the Law Society was the exclusive provider of legal training of prospective Ontario lawyers. Since 1833, it has not restricted entry to its education programs or to the bar based on religious or other discriminatory grounds. In the second half of the 20th century, the Law Society permitted universities to play a role in the provision of requisite legal education for the purpose of obtaining a license to practice law in Ontario. However, the Law Society continues to be statutorily responsible for how lawyers are trained and over who is training them. It remains what it has always been: the ultimate gatekeeper of who gains access to and can keep a licence to practice law. Thus, it has retained the broad jurisdiction to accredit law schools as part of its licensing process.

47. The strength, integrity and culture in the profession begin at law school. Former Chief Justice Brian Dickson wrote "the ethos of the profession is determined by the selection process at

[29] *2001 BCCT*, *supra* at paras. 13 and 32, BOA, Tab 2.

the law schools."[30] He further wrote that those involved in the admission process at law schools are "in a real sense, the gatekeepers of the legal profession" and that it is "incumbent upon those involved in the admissions process to ensure equality of admissions." [31] That is why, in exercising its public interest mandate, the Law Society cannot be precluded from considering policies directly related to the admission of its prospective licensees. Indeed, denying otherwise qualified candidates access to legal education on a discriminatory basis cannot be consistent with the public interest. The Law Society cannot legitimately maintain its commitment to equality and diversity at the same time as it denies equal access to the profession.

48. The disadvantage created by a discriminatory admissions policy to an accredited law school is problematic because, as the evidence makes clear, access to the profession is increasingly difficult. In 2013, there were approximately 9,000 law school applicants in Canada and only 2,782 places. In Ontario, the number of applicants was 4,758 for 1,502 positions.[32] The number of applicants to law schools far exceeds the number of offers made and the number of seats available. It is a reality that many qualified students aspiring to become lawyers are denied admission.

49. No one is denied access to any of the 20 accredited law schools – including Evangelical Christians – because of their, religion, gender or sexual orientation.[33] The Law Society could not accredit a law school with a discriminatory admissions policy.

4. Trinity Western University and its Community Covenant

50. TWU is a private university located in British Columbia which has the statutory objective of offering to the general public university education "with an underlying philosophy and

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[30] B. Dickson, "Legal Education" (1986) 64:2 Can. Bar Rev. 374 at 377 ["B. Dickson"], BOA, Tab 41.
[31] B. Dickson, *supra*, BOA, Tab 41.
[32] Affidavit of Benjamin Alarie, sworn on October 24, 2014 ["Alarie Affidavit"], *RAR,* paras. 50-51, Vol. 1, Tab 2, pp. 26-27.
[33] Charney, *supra* at p. 18-19, BOA, Tab 39.

viewpoint that is Christian".[34] It does not offer only theological degrees. It currently offers 42 undergraduate and 17 graduate degree programs, including nursing and education.

51. While TWU is affiliated with the Evangelical Free Church of Canada, an association of Evangelical Christian churches that adhere to the same statement of faith, and claims to be an "arm of the Church", it is not itself a church. TWU described itself as an "expressly Evangelical Christian community", and exists to serve those who share Evangelical religious beliefs.[35]

52. TWU will require all prospective students, faculty and staff of its proposed law school to sign and abide by the Community Covenant. The Community Covenant is a contract which would constitute a condition precedent to admission to TWU.

53. The Community Covenant is a code of conduct which is said to embody TWU's Evangelical religious values.[36] It sets out the standards of belief and conduct expected of members of the TWU community, including students. According to TWU, it is a significant means of ensuring that TWU maintains its religious character, achieves its mission and continues to attract students, faculty and staff that share its Evangelical religious beliefs.[37]

54. The Community Covenant provides:

> ***1. The TWU Community Covenant***
>
> The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible. This identity and allegiance shapes an educational community in which members pursue

[34] *Trinity Western University Act*, SBC 1969, c44, s. 3(2) ["*Trinity Western University Act*"].
[35] Affidavit of W. Robert Wood, sworn on August 22, 2014 ["Wood Affidavit"] at paras. 17, 20 and 27, Exhibit "C", TWU Community Covenant Agreement, *Application Record* ["*AR*"], Vol. 2, Tab 5, pp. 418, 420, 422.
[36] Wood Affidavit, *supra* at para. 33, *AR*, Vol. 2, Tab 5, p. 424. In fact, the Community Covenant is periodically reviewed and amended.The present Community Covenant does not prescribe a prohibition against alcohol, tobacco and social dancing like prior iteration of the Community Covenant (Affidavit of Richard M. Green ["Green Affidavit"], sworn on August 15, 2014, para. 10, *AR*, Vol. 2, Tab 12, p. 589; Affidavit of Jessie Legaree, sworn on August 18, 2014 ["Legaree Affidavit"], para. 17, *AR*, Vol. 2, Tab 15, p. 618).
[37] Wood Affidavit, *supra* at paras. 29-30, *AR*, Vol. 2, Tab 5, p. 422.

truth and excellence with grace and diligence, treat people and ideas with charity and respect, think critically and constructively about complex issues, and willingly respond to the world's most profound needs and greatest opportunities.

The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its aspirations.

The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. By doing so, members accept reciprocal benefits and mutual responsibilities, and strive to achieve respectful and purposeful unity that aims for the advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community. It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.

2. Christian Community

The University's acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God's purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled. This ongoing God-enabled pursuit of a holy life is an inner transformation that actualizes a life of purpose and eternal significance. Such a distinctly Christian way of living finds its fullest expression in Christian love, which was exemplified fully by Jesus Christ, and is characterized by humility, self-sacrifice, mercy and justice, and mutual submission for the good of others.

This biblical foundation inspires TWU to be a distinctly Christian university in which members and others observe and experience truth, compassion, reconciliation, and hope....

3. Community Life at TWU

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

- ...uphold their God-given worth from conception to death...

- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce...

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

- sexual intimacy that violates the sacredness of marriage between a man and a woman…

4. Areas of Careful Discernment and Sensitivity

[…]

Healthy Sexuality

…according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation...

5. Commitment and Accountability

[…]

By my agreement below I affirm that:

… I understand that by becoming a member of the TWU community I have also become an ambassador of this community and the ideals it represents…[38]

55. The effect of the Community Covenant is apparent: it imposes discriminatory burdens on many individuals and groups for reasons of sexual orientation, marital status, gender, and religion.[39]

56. The Community Covenant discriminates by limiting expressions of sexual intimacy to married heterosexual couples. The Community Covenant places a discriminatory burden on married lesbian, gay, bisexual, trans-gender and queer ("LGBTQ") persons because, unlike heterosexuals, they are denied sexual intimacy even if they are married.

57. The Community Covenant has the effect of discriminating against individuals involved in common-law relationships, whether heterosexual or LGBTQ individuals, as a result its pledge of

[38] Wood Affidavit, *supra* at Exhibit "C", TWU Community Covenant, *AR*, Vol. 2, Tab 5, p. 439-42.
[39] Affidavit of Pamela Klassen, sworn on October 23, 2014 ["Klassen Affidavit"], Exhibit "B", *RAR*, Vol. 2, Tab 4, p. 554-63 Affidavit of Helen Kennedy, sworn on October 24, 2014, ["Kennedy Affidavit"], *RAR*, Vol. 1, Tab 1, p. 5.

abstinence outside of heterosexual marriage.[40] This discrimination equally applies to unmarried individuals, whether heterosexual or LGBTQ persons.

58. It further places a discriminatory burden on LGBTQ individuals who could not sign the Community Covenant and continue to express their identity.[41]

59. The Community Covenant discriminates against women because it requires the signatory to commit to upholding the "God-given worth from conception to death." This stipulation amounts to a rejection of a woman's right to abortion services, and women's self-determination with regard to reproduction would be negated at TWU.[42]

60. The Community Covenant repeatedly refers to TWU as a "distinctly Christian" environment and it requires each of its members to become an "ambassador" of the TWU community.[43] The Community Covenant discriminates against individuals who do not share a thoroughly Evangelical Christian worldview, including religious minorities such as Jews, Muslims, Buddhists, Atheists and Agnostics.[44]

61. By contrast, it is useful to consider the evidence that the Applicants rely upon to advance claims that their rights have been infringed. Specifically, while TWU has filed 15 affidavits in support of its application, it is important to highlight what the evidence does not establish:

a. While some of the affiants expressed a preference for TWU, none claim that attending a secular program impaired their ability to practice their religion;

b. There is no evidence that Evangelical Christianity requires the study of law;

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[40] Klassen Affidavit, *supra* at pp. 558-559.
[41] Kennedy Affidavit, *supra* at paras. 20-21, *RAR*, Vol. 1, Tab 1, p. 5.
[42] Klassen Affidavit, *supra* at *RAR*, Vol. 2, Tab 4, pp. 559, 563.
[43] Wood Affidavit, *supra* at Exhibit "C", TWU Community Covenant, *AR*, Vol. 2, Tab 5, p. 439-42
[44] Klassen Affidavit, *supra* at pp. 559, 563.

c. The evidence does not show that the existence of a distinctly Evangelical Christian university community is necessary for Evangelical Christians to practice their faith;

d. There is no evidence that Evangelical Christianity requires mandatory adherence to a code of conduct similar to the Community Covenant as a requirement to practice the faith and

e. None of the affiants gave evidence that their faith or practice of their religion was impaired by studying in a context that included non-believers. On the contrary, the evidence is Evangelical Christians develop a greater understanding of their distinctiveness through interaction with non-evangelicals.[45]

62. The Applicants claim to welcome a variety of different points of view on moral, ethical and religious issues.[46] Yet, they exclude a myriad of individuals who could not in good conscience sign the Community Covenant as it would be inconsistent with their beliefs and whose views obviously would differ from the ones held by those who felt able to sign the Community Covenant.

63. The proposed law school is far more than a school with a religious affiliation. TWU requires its students to commit to the religious tenets set out in the Community Covenant and become ambassadors of the TWU community.

5. The process leading up to the decision of the Law Society was reasonable

64. In January 2014, TWU sought the accreditation of the Law Society, a public benefit which only the Law Society can confer under the powers granted to it by its enabling statute.[47]

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[45] Affidavit of Dr. Samuel H. Reimer, sworn on August 19, 201, para. 44, *AR*, Vol. 2, Tab 11, p. 569.
[46] TWU Factum, para. 18; Wood Affidavit, *supra* at para. 15, *AR*, Tab 5, page 417.
[47] Letter from B. Kuhn to Law Society Treasurer, January 6, 2014, *Record of Proceedings*, Tab 253, p. 2746.

65. At the February 2014 Convocation, the then Law Society Treasurer outlined the process that the Law Society intended to follow to determine the accreditation of TWU. He noted that the process must:

> - preserve the impartiality of members of Convocation as decision-makers;
> - provide appropriate information to Convocation upon which the decision can be made;
> - provide appropriate procedural fairness; and
> - comply with legal requirements including the *Charter*, *Human Rights Code*, common law, the *Law Society Act* and Law Society by-laws, rules and policies.[48]

66. TWU was invited to provide written submissions, which it did on April 2.[49] The public and the profession were also invited to provide written submissions.[50] The Law Society also considered the reports of the Federation of Law Societies and the submissions it received, along with various memoranda on legal issues.[51]

67. The Law Society's decision making process was designed to have two components. First, at the Convocation on April 10, 2014 (the "April 10 Convocation") members discussed the TWU application and raised questions so that TWU would have the opportunity to respond. No vote was taken at this meeting.[52] On April 22, 2014, TWU provided written reply submissions to some of the issues raised at the April 10 Convocation. Second, at the Convocation on April 24, 2014 (the "April 24 Convocation") TWU made oral reply submissions responding to the Benchers' questions from the April 10 Convocation and to the written comments the Law Society received on this

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[48] Treasurer's Statement, February 27, 2014, *Record of Proceedings*, Tab 255, p. 2756.
[49] *Record of Proceedings*, Tabs 249, 254 and 257.
[50] *Record of Proceedings*, Tabs 34-243.
[51] *Record of Proceedings*, Tabs 1-32 and 244-248.
[52] Convocation Transcript, April 10, 2014, *AR*, Vol. I, Tab 3, p. 23.

matter. Subsequently, numerous and thoughtful representations were made by Benchers, following which Convocation voted.

68. On April 24, Convocation voted to reject the accreditation by a vote of 28 to 21 with one abstention.[53] Bencher Clayton Ruby was not entitled to vote because of his status as a life bencher and, in any event, was not present that day.[54]

Part II – Issues and Statement of Law

69. The Law Society's position on the main issues raised by this application is as follows:

a) The Law Society's decision is entitled to deference and is reviewable on a standard of reasonableness;

b) The *2001 BCCT* decision does not dictate that TWU must be accredited;

c) The Law Society's decision was at least reasonable, if not correct, because it conforms to the standards set out by the Supreme Court of Canada in *Doré*:

i. it is consistent with its statutory obligations;

ii. does not interfere with the Applicants' rights; and

iii. in any event, reflects a proper balancing of the various rights and interest at issue;

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[53] Convocation Transcript, April 24, 2014, *AR*, Vol. I, Tab 4, p. 201. Unlike the Nova Scotia Barristers' Society ["NSBS"], the Law Society is not attempting to dictate the policies of a private institution. Rather, the Law Society's decision is limited to the ambit of its own jurisdiction and reflects the Law Society's view of what it can and cannot do. In contrast, the NSBS took the step of passing a resolution that appeared to set conditions for TWU. The Nova Scotia Supreme Court clearly objected to this measure – viewing it as a state actor overreaching in attempting to exert its power against a private institution (*Trinity Western University v. Nova Scotia Barristers' Society,* 2015 N.S.S.C. 25 ["*TWU v NSBS*"]), BOA, Tab 2.

[54] See *Law Society Act*, *supra* at s. 12(1), (4), which provide that Benchers who held their office because they had been a bencher for at 16 years may not vote in Convocation.

d) The Law Society's decision is not tainted by actual or reasonable apprehension of bias.

A. The Law Society's decision must be reviewed on a reasonableness standard

70. The Applicants concede[55] that the applicable standard of review of Convocation's decision is reasonableness and therefore the decision must fall within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. However, they claim based on an outdated jurisprudence, that where there is no real dispute on the facts, the range of reasonable outcomes is much narrower. This purported narrowing of the reasonableness standard does not find support in the recent case law of the Supreme Court of Canada, particularly the *Doré* decision, which did not involve contested facts.

71. The Law Society has the exclusive jurisdiction to regulate the admission to the Bar of Ontario. In deciding whether to accredit a law school, the Law Society considers a broad array of factors including the proposed curriculum[56] and public interest implications. The Law Society's decision to not accredit TWU's law school was essentially a policy-based decision. In reaching this decision, the Law Society was required to weigh a number of factors: its statutory public interest mandate; the *Charter*; the *Code*; and the impact of the decision on a wide and diverse range of individuals and groups including its members, prospective licensees and the public.

72. The Law Society is uniquely positioned to make this type of decision. The *Law Society Act* empowers the Law Society to represent the public interest in matters relating to the legal profession in Ontario. The *Law Society Act* sets out the composition of Convocation, the decision making body. It is composed of elected and appointed Benchers who bring a variety of backgrounds and experiences to their roles. In reaching the decision under review, the Benchers

[55] Applicants' Factum, paras. 71-73.
[56] With respect to TWU's proposed curriculum, the Law Society referred to the analysis of the Federation of Law Societies.

conducted a fair process and the issues were fully debated. Pursuant to the *Law Society Act*, the decision of the majority is binding.

73. This Court should not interfere with the Law Society's decision arrived at in accordance with its statutorily mandated process unless it determines that there is no reasonable basis on which the majority could have reached the decision it did. This Court should be particularly reluctant to interfere with a policy-based decision when it is arrived at by a process that the Legislature intended would represent a broad range of views and experiences with respect to the legal profession and the public interest.

74. Even when the *Charter* is engaged, the applicable standard of review is reasonableness.[57] The court must determine whether the decision of the administrative decision-maker falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law, including the *Charter*.[58] A measure of deference and leeway must be accorded to the decision-maker.[59]

B. The *2001 BCCT* decision does not dictate that TWU must be accredited

75. In its *2001 BCCT* decision, the Supreme Court of Canada found that the B.C. College of Teachers exceeded its jurisdiction when it refused to accredit TWU's teachers college. It did so on two principal grounds. First, that the applicable standard of review was correctness, because the B.C. College of Teachers did not have special expertise in interpreting issues involving the *Charter*. And, secondly, because the B.C. College of Teachers' decision was essentially premised on what the Court deemed speculative concerns, namely, the possibility that TWU graduates might

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[57] *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 47 ["Doré"], BOA, Tab 4
[58] *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9 at para. 47, BOA, Tab 5.
[59] *Doré*, *supra* at para. 56, BOA, Tab 4.

act in a discriminatory manner in a public teaching setting. The Court found there was no reliable evidence to justify this concern.

76. The case at bar is different. First, it is accepted that the applicable standard of review to the Law Society's decision is reasonableness, not correctness, and that the Court owes deference to the Law Society's assessment of applicable requirements of the *Charter* and the *Code*.

77. Second, the main arguments against accreditation in the *2001 BCCT* case focused on the concern that TWU graduates might discriminate as teachers in the future. The Law Society does not raise that concern with respect to the TWU Law School graduates. Instead, the Law Society's decision is based on the effect of TWU's discriminatory admissions policy that would deny equal access to the profession. That argument was not the justification for the Court's finding that the B.C. College of Teachers had erred in not allowing accreditation of TWU.

C. The Law Society's decision was reasonable

78. Pursuant to *Doré*, in assessing the reasonableness of the Law Society's decision not to accredit TWU, the Court must consider the Law Society's decision in the context of (i) the statutory objectives of the regulatory regime within which the Law Society made its decision, (ii) the Applicants' *Charter* values at issue, and (iii) whether the Law Society balanced the statutory objectives with protecting the *Charter* and *Code* values at stake.[60]

1. The Law Society reasonably considered its statutory mandate to act in the public interest

a) The Law Society's obligations

79. The Law Society was first required to consider the statutory purposes of relevant legislation, including the *Law Society Act* and the Law Society by-laws (described above) in

[60] *Doré*, *supra* at paras. 55-58, BOA, Tab 4.

deciding whether to accredit TWU. It had to do so in light of its obligations under the *Charter* and the *Code*.[61]

80. The Law Society's decision fulfills its mandate as a public interest regulator in respect of the licensing process and gives effect to the relevant statutory objectives. A review of the submissions of the Benchers who opposed accreditation at both convocations reflects a consistent theme and rationale. Although those views were expressed differently by various Benchers, the core of their objections to accreditation was that accrediting would be endorsing and adopting a discriminatory licensing admissions policy. As such, it would violate the Law Society's core values of equality to individuals and groups of diverse beliefs and backgrounds and would discriminate against individuals based on sexual orientation, gender, marital status and religion. Discrimination in the licensing process would be corrosive of confidence in the legal profession. As part of this deep seated concern, those Benchers believed that refusing accreditation conformed with the Law Society's role in advancing the cause of justice and the rule of law; ensuring equal access to and public confidence in the profession; and maintaining public confidence in the Law Society as a protector and promoter of the public interest.[62]

81. The Law Society's consideration of the discriminatory implications of the Community Covenant in determining whether the accreditation of TWU's law school was consistent with the Law Society's duty to protect the public interest and maintain and advance the cause of justice and the rule of law.[63]

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[61] *Doré*, *supra* at para. 55, BOA, Tab 4.
[62] Convocation Transcript, April 10, 2014, pp. 57-63, 93-100, 101-102, *AR*, Vol. I, Tab 3, pp. 23; Convocation Transcript, April 27, 2014, pp. 80-89, 147-148, *AR*, Vol. I, Tab 4, pp. 201.
[63] *Law Society Act*, *supra*, s. 4.1-4.2.

82. In *2001 BCCT*, the Supreme Court of Canada acknowledged that a regulator is entitled to look at an institution's alleged discriminatory practices when regulating in the public interest.[64]

83. As a public actor, the Law Society must act in accordance with the *Charter*, including section 15. That section enshrines a constitutional guarantee of equality. It provides:

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

84. The Supreme Court of Canada has characterized the purpose and fundamental importance of the equality guarantee constitutionally protected by section 15 in the following way:

> ...It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.[65]

85. Moreover, the Law Society was also required to consider human rights legislation.[66] Human rights legislation, as a declaration of "public policy regarding matters of general concern", forms part of the body of relevant law necessary to assist a tribunal in interpreting its enabling legislation.[67]

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[64] *2001 BCCT*, *supra* at para. 26-27, BOA, Tab 2; see also *TWU v NSBS*, *supra* at paras. 185-186, BOA, Tab 2.
[65] *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 67 ["*Vriend*"], BOA, Tab 42.
[66] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710 ["*Chamberlain*"], BOA, Tab 43. *2001 BCCT*, *supra*, BOA, Tab 2.
[67] *Council of Canadians with Disabilities v. VIA Rail Canada Inc.*, [2007] 1 S.C.R. 650 at para. 114 ["*Council of Canadians with Disabilities*"], BOA, Tab 44, citing *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150, at p. 156, BOA, Tab 45 and *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513, at para. 26 ["*Tranchemontagne*"], BOA, Tab 46.

86. The *Code* is quasi-constitutional law and administrative bodies must take into account the *Code* in situations where human rights issues arise.[68]

87. As stated by the Supreme Court of Canada, "human rights legislation must be offered accessible application to further the purposes of the Code by fostering 'a general culture of respect for human rights in the administrative system'."[69]

88. Section 6 of the *Code* requires equal access to self-governing professions:

> 6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.[70]

89. There is no exception under the *Code* from the guarantee of equal access to self-governing professions set out in section 6 of the *Code* – not even for religious or education institutions. In contrast, there are exceptions, such as under section 18 of the *Code*, available to private service providers that are not available under section 6 of the *Code*.[71]

90. Finally, the Law Society has stated: "there is great diversity in the religious and spiritual beliefs and practices of people in Ontario and Canada. This diversity, together with the values and spirituality that are shared in Ontario, in Canada and throughout the world, should be celebrated."[72] It would be inconsistent for the Law Society to promote such prescribed diversity and yet restrict

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[68] *Tranchemontagne*, *supra* at paras. 13-14, 26, 33, BOA, Tab 46.
[69] *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422 at para. 53, BOA, Tab 47; *Tranchemontagne*, *supra* at paras. 33, 39, BOA, Tab 46; *Council of Canadians with Disabilities*, *supra*, BOA, Tab 44.
[70] *Human Rights Code*, RSO 1990, c H.19, s. 6.
[71] Section 18 of the *Code* provides that equal treatment with respect to "services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified." However, this exemption does not apply to the guarantee of equal access to vocational associations set out in section 6 of the *Code*.
[72] Bouchard Affidavit, *supra* at Exhibit "G", *RAR*, Vol. 1, Tab 3, p. 465.

entry into this profession and condone such restriction on a prohibited ground. The Law Society is not entitled to do so under the *Charter* and the *Code*.

b) The Community Covenant is Discriminatory

91. The Community Covenant discriminates against many individuals and groups on the prohibited grounds[73] in a manner that clearly rises to the level of violating the "norm of substantive equality" as required by the *Charter*.[74] The Community Covenant discriminates on the basis of sexual orientation, marital status, gender and religion as set out at paragraphs 55-60 above.

92. Accrediting TWU would create differential access to a public benefit – access to a license to practice law in Ontario – based on prohibited grounds. Individuals who are willing to sign the Community Covenant will have greater access to the exclusion of those unwilling to sign the Community Covenant. In short, Evangelical Christians will have a greater opportunity to obtain a license to practice law in Ontario than will others. This amounts to (i) a clear advantage to Evangelical Christians and others willing to sign the Community Covenant and (ii) a corresponding deprivation to those unable to sign it.

93. In this way, accreditation of TWU's proposed school of law would create a clear and direct distinction in the access to a law license in Ontario based upon enumerated and analogous grounds. This distinction cannot be tolerated under section 15 of the *Charter* or section 6 of the *Code.* As stated by the Supreme Court: "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory."[75]

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[73] *Egan v. Canada* [1995] 2 S.C.R. 513, [*"Egan"*], BOA, Tab 48*; M v. H.* [1999] 2 S.C.R. 3, at para. 315, BOA, Tab 49*; Miron v. Trudel,* [1995] 2 S.C.R. 418, BOA, Tab 50*; Charter*, s. 15.
[74] *Quebec (Attorney General) v. A,* 2013 SCC 5, at para. 325, BOA, Tab 17.
[75] *Quebec (Attorney General) v. A,* 2013 SCC 5, *supra* at para. 332, BOA, Tab 17; see also *Withler v. Canada (Attorney General)* 2011 SCC 12, BOA, Tab 51, where the Court held that a decision must be examined in its full context and that consideration should be given to the negative impact of the impugned law on the excluded group.

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

> Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction.[76]

95. When one considers this element of the *Charter* guarantee of equality, the Community Covenant must be seen as highly problematic. The Community Covenant refers to certain acts, including sexual intimacy outside of heterosexual marriage, as being "destructive"[77], and has the effect of rendering such conduct illicit and non-virtuous.[78] The Community Covenant not only has terms that are offensive to many groups, but their effect is to directly exclude identifiable minorities from attending TWU. The Law Society could not adopt into the licensing process such harmful exclusion pursuant to its obligations under the *Charter* and the *Code*.

96. The Community Covenant offends the human dignity of those that it excludes. The Supreme Court of Canada has identified human dignity as an "essential value"[79] underlying the section 15 equality guarantee:

> Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits. It is enhanced by laws which are sensitive to the needs, capacities, and merits of different individuals, taking into account the context underlying their differences. Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society. Human dignity within the

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[76] *Egan, supra* at 567, BOA, Tab 48.
[77] TWU Community Covenant Agreement, *supra, AR,* Vol. 2, Tab 5.
[78] Klassen Affidavit, *supra* at *RAR*, Vol. 2, Tab 4(b), p. 557.
[79] *R v. Kapp* [2008] 2 S.C.R. 483 at para. 21, BOA, Tab 52.

> meaning of the equality guarantee does not relate to the status or position of an individual in society per se, but rather concerns the manner in which a person legitimately feels when confronted with a particular law. Does the law treat him or her unfairly, taking into account all of the circumstances regarding the individuals affected and excluded by the law?[80]

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

98. Denying or restricting access to a public benefit based on prohibited grounds conveys a very hurtful message to the excluded groups.[81] Accordingly, the Law Society could not have decided to accredit TWU without interfering with the equality rights of those excluded by the Community Covenant. This cannot be tolerated by the Law Society which is bound by the *Charter* and the *Code*.

99. To borrow the words of Justice Cory and Iacobucci in *Vriend v. Alberta*,[82] adopting the exclusion created by the Community Covenant would send a message to the public that it is permissible, and perhaps even acceptable, to discriminate against individuals on the basis of their sexual orientation, gender, marital status, or religion.[83] This is unacceptable by any public actor. The Law Society cannot adopt into its licensing process an admissions policy that excludes any group from a license to practice law.

100. Furthermore, although the Applicants have asserted that TWU does not deny admission to LGBTQ individuals because some may be willing to abide the terms of the Community Covenant,[84] the Community Covenant nevertheless places an onerous burden on those individuals

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[80] *Law v. Canada (Minister of Employment and Immigration*, [1999] 1 S.C.R. 497 at para. 53, BOA, Tab 53.
[81] See *Quebec (Attorney General) v. A,* 2013 SCC 5 at para 331, where the Supreme Court held that section 15 is concerned with whether the distinction creates an "arbitrary disadvantage" suffered by the enumerated or analogous group, BOA, Tab 17.
[82] *Vriend, supra*, BOA, Tab 42.
[83] *Vriend, supra* at para. 101, BOA, Tab 42.
[84] TWU Factum, para. 147.

on discriminatory grounds. The Supreme Court of Canada has rejected the notion that the targeting of sexual behavior is distinct from the targeting of sexual orientation. The Court adopted the following passage from the dissenting opinion in *2001 BCCT*:

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. . . . The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected ... This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.[85]

101. Accordingly, the Appellants cannot assert that LGBTQ individuals can choose to restrain their sexual activity in order to attend TWU. As stated by the Court in *Whatcott*, "Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself."[86]

102. The Law Society as a public actor and gatekeeper cannot exercise its statutory licensing power in a discriminatory manner. It cannot deny access to a licence based on prohibited grounds. In particular, to the extent that the Law Society prescribes or recognizes certain academic requirements as pre-requisites for licensing, it cannot condition or limit access for satisfying such requirements on discriminatory grounds. While religious groups, within the private sphere, may be allowed to discriminate pursuant to the freedom of religion protected by section 2(a) of the *Charter*, the Law Society, as a public actor, is forbidden from doing so.[87]

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[85] *Saskatchewan (Human Rights Commission) v. Whatcott,* [2013] 1 S.C.R. 467 at para. 123 ["*Whatcott*"], BOA, Tab 19.

[86] *Whatcott*, *supra* at para. 124, BOA, Tab 19.

[87] Similarly, had the *Charter* been in force when the Society administered legal education at Osgoode Hall, it of course would not have been able to impose the conditions of the Community Covenant on its students.

103. Moreover, quite apart from the specific constitutional and statutory prohibitions against discrimination that bind it, the Law Society had to consider the effect on public confidence in the legal profession. The integrity of the legal profession is essential to the well-being of a free and democratic society.[88] As the regulator of the legal profession, the Law Society is bound by the equality guarantee enshrined in the *Charter* and in the *Code*.

104. The integrity of the legal profession depends upon the trust it can command in society. That we are a diverse society is particularly important to the case at bar. As the regulator of the legal profession with a duty to maintain and advance the rule of law in Ontario, the Law Society's obligation to equality and diversity must be paramount. For the Law Society to accredit a law school knowing that it had a discriminatory admissions policy, it would jeopardize the public's confidence in the legal profession.

105. The Law Society's determination that adopting TWU's discriminatory admissions policy into the process to obtain an Ontario law license would be contrary to its statutory mandate and irreconcilable with its public interest mandate – including the promotion of equality and diversity - is, in every respect, reasonable.

c) The Law Society cannot discriminate directly or indirectly

106. The Law Society could not itself deny a license on any prohibited ground, nor could it deny access to any of its licensing requirements such as the bar admission course on such grounds.

107. The fact that the Law Society has allowed universities to provide the requisite legal education to obtain a licence does not permit the universities who wish to be part of the licensing process to do what the Law Society itself could not do. In recognizing and accrediting university

[88] Law Society of Upper Canada, Role Statement, Oct. 27, 1994 as cited in the Cavaluzzo opinion, *Record of Proceedings*, Tab 246.

law schools as part of its licensing process, the Law Society accepts that the universities will be required to establish admission policies. That said, when deciding whether to accredit, it is necessary for the Law Society to determine that the law school will not employ admission policies that the Law Society would not itself either choose to use or be permitted by law to use.[89]

108. TWU states that it is not subject to the *Charter's* requirement to provide equal protection to LGBTQ persons.[90] It misses the point that it is the Law Society's decision that is being assessed, and that decision must comply with the *Law Society Act*'s statutory objectives and respect the constitutional and statutory prohibition against the Law Society to discriminate in any way.[91]

109. Similarly, the Applicants assert that the Law Society would not violate the *Code* because it is exempt from British Columbia human rights legislation and the *Code* similarly accommodates religious organizations and institutions.[92] However, Applicants fail to recognize that there is no exemption or exception from the requirement to treat every person equally and without discrimination in respect of self-governing professions under section 6 of the *Code*. As a result, the Law Society is bound by the *Code* to treat every person equally and without discrimination, and the status of TWU does not negate that obligation.

110. The Law Society is duty-bound to act in the public interest and conform to constitutional requirements, irrespective of the status of the entity seeking a public benefit from the Law Society.

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[89] It would be contrary to the principles of administrative law and the *Charter* for the Law Society to permit discrimination in the exercise of its powers, directly or indirectly. See *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624 at 20, BOA, Tab 54; *Little Sisters Book & Art Emporium v. Canada* (Minister of Justice), [2000] 2 S.C.R. 1120 at 138 and 256, BOA, Tab 55; see also *Suresh v. Canada (Ministry of Citizenship and Immigration)* 2002 SCC 1 at para. 54, BOA, Tab 56.

[90] TWU Factum, para. 133.

[91] Similarly, in *Vriend, supra*, BOA, Tab 42, the Supreme Court held, in response to the submission that applying the *Charter* to the impugned human rights legislation would amount to the regulation of private activity: "The respondents' submission has failed to distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal."

[92] TWU Factum, para. 137.

111. The Applicants assert[93] that the Law Society could not disbar an Ontario lawyer for believing that sexual intimacy should be limited to heterosexual marriage and that, on the same basis, the Law Society cannot bar licensees for sharing those beliefs. This is a false corollary. Of course the Law Society could not, and does not, disbar lawyers for their private beliefs. The Law Society is bound to respect such private beliefs. However, it does not follow that the Law Society *must*, under its statutory authority, accredit (i.e. publicly sanction and adopt as part of its licensing process) a law school that *excludes* students on the basis of their private beliefs, or any other prohibited ground.

112. As the Law Society cannot itself discriminate, it necessarily follows that the Law Society cannot be compelled to permit discrimination in the exercise of its accreditation function. For the same reasons, it was entirely reasonable for the Law Society to determine that accrediting TWU would be contrary to its statutory objectives.

2. The alleged infringement of the *Charter*

a) The proper scope of *Charter* values

113. The Applicants have asserted that the Law Society's decision violates their *Charter* rights, including their freedoms of religion, expression, association and right to equality. TWU asserts that the Law Society has "preferred certain Charter values over the freedom of religion, association and expression and the equality rights of Evangelical Christians."[94] This position ignores the basic, and firmly established, proposition that, in the public sphere, no right is absolute.

114. As stated by the Supreme Court:

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[93] TWU Factum, para. 7.
[94] TWU Factum, para. 152.

> No right, including freedom of religion, is absolute. This is so because we live in a society of individuals in which we must always take the rights of others into account. In the words of John Stuart Mill: "The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it" In the real world, oftentimes the fundamental rights of individuals will conflict or compete with one another.[95]

115. The rights of expression, association and religion of one group of individuals cannot be favoured over the equality rights of others. As stated by Chief Justice Dickson:

> A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct.[96]

116. Freedoms, such as freedom of religion, are "inherently limited by a number of considerations, including the rights and freedoms of others."[97] Section 2 of the *Charter* entitles individuals to declare and manifest religious beliefs and practices, and to do so collectively. It does not, however, entitle individuals of any belief system to an insular community while operating in the public space. Nor does it entitle individuals to impose beliefs on others in that space. The *Charter* places no restraints on religious beliefs, but the state may constrain practices where they affect the rights and freedoms of others.[98] It is well established that Canadian jurisprudence does not allow individuals to do absolutely anything in the name of freedom of religion:

> Conduct which would potentially cause harm to or interference with the rights of others would not automatically be protected. The ultimate protection of any particular Charter right must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises.[99] [emphasis added]

117. In the public sphere, the exercise of fundamental freedoms must be constrained where it is necessary to protect the freedoms and equality of others. In the context of the freedom of religion, when an individual believer seeks an exemption from the law for her religious practice, the key

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[95] *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 at para 61 ["*Amselem*"], BOA, Tab 15.
[96] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 1985 CanLII 69 (SCC) at para 94, BOA, Tab 57.
[97] *Young v. Young*, [1993] 4 S.C.R. 3 at 94, BOA, Tab 61.
[98] *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 ["*Children's Aid Society*"], BOA, Tab 58.
[99] *Amselem, supra* at para. 62, BOA, Tab 15.

issue for the Court is whether the rights of others will be negatively affected.[100] An individual's religious freedom is limited where the practice of religion could promote discrimination against a minority group.[101]

118. *A fortiori*, this must be so where one is seeking, not freedom from constraint, but rather a public benefit from a public regulator.

119. Here, the Applicants' assertion of their freedom to exclude others while seeking a public benefit directly interferes with the equality rights of those excluded from TWU by the Community Covenant. In the public sphere, the Applicants' rights are limited by the extent to which they preclude others from realizing their own fundamental freedoms.

120. Indeed, the submissions of the Applicants implicitly recognize this point. The Applicants emphasize that TWU is a "private" institution and not part of the "government apparatus".[102] They assert that the Community Covenant is a "private" expression of their faith. As a result, they state that they are not prohibited from discriminating.[103] In this regard, the Applicants' submissions expose an obvious truth: while TWU is a private actor when merely seeking to educate students, the Law Society is incontrovertibly a public actor, bound to act in the public interest and to maintain public confidence in the legal profession. The Law Society is consequently obligated to provide the right to equal protection without discrimination in all its functions, including the accreditation of law schools. The private status of TWU, in this respect, cannot dictate the decision of the Law Society.

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[100] *Charney*, supra, at 20; Richard Moon, *Freedom of Conscience and Religion*, (Irwin Law Inc., 2014) pp. xvi and 139-140, BOA, Tab 59.
[101] See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, BOA, Tab 60; See also *Chamberlain, supra*, BOA, Tab 43, where the Court held that the religious views of one part of the community cannot exclude from consideration the values of equality and respect for other members of the community. Different groups must be given recognition.
[102] TWU Factum, para. 132.
[103] TWU Factum, para. 118.

121. The Supreme Court of Canada articulated the limits of the Applicants' fundamental freedoms in the public sphere in *S.L.* There, the appellants were Catholic parents who argued that their children's mandatory attendance in an Ethics and Religious Culture class, which exposed students to study of various religions, interfered with their moral obligation to instruct their children about the Catholic faith. The Court agreed that the appellants held a sincere and genuine belief that they were morally obligated to instruct their children in the Catholic faith. The Court disagreed, however, that mandatory attendance in the class interfered with their ability to practice their faith or constituted an infringement. The Court wrote:

> Religious neutrality is … a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights.[104] …
>
> state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected.[105] …
>
> The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.[106]

122. Thus, freedom of religion, association and expression do not extend so far in the public sphere as to entitle any religious group to exclude others while seeking a public benefit.

123. Indeed, in the public space, no individual right should be permitted to violate the rights of others: "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."[107] Therefore, in interpreting any single freedom or right, the Court must strive to do so in harmony with the freedoms of others.

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[104] *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235, 2012 SCC 7, at para. 10 ["*S.L.*"], BOA, Tab 62.
[105] *S.L.*, *supra* at para. 32, BOA, Tab 62.
[106] *S.L.*, *supra* at para. 40, BOA, Tab 62. See also *Whatcott*, *supra* at para. 162, BOA, Tab 19.
[107] *Reference re Same-sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79 at para 46, BOA, Tab 63.

b) No breach of the Applicants' freedom of religion

124. An infringement of the freedom of religion under section 2(a) of the *Charter* will be established where: (1) the claimant sincerely holds a belief or practice that has a nexus with religion (the subjective component); and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs (the objective component).[108]

125. With respect to the first element of the test, there is an insufficient nexus between the Law Society's decision and any component of freedom of religion from either the perspectives of TWU students or TWU as an institution on behalf of its students. There is no authority for the proposition that there is a nexus between freedom of religion and teaching and/or learning the law. Lawyers in Canada do not practice religious law and experts in religious law are not required to be lawyers.[109] Moreover, by their own admission,[110] the Applicants recognize that their faith does not require them to exclude certain minorities while they *practice* law once they become lawyers.

126. Indeed, it could not seriously be argued that accredited law schools and the Law Society have been violating the freedom of religion of Evangelical Christians by requiring them to attend classes with people from the minorities now sought to be excluded by the Community Covenant.

127. Second, even assuming that the Applicants sincerely believe that attending a law school that is accredited by the Law Society has a nexus with their Evangelical faith, it cannot be said that the Law Society's decision more than trivially or insubstantially interferes with their religious freedom.

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[108] *Whatcott, supra* at para 155, BOA, Tab 19.
[109] Charney, *supra* at p. 29, BOA, Tab 39. In contrast, in *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, BOA, Tab 64 the Supreme Court found that what was protected was the right to teach religion.
[110] TWU Factum, paras. 36, 145; Green Affidavit, *supra* at *AR*, Tab 12, p. 587; Affidavit of Kelly P. Hart, sworn August 20 ["Hart Affidavit"], 2014, *AR*, Tab 13, p. 597.

128. "Trivial or insubstantial" interference is interference that does not threaten actual religious beliefs or conduct.[111] The question at this stage is whether, objectively, a belief or practice exists that has been infringed:

> As with any other right or freedom protected by the Canadian Charter and the Quebec Charter, proving the infringement requires an objective analysis of the rules, events or acts that interfere with the exercise of the freedom. To decide otherwise would allow persons to conclude themselves that their rights had been infringed and thus to supplant the courts in this role.[112]

129. In this case, there is not substantial interference on the prospective students' ability to act in accordance with his or her religious beliefs. Prospective students are free to attend a TWU law school whether or not it receives accreditation. They are also free to apply to any Law Society-accredited law school and, if accepted, attend. Neither option interferes with the students' religious beliefs or practices.[113]

130. There is no evidence the Applicants' religious beliefs preclude them from attending law schools accredited by the Law Society. On the contrary, Evangelical Christians have attended secular schools without discrimination based on their religious beliefs.[114] Moreover, TWU has not adduced any evidence to show that attending an accredited law school "threatens actual religious beliefs or conduct". While the Applicants place heavy emphasis[115] on the fact that one Evangelical Christian student allegedly had an unpleasant experience at the University of Toronto Law School, there is no evidence that amounts to objectively establishing an interference with religion. For there to be interference with a religious freedom, more is required than mere anecdotes of exposure

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[111] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 32, BOA, Tab 16.
[112] *S.L.*, *supra* at para. 24, BOA, Tab 62.
[113] Charney, *supra* at p. 18-20, BOA, Tab 39.
[114] Hart Affidavit, *supra* at *AR*, Tab 13, p. 598.
[115] TWU Factum, para. 17; Legaree Affidavit, *supra* at paras. 5-6, *AR*, Tab 15, pages 618-619.

to different viewpoints and contrary opinions.[116] This is particularly so where, as here, the anecdotal evidence is inconsistent with the Applicants' claim that they welcome alternate points of view.

131. The Applicants also assert, without any evidence, that the Law Society has denied Evangelical Christians their livelihood in the Province of Ontario.[117] To the contrary, TWU's own evidence is that Evangelical Christians are, in fact, practising law in Ontario.[118] The Law Society could not, and has not, prevented anyone from obtaining a license because of their faith-based beliefs.

132. The Applicants also assert that their religious freedoms are infringed because the Law Society's decision "impairs TWU's ability to attract and retain students who may want to practice law in Ontario."[119] However, TWU's ability to attract and retain students is not something which freedom of religion protects. TWU is, in reality, asserting a right to state support for its faith-based enterprise. But freedom of religion cannot be invoked to compel government support for a religion. As Chief Justice Dubin stated in *Adler*:

> The right involves the freedom to pursue one's religion or beliefs without government interference, and the entitlement to live one's life free of state-imposed religions or beliefs. It does not provide, in my view, an entitlement to state support for the exercise of one's religion. Thus, in order to found a breach, there must be some state coercion that denies or limits the exercise of one's religion.[120]

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[116] In *S.L.*, *supra*, BOA, Tab 62 and *Adler, infra,* the Supreme Court of Canada found that participation in a non-religious or secular program does not breach the individual's religious freedom.
[117] TWU Factum, para. 4.
[118] Hart Affidavit, *supra* at *AR,* Tab 13, p.597.
[119] TWU Factum, para. 104.
[120] *Adler v. Ontario* (1994), 19 O.R. (3d) 1 at p. 10 (C.A.), aff'd [1996] 3 SCR 609 ["*Adler*"], BOA, Tab 65. See also Charney, *supra*, Tab 39.

133. Section 2(a) does not impose a constitutional obligation on the state to accredit a professional school that has discriminatory admission policies.[121]

c) No breach of the Applicants' freedom of association

134. The Law Society has not infringed the Applicants' freedom to associate. As the Applicants acknowledge, the fundamental purpose of freedom of association is to protect the individual from state-enforced isolation in the pursuit of his or her ends.[122] Here, the Applicants are turning the purpose of the right to associate on its head: they are asserting the right to accreditation while isolating themselves from those who may disagree with their religious beliefs.

135. The right to associate does not include the right to have discrimination adopted by a public actor. Thus, Evangelical Christians could not, under the guise of the right to associate, insist upon segregated classes based on religion in education offered by the Law Society or any accredited law school.[123] The fact that the associational activity is taking place at a private institution does not diminish the public nature of the Law Society's decision not to accredit.

136. Nothing precludes anyone attending courses offered by the Law Society or any accredited law school from associating freely with those who share their religious beliefs. However, what the Applicants are seeking is not so much a right to associate, as it is a right to exclude those with whom they disagree and to force the Law Society as a public regulator to endorse a "separate but equal doctrine."

137. In *Brown v. Board of Education*, the United States Supreme Court held that "separate educational facilities are inherently unequal" because the very act of the separation denotes the

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[121] Charney, *supra* at 15, BOA, Tab 39.
[122] *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1 at 35, BOA, Tab 21.
[123] In this regard, it is noteworthy that neither the Applicants nor the affiants asserted the associational right to matriculate exclusively with others who share their world view while attending public schools.

inferiority of the minority group.[124] "Separate but equal" has been rejected by Canadian courts, including in the treatment of people in same sex relationships.[125]

138. Such an extreme form of freedom of association is irreconcilable with the guarantees provided by section 15 of the *Charter*.

d) No breach of the Applicants' freedom of expression

139. The Applicants are free to express the beliefs embodied in the Community Covenant while attending any law school accredited by the Law Society. There is no evidence that freedom of expression is not rigorously protected and fostered at law schools accredited by the Law Society.[126]

140. The Applicants assert that they have a right to "private expression embodied in the Community Covenant [...] even though some people might find it offensive." The Law Society agrees. However, the expression loses its private character when the Applicants invite the Law Society, a public actor, to sanction its religious beliefs, and act on these beliefs by denying equal access to the legal profession. Religious belief and expression may be virtually unconstrained, but practice that affects the rights of others is not.[127]

e) No breach of the Applicants' equality rights

141. In this case, the Applicants are seeking, under the guise of section 15, protection for a right to discriminate on the basis of religion with respect to who can attend its law school. In reality, TWU is asserting a right to discriminate that no other accredited law school has. It is not seeking to be treated like the other accredited law schools, but rather to be treated differently, so as to be able to discriminate in a manner that other law schools do not.

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[124] *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954), BOA, Tab 66.
[125] *Halpern v. Canada* (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.), BOA, Tab 67; *Moore v. British Columbia* (Education) 2012 SCC 61 at para. 30, BOA, Tab 68.
[126] Alarie Affidavit, *supra* at paras. 21-23, *RAR*, Vol. 1, Tab 2, p. 19.
[127] *Children's Aid Society*, *supra* at para. 226, BOA, Tab 58.

142. Further, even assuming that the Law Society's decision not to accredit TWU creates a distinction on the ground of religion, it arises not from any demeaning stereotype but from a neutral and rationally defensible policy choice (mandated by its obligation under section 15 of the *Charter* and section 6 of the *Code*) made by the Law Society in accordance with its public interest role. Mr. Volkenant's claim is to the unfettered ability to attend an educational institution where his religion is taught, not to be free from religious discrimination.[128] He has and retains that right but he cannot extend it to force a public actor to adopt the discrimination that arises from his beliefs.

143. The students who may wish to attend TWU will choose to attend a faith-based university that discriminates against several minority groups. They could attend any other law school in the country, where they could not be denied entry on the basis of religion or any other prohibited ground. They are not denied any benefit available to other students.

144. It follows that none of the freedoms relied upon by the Applicants have been infringed by the Law Society's refusal to accredit TWU.

3. The Law Society reasonably and proportionally balanced *Charter* values

145. On judicial review, the Court must determine whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play.[129] The key element is one of proportionality, in which the spirit of section 1 of the *Charter* plays a role.[130]

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[128] These are analogous to findings of the Supreme Court of Canada in *Alberta v. Hutterian Brethren of Wilson Colony*, *supra* at paras. 107-108.
[129] *Doré*, *supra* at para. 57, BOA, Tab 4.
[130] *Doré*, *supra* at para. 57, BOA, Tab 4.

146. In this case, even assuming that any of the Applicants' rights were infringed, the Law Society's decision reflects a proportional balancing of those rights with its statutory objectives and the rights of other persons who would be excluded by the Community Covenant.

147. *Charter* rights must be balanced in the context in which they are invoked.[131] In this case, the Law Society was obligated to ensure that LGBTQ and other minorities excluded by the Community Covenant do not experience barriers to access to the legal (and judicial) professions in Ontario. The Law Society's decision enforces the equality guarantee of the *Charter* and furthers the Law Society's statutory mandate. The salutary effect of the refusal to accredit is very significant. Not only does it preserve equal access to the profession, the Law Society also reaffirms its commitment to recognize and promote the equality of persons regardless of religion, marital status, gender and sexual orientation.

148. Evangelical Christians have a right to attend any accredited law school. While some might prefer to attend TWU, any interference with that preference cannot reasonably outweigh the discriminatory effect of the Community Covenant.

149. In contrast, any deleterious effects of the Law Society's decision on the Applicants are costs of exercising those rights that are reasonable in these circumstances. The Law Society is not precluding students from attending TWU or practicing law in Ontario. It is not precluding TWU from operating the law school. It is not taking issue with any of the religious belief held by TWU or its students. The Law Society's decision reflects the fact that TWU, by seeking the accreditation of the Law Society, has chosen to leave the private sphere where some discrimination may be permitted and entered the public domain where it cannot be adopted by a public regulator.

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[131] See *Doré*, *supra*, BOA, Tab 4 and *Whatcott*, *supra* at para. 66, BOA, Tab 19.

150. Admission into the Law Society for membership to practice law in this province is a privilege, not a right. Just like the requirement of a photo for a driver's license was considered by the Supreme Court of Canada to be a justifiable limit on a genuinely held religious belief,[132] the Law Society's decision to not give its imprimatur to the discrimination practiced by TWU is justified and reasonable.

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

D. The Law Society was at all times fair to TWU

152. TWU claims that the Law Society's decision is biased and that the Law Society showed a reasonable apprehension of bias by allowing Clayton Ruby, a non-voting Bencher, to participate in the Convocations.

153. To prove actual bias, one must prove that the decision-maker actually had a predisposition to decide the issue in a certain way which did not leave their mind open to accreditation.[133] No evidence has been filed by TWU that meets this very high threshold. In fact, statements of the Benchers at the April 10 Convocation demonstrate that they had yet to determine the outcome of the matter and still had questions for TWU for which they were seeking clarification.[134]

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[132] *Alberta v. Hutterian Brethren of Wilson Colony, supra*, BOA, Tab 16.
[133] See *R. v. Bertram,* [1989] O.J. No. 2123 (H.C.), BOA, Tab 69, cited by Cory J. in *R. v. S. (R.D.),* [1997] 3 S.C.R. 484 at para.106, BOA, Tab 70.
[134] Convocation Transcript, April 10, 2014, *AR*, Vol. I, Tab 3, pp. 24-25, 30-31, 31, 64-65, 77-78, 93, 109-110, 115-116, 141-143, 155-159, 173.

154. With respect to apprehension of bias, the appropriate test will depend on the nature of the administrative tribunal:

> Those that are primarily adjudicative in their functions will be expected to comply with the standard applicable to courts: there must be no reasonable apprehension of bias with regard to their decision. At the other end of the scale are boards with popularly elected members where the standard will be much more lenient. In such circumstances, a reasonable apprehension of bias occurs if a board member pre-judges the matter to such an extent that any representations to the contrary would be futile. Administrative boards that deal with matters of policy will be closely comparable to the boards composed of elected members. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted to them by the legislature.[135]

155. In the present case, the applicable standard is the "closed mind" standard given that Convocation is an administrative board comprised of a large majority of elected members that generally deal with matters of policy (similar to municipal councils). The Supreme Court of Canada has held that, in those circumstances, the strict application of the reasonable apprehension of bias applicable to administrative boards that are primarily adjudicative in their functions would undermine the very role which has been entrusted to them. A more lenient standard will apply, namely whether there has been a prejudgment of the matter to such an extent that any representations to the contrary would be futile.[136] Further, a member of a board that performs a policy formation function should not be susceptible to a charge of bias simply because of the expression of strong opinions prior to the hearing.[137]

156. The Applicants take issue with the participation of Clayton Ruby and some comments he may have made during and prior to the April 10 Convocation. While Mr. Ruby may have made

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[135] *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 at 640 ["*Newfoundland Telephone Co.*"], BOA, Tab 29.
[136] *Newfoundland Telephone Co.*, *supra* at 638-639 and 642, BOA, Tab 29.
[137] *Newfoundland Telephone Co.*, *supra* at 639, BOA, Tab 29.

public statements prior to the April Convocations against accreditation, these are not sufficient to conclude that Convocation, as a policy-making body, had a "closed mind".

157. First, as noted, the April 10 Convocation was an opportunity for members to raise issues or concerns, which TWU was afforded the opportunity to respond to.

158. Second, it should be noted that the statements made by Mr. Ruby prior to the April Convocations were in his capacity as counsel acting for a party in a B.C. proceeding. One must distinguish between the role an individual may hold as an advocate and a bencher. Moreover, an objective and well-informed observer, having reviewed the transcript of Convocations, could not conclude that Mr. Ruby's comments at the April 10 Convocation dictated the result.

159. Third, it has been held that statements made by members of an administrative tribunal, who do not have any decision-making responsibility, will not give rise to a reasonable apprehension of bias on the part of the body's actual decision-makers.[138] In the present case, Mr. Ruby was not entitled to vote[139] and, in any event, was not present at the April 24 Convocation at which the vote was taken.[140] The mere fact that he was allowed to make comments at the April 10 Convocation cannot be enough to "taint" the entire Convocation, comprised of reasonable and right-minded individuals. On the contrary, considering he did not have the right to vote, Mr. Ruby's comments are akin to the many of written comments received by the Law Society, to which TWU had the opportunity to respond. Furthermore, the benchers were explicitly reminded on numerous occasions by the Treasurer, and were fully aware, of their duty to be impartial.[141]

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[138] *E.A. Manning Ltd. v. Ontario Securities Commission*, [1995] O.J. No. 1305, BOA, Tab 71.
[139] See *Law Society Act*, *supra* at s. 12(1), (4), which provide that Benchers who held their office because they had been a bencher for at 16 years may not vote in Convocation.
[140] Convocation Transcript, April 24, 2014, *AR*, Vol. I, Tab 4
[141] See Treasurer's February 27, 2014 statement, *Record of Proceedings,* Tab 33, pp. 529; Convocation Transcript, April 10, 2014, pp. 15, 23, 175, *AR*, Vol. I, Tab 3.

160. Finally, contrary to its assertion, TWU was provided at the second Convocation with the opportunity to reply both in writing and orally to all the comments made by the benchers at the April 10 Convocation, including those of Mr. Ruby, as well as the written comments received by the Law Society.

Part III – Order Sought

161. The Respondent asks that the Court dismiss the present application with costs.

All of which respectfully submitted this 13th day of April 2015.

Guy J. Pratte
Nadia Effendi
Duncan Ault

Lawyers for the Respondent,
The Law Society of Upper Canada

TOR01: 5904915: v1

A

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Edwards v. Law Society of Upper Canada*, [2001] 3 S.C.R. 562
2. *Trinity Western University v. College of Teachers,* [2001] 1 S.C.R. 772
3. *The Law Society v. Shore*, [2007] L.S.D.D. No. 42
4. *The Law Society v. Kelly*, [2009] L.S.D.D. No. 103
5. *Bolton v Law Society* [1994] 1 W.L.R. 512
6. Law Society of Upper Canada, *Rules of Professional Conduct,* Toronto: Law Society of Upper Canada, 2014
7. *Stewart v. Canadian Broadcasting Corp*, 1997 CanLII 12318 (ONSC)
8. *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, [2010] 1 S.C.R. 815
9. R.E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?", *34 N.J.C.L.*
10. "Accredit", online: Oxford English Dictionary <http://www.oed.com/view/Entry/1224>
11. B. Dickson, "Legal Education" (1986) 64:2 Can. Bar Rev. 374
12. *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 N.S.S.C. 25
13. *Doré v. Barreau du Québec*, 2012 SCC 12
14. *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9
15. *Vriend v. Alberta*, [1998] 1 S.C.R. 493
16. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710
17. *Council of Canadians with Disabilities v. VIA Rail Canada Inc.,* [2007] 1 S.C.R. 650
18. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150
19. *Tranchemontagne v. Ontario (Director, Disability Support Program)*, [2006] 1 S.C.R. 513
20. *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422
21. *Egan v. Canada*, [1995] 2 S.C.R. 513
22. *M v. H.*, [1999] 2 S.C.R. 3
23. *Miron v. Trudel*, [1995] 2 S.C.R. 418
24. *Quebec (Attorney General) v. A*, 2013 SCC 5
25. *Withler v. Canada (Attorney General)*, 2011 SCC 12
26. *R v. Kapp*, [2008] 2 S.C.R. 483
27. *Law v. Canada (Minister of Employment and Immigration*, [1999] 1 S.C.R. 497
28. *Saskatchewan (Human Rights Commission) v. Whatcott,* [2013] 1 S.C.R. 467
29. *Eldridge v. British Columbia (Attorney General),* [1997] 3 S.C.R. 624
30. *Little Sisters Book & Art Emporium v. Canada*, [2000] 2 S.C.R. 1120
31. *Suresh v. Canada (Ministry of Citizenship and Immigration)*, 2002 SCC 1

32. *Syndicat Northcrest v Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47
33. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, 1985 CanLII 69
34. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315
35. *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825
36. *Young v. Young*, [1993] 4 S.C.R. 3
37. *S.L. v. Commission scolaire des Chênes*, [2012] 1 S.C.R. 235, 2012 SCC 7
38. *Reference re Same-sex Marriage*, [2004] 3 S.C.R. 698, 2004 SCC 79
39. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
40. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37
41. *Adler v. Ontario* (1994), 19 O.R. (3d) 1 (C.A.), aff'd [1996] 3 SCR 609
42. *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1
43. *Brown v. Board of Education of Topeka* 347 U.S. 483 (1954)
44. *Halpern v. Canada* (Attorney General) (2003), 65 O.R. (3d) 301 (C.A.)
45. *Moore v. British Columbia* (Education) 2012 SCC 61
46. *R. v. Bertram,* [1989] O.J. No. 2123 (H.C.)
47. *R. v. S. (R.D.),* [1997] 3 S.C.R. 484
48. *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623
49. *E.A. Manning Ltd. v. Ontario Securities Commission*, [1995] O.J. No. 1305

B

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY – LAWS

1. *An Act for the better regulating the Practice of Law*, 37th George III. A.D. 1797, c. XIII

V. *And be it further enacted,* That no person other than the present Practitioners, and those hereafter mentioned, shall be permitted to practise at the bar of any of His Majesty's Courts in this Province, unless such person shall have been previously entered of and admitted into the said Society as a Student of the Laws, and shall have been standing in the books of the said Society for and during the space of five years, and shall have conformed himself to the rules and regulations of the said Society, and shall have been duly called and admitted to the practice of the law as a Barrister, according to the Constitutions and establishment thereof [...].

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

1.(1) "Convocation" means a regular or special meeting of the benchers convened for the purpose of transacting business of the Society; ("Conseil")

"licensee" means,

(a) a person licensed to practise law in Ontario as a barrister and solicitor, or

(b) a person licensed to provide legal services in Ontario; ("titulaire de permis")

Function of the Society

4.1 It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

Principles to be applied by the Society

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

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.

2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.

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

4. The Society has a duty to act in a timely, open and efficient manner.

5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

Licensing

Classes of licence

27. (1) The classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and any terms, conditions, limitations or restrictions imposed on each class of licence shall be as set out in the by-laws. 2006, c. 21, Sched. C, s. 23 (1).

Good character requirement

(2) It is a requirement for the issuance of every licence under this Act that the applicant be of good character. 2006, c. 21, Sched. C, s. 23 (1).

Duty to issue licence

(3) If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant. 2006, c. 21, Sched. C, s. 23 (1).

Refusal

(4) An application for a licence may be refused only after a hearing by the Hearing Division, on referral of the matter by the Society to the Tribunal. 2013, c. 17, s. 6.

Parties

(5) The parties to a hearing under subsection (4) are the applicant, the Society and any other person added as a party by the Hearing Division. 1998, c. 21, s. 14; 2013, c. 17, s. 26.

Subsequent applications

(6) If an application for a licence is refused, another application may be made at any time based on fresh evidence or a material change in circumstances. 1998, c. 21, s. 14; 2006, c. 21, Sched. C, s. 23 (3).

(7) Repealed: 2006, c. 21, Sched. C, s. 23 (4).

Register

27.1 (1) The Society shall establish and maintain a register of persons who have been issued licences. 2006, c. 21, Sched. C, s. 24.

Contents of register

(2) Subject to any by-law respecting the removal of information from the register, the register shall contain the following information:

1. The name of each licensee.

2. The class of licence issued to each licensee.

3. For each licensee, all terms, conditions, limitations and restrictions that are imposed on the licensee under this Act, other than terms, conditions, limitations and restrictions that are imposed by the by-laws on all licences of that class.

4. An indication of every suspension, revocation, abeyance or surrender of a licence.

5. Any other information required by the by-laws. 2006, c. 21, Sched. C, s. 24.

By-laws

62. (0.1) Convocation may make by-laws,

1. relating to the affairs of the Society;

4. prescribing the classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence;

4.1 governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence;

21. governing degrees in law;

23. respecting legal education, including programs of pre-licensing education or training;

3. Law Society of Upper Canada, By-Law 4 – Licensing

7. "accredited law school" means a law school in Canada that is accredited by the Society.

9.1 The applicant must have one of the following:

i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.

ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans.

2. The applicant must have successfully completed the applicable licensing examination or examinations set by the Society by not later than two years after the end of the licensing cycle into which the applicant was registered.

8. *Trinity Western University Act*, SBC 1969, c44

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

9. *Human Rights Code*, RSO 1990, c H.19

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7); 2012, c. 7, s. 5.

Special interest organizations

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified. R.S.O. 1990, c. H.19, s. 18; 2006, c. 19, Sched. B, s. 10.

10. *Canadian Charter of Rights and Freedoms*, Part I of the *The Constitution Act, 1982*, Schedule B to the Canada Act 1982 (UK), 1982, c 11

2. Everyone has the following fundamental freedoms:
(a) freedom of conscience and religion;
(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
(c) freedom of peaceful assembly; and
(d) freedom of association.

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

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental

Court File No. 250/14

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT
Applicants

- and -

the Law Society OF UPPER CANADA
Respondent

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

FACTUM OF THE RESPONDENT, THE LAW SOCIETY OF UPPER CANADA

[Application for Judicial Review returnable June 1, 2015]

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