

COURT OF APPEAL

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(RESPONDENT)

AND:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(PETITIONERS)

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OPENING STATEMENT

The Law Society of British Columbia confronted an unprecedented issue when it addressed the question of whether the proposed faculty of law at Trinity Western University should be approved to produce candidates eligible for admission to the bar in British Columbia. The Benchers and the members considered the issue in an extended process that involved professional introspection, vigorous legal debate and close examination of contending equality and religious freedom concerns. Ultimately, the Law Society decided not to approve the proposed faculty of law. The Law Society's decision represents a proportionate balance of freedom of religion and equality in Canada and should be restored.

In determining criteria for admission to the profession, as in all other decision-making, the Law Society must uphold and protect the public interest in the administration of justice. In so doing, it must preserve and protect the rights and freedoms of all persons. Trinity Western University's intention to require students of the proposed law school to endorse a Community Covenant that requires observance of Evangelical Christian expectations for marriage and sexuality trenches on the equality rights of prospective lawyers, including, especially, LGBTQ persons and women who could not honestly adhere to the Covenant and remain true to themselves. As law schools are the gateways to legal practice, the Law Society legitimately concerned itself with the discriminatory impact of the Community Covenant on prospective candidates for admission to the bar.

Moreover, as a statutory decision-maker bound by the *Charter of Rights and Freedoms*, the Law Society is not at liberty to ignore, condone or endorse discriminatory conduct by an institution for legal education. Had the Law Society approved Trinity Western University to produce candidates for admission to the bar, that would have been the result.

PART 1 - STATEMENT OF FACTS

1. The Advocates' Society's 5,000 member lawyers advocate before Canadian courts and tribunals. The Advocates' Society has an interest in ensuring that admission to the legal profession is non-discriminatory and equality-promoting, and that legal education fosters respect for diversity and substantive equality. In this appeal, The Advocates' Society accepts and adopts the statement of facts set out in the factum of the Law Society of British Columbia (the "Law Society").

PART 2 – ISSUES ON APPEAL

2. The Law Society decided, in accordance with *Charter* protections and with due regard to *Charter* values, that the proposed law school at Trinity Western University ("TWU") is not an approved faculty of law. The Advocates' Society submits that the decision reflects a reasonable balance of equality and religious freedom interests.

PART 3 – ARGUMENT

A. Introduction

3. TWU wants prospective graduates of its intended law school to be eligible for admission to the practice of law in British Columbia. The Law Society was required to decide whether to approve the proposed faculty of law for this purpose, notwithstanding that the operation of TWU's religiously-rooted Community Covenant will exclude students from the school due to personal characteristics unrelated to their merits as prospective lawyers.
4. The discriminatory exclusion the Community Covenant produces is indisputable. It is clear that "a homosexual student would not be tempted to apply for admission [to TWU], and could only sign the so-called student contract at a considerable personal cost".¹ Many women and anyone committed to a common law

¹ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 ("*TWU v. BCCT*") at paras 25 and 26.

relationship could not sincerely enter into the Community Covenant and remain true to themselves.² The doors to the TWU law school would be closed to those who cannot act in accordance with the Respondents' beliefs.

B. The Law Society is guided by its overarching statutory object and duty

5. The Respondents approach the accreditation question from the perspective that the Law Society's function is to ensure that TWU will produce academically competent candidates for admission to the bar.³ This approach is unduly narrow.

6. As in all of its other decisions, the Law Society must be guided by its "paramount purpose"⁴ in determining admissions criteria. This purpose is set out in the *Legal Profession Act*, S.B.C. 1998, c. 9 (the "*LPA*"), s. 3:

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

7. The Law Society is responsible for articulating the public interest in the administration of justice, in accordance with the criteria in *LPA*, ss. 3(a) to (e). Of particular relevance to this appeal, *LPA*, s. 3(a) instructs the Law Society – the Benchers and the members – to fulfil its purpose by "preserving and protecting the rights of all persons".

8. The Law Society's competence to determine the public interest flows from its mandate as the regulator of a self-governed profession. The *LPA* "*manifestly intends to leave the governance of the legal profession to lawyers* and, unless judicial intervention is clearly warranted, this expression of the legislative will ought to be respected".⁵

² *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 ("*TWU v. LSUC*") at para. 104.

³ See, e.g., Respondents' Factum at paras. 94 – 95.

⁴ *Law Society of British Columbia v. Dempsey*, 2005 BCSC 1277 at para. 112.

⁵ *Pearlman v. Manitoba Law Society Judicial Committee*, [1991] 2 S.C.R. 869 at 888; emphasis added.

9. The Advocates' Society disagrees with the Respondents that Law Society's ability to interpret the public interest is "limited" in relation to bar admission.⁶ The Court below correctly held that the Law Society has the power to consider a law school's admissions policy "as part of ... [its] statutory mandate ... and its duties and obligations under the *LPA*".⁷
10. This power is necessary and appropriate. Law schools are integral to the administration of justice. They are the incubators of future lawyers and judges. As Dickson C.J. observed thirty years ago, "legal education ... is the *foundation* of the entire legal system and profession" and "[u]ltimately, the ethos of the profession is determined by the selection process at the law schools".⁸
11. Given the primordial role of legal education in the administration of justice, the Law Society has a legitimate reason to examine the admissions criteria of any law school that seeks approval to produce candidates for admission to the bar. Moreover, if a law school's admissions criteria are inconsistent with the Law Society's duty to protect the public interest in the administration of justice, the Law Society not only may, but *must*, take cognizance of the inconsistency.

C. The Law Society's decision respects *Charter* rights and *Charter* values

12. Of course, the Law Society was required to decide whether to approve or disapprove TWU's proposed law school in accordance with *Charter* rights and with due regard to *Charter* values.⁹ Insofar as *Charter* rights were implicated in the Law Society's decision, the Law Society was required to proportionately balance and give effect to the values that underpin those rights, in light of the factual

⁶ Respondent's Factum at para. 104.

⁷ Reasons for Judgment at para. 108, Joint Appeal Record (JAR) at p. 443.

⁸ Rt. Hon. Brian Dickson, P.C., "Excerpts from the Speech Delivered at the Closing Dinner of the Conference on Legal Education" in Roy J. Matas and Deborah J. McCawley, eds., *Legal Education in Canada* (Montreal: Federation of Law Societies of Canada, 1987) 68 at 68 and 70; emphasis added.

⁹ *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 2 S.C.R. 584 ("*Doré*") at para. 24.

context for the decision and the mandate conferred by the *LPA*, s. 3.¹⁰

(a) Freedom and religion and equality were front and centre in deliberations

13. It was always plain that TWU appealed to freedom of religion to explain why the Law Society should approve the proposed faculty of law. It was equally obvious that the prospect of approval raised equality concerns among lawyers, due to the predictable impact of TWU's Community Covenant on prospective law students.¹¹ In the result, the *Charter* values of equality and "accommodation of a wide variety of beliefs"¹² were in play at all stages of the Law Society's decision-making.
14. The record shows that the Benchers repeatedly considered the contending *Charter* interests in deciding whether to approve TWU's proposed school of law.¹³ The members were equally alive to these concerns. The written submissions to the Law Society were replete with references to religious freedom and equality. These values were debated in speeches at the Special General Meeting held on June 10, 2014.¹⁴ With the greatest respect to Hinkson C.J., it is clear that the Benchers and the members of the Law Society appreciated the contending *Charter* values in issue in deciding that the proposed school of law should not be approved.¹⁵

¹⁰ *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 ("*Loyola High School*") at para. 39.

¹¹ See *TWU v. BCCT* at para. 26.

¹² *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 64.

¹³ Affidavit #1 of Earl Phillips, Ex. "T", Joint Appeal Book (JAB), v. 3, pp. 832 – 881; Affidavit #2 of Tim McGee, Q.C., Ex. "J", JAB, v. 9, pp. 3338 – 3389.

¹⁴ Affidavit #2 of Cindy Chu, Exs. "A", "B" and "C", JAB, v. 11 – 13, pp. 3718 – 4773; Affidavit #2 of Tim McGee, Q.C., Ex. "L", v. 10, pp. 3395 - 3440.

¹⁵ Reasons for Judgment at para. 151, JAR, p. 455.

(b) Freedom of religion and TWU

15. The Respondents' religious freedom claim must be properly contextualized. The Respondents did not invoke s. 2(a) of the *Charter* to protect against state interference with worship, the ability to live the values of their religion, or to perpetuate or transmit those values. Rather, they invoked freedom of religion to argue for approval of a law school that would afford religiously like-minded individuals the opportunity to study law together, but in an exclusive atmosphere, due to the requirements of the Community Covenant.
16. The Respondents' interest in having a religiously insular forum for legal education does not give them a right to compel the Law Society to approve the proposed faculty of law.¹⁶ As held in *Braker v. Markovitz*, the right to protection of religious differences "does not mean that those differences are always hegemonic". Instead, they must sometimes yield to other pressing public interests.¹⁷
17. Respectful attention to freedom of religion does not imply that a statutory decision-maker like the Law Society may disregard the impact of a religiously-based claim on equality interests. Rather, freedom of religion and the right to equality "must co-exist".¹⁸ Claims to religious freedom must "be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights".¹⁹ It follows from these precepts that the Law Society *could not* minimize equality concerns in determining whether the public interest in the administration of justice would accommodate accreditation of TWU's proposed law school.

¹⁶ *TWU v. LSUC* at para. 115.

¹⁷ 2007 SCC 54, [2007] 3 S.C.R. 607 at para. 2.

¹⁸ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 ("*Whatcott*") at para. 161.

¹⁹ *Loyola High School* at para. 47.

18. In any event, the Law Society's decision not to approve TWU's proposed faculty of law does not infringe s. 2(a) of the *Charter*. A violation of the right to religious freedom will be established where a claimant sincerely adheres to a belief or practice with a nexus to religion and a state measure substantially interferes with the claimant's ability to act in accordance with it.²⁰ In this case, the Law Society's decision declining to approve the proposed school of law does not in any way impair the religious freedom of anyone at TWU. Students, faculty and staff who espouse Evangelical Christian beliefs may continue to voluntarily act in accordance with, and perpetuate, those beliefs, regardless of the Law Society's decision.
19. However, even if one were to assume that non-approval of the proposed law school rises to the level of an infringement of the exercise of freedom of religion, the infringement should attract "only an attenuated level" of attention in the consequent balancing of *Charter* values because of its impact on the equality rights of others, especially LGBTQ people. The Supreme Court of Canada has held that where the manifestation of a religious belief is "incompatible with the very values sought to be upheld ... [in a free and democratic society], then an attenuated level of ... justification is appropriate" under s. 1 of the *Charter*.²¹ The same must be true for the balancing of *Charter* values by a statutory decision-maker, since s. 1 and the balancing process prescribed by *Doré* exercise the same "justificatory muscles".²²
20. Equality is "core national value" and is "essential to a free and democratic society".²³ Accordingly, "the state *always* has a legitimate interest in promoting

²⁰ *Alberta v. Hutterian Brethern of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 at para. 32.

²¹ *Whatcott* at para. 162.

²² *Doré* at paras. 5 – 6; *Loyola High School* at para. 40.

²³ *R. v. Oakes*, [1986] 1 S.C.R. 103 at para. 64; *Loyola High School* at para. 46.

and protecting” it.²⁴ Because it is a dimension of the public interest,²⁵ the Law Society is bound by *LPA*, s. 3(a) to protect it. In short, equality concerns may not be side-lined.

21. Requiring all prospective law students at TWU to conform to the Community Covenant might advance Evangelical Christian beliefs in the sense that it would reinforce the importance of those beliefs to the people who hold them, but it would do so in a way that is incompatible with equality for and among prospective candidates for admission to the bar. It was not unreasonable for the Law Society to conclude that the religious freedom interest advanced by the Respondents does not generate sufficient gravitational force to overtake the equality concerns.

(c) *Equality in eligibility for admission to the bar*

22. Section 15 of the *Charter* protects substantive equality and is an anti-discrimination provision. It is intended to “eliminate the exclusionary barriers faced by individuals in the enumerated or analogous groups in gaining meaningful access to what is generally available”,²⁶ including LGBTQ people and women.
23. The Respondents say that the issue before the Law Society did not engage equality rights.²⁷ This assertion must be rejected.
24. TWU’s insistence that students and faculty sign the Community Covenant is not simply an invitation to profess belief. It is a direction to act. The Community Covenant describes itself as “a solemn pledge”, a “contractual agreement and a relational bond” that describes “reciprocal benefits and mutual responsibilities”.²⁸

²⁴ *Loyola High School* at para. 47; emphasis added.

²⁵ *TWU v. BCCT* at para. 26.

²⁶ *Quebec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 S.C.R. 61 at para. 319.

²⁷ Respondents’ Factum, paras. 117 to 140.

²⁸ Affidavit #1 of Robert Wood at Ex. “C”, JAB, v. 1, pp. 40 – 44.

It requires adherents to limit their expression of deeply personal traits,²⁹ and commits them to “tak[e] steps to hold one another accountable” under the Covenant.³⁰ The Community Covenant thus requires adherents to police the behaviour of co-covenantors.

25. The discriminatory effect of the conduct mandated by the Community Covenant is “self-evident”.³¹ The Community Covenant disqualifies those who cannot commit to observance of Evangelical views of marriage and sexuality from attending TWU. It does so on the premise that the proscribed behaviours and beliefs are “destructive”.³² A “destructive” belief or behaviour is, by definition, not “equally deserving of concern, respect and consideration”.³³ Unequal concern, respect and consideration have long been recognized as hallmarks of discrimination.
26. The discriminatory impact of the imposition of the Community Covenant is a relevant consideration to whether approval of TWU’s proposed faculty of law is in the public interest in the administration of justice. As such, it would have been unreasonable for the Law Society to have ignored it.³⁴
27. Moreover, the discriminatory impact of the Community Covenant, in relation to the Law Society’s decision-making, is not neutralized by the fact that TWU may be immune from a finding of discrimination under the *Human Rights Code*, R.S.B.C. 1996, c. 210 (the “Code”), s. 41(1). That provision simply provides a qualifying institution with a liability defence to a claim under the *Code*.³⁵ It does not

²⁹ In this regard, we note the Supreme Court’s acknowledgment in *Whatcott* at para. 124 that “there is a strong connection between sexual orientation and sexual conduct”.

³⁰ Affidavit #1 of Robert Wood at Ex. “C”, JAB, v. 1, pp. 40 – 44.

³¹ *TWU v. LSUC* at para. 105.

³² Affidavit #1 of Robert Wood, at Ex. “C”, JAB, v. 1, p. 41.

³³ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 171.

³⁴ *Loyola High School* at para. 38.

³⁵ *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 at para. 43.

alchemically transmute the discriminatory into the benign. It would not permit the Law Society, as a public decision-maker, to endorse or disregard the discriminatory operation of the Community Covenant.

28. Granting approval for TWU to produce candidates for admission to the bar would have made the Law Society complicit in TWU's discriminatory practices. To approve TWU, the Law Society would have had to turn a blind eye to, if not tacitly condone, the discriminatory impact of the Community Covenant on admission to the practice. To do either of these things would be inconsistent with the Law Society's duty under *LPA*, s. 3(a), to affirmatively protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons. It would also be inconsistent with the Law Society's express commitment "to the principles of equity and diversity [in the profession and that] ... the public is best served by a more inclusive and representative profession".³⁶
29. Also, by approving TWU's proposed law school, the Law Society would perpetuate an exclusionary barrier to the practice of law and so engage in discriminatory conduct, contrary to s. 15 of the *Charter*. This is objectionable *per se*, but its deleterious effects are further aggravated by the competitive state of law school admissions.
30. Across Canada, the demand for law school seats far outstrips supply, with an average of 11 applications per available first year seat at common law schools.³⁷ In this province, the situation is more competitive. There are 84 first year law school spots per 1,000,000 residents in British Columbia. This compares to an average of 96.2 seats per 1,000,000 people, nationally.³⁸ If some of the limited

³⁶ Affidavit #2 of Tim McGee, Q.C., Ex. "T", JAB, v. 10, p. 3494.

³⁷ Affidavit of William Brent Cotter #1 at para. 6, Ex. "M" to Affidavit #1 of Tracy Tso, JAB, p. 2588.

³⁸ *Ibid.* at para. 13, p. 2590.

number of law school places in British Columbia are, in practice, unavailable to those who cannot subscribe to TWU's Community Covenant, those prospective lawyers face a disadvantage in gaining admission to the bar, due to their personal characteristics.

31. It would be particularly problematic for the Law Society to approve a religiously affiliated law school to the disadvantage of LBGTQ people and women who do not share Evangelical Christian beliefs, since the state "may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others".³⁹ Yet, that is precisely what approval of TWU's proposed law school would have entailed. Those able to adopt the Community Covenant would have the opportunity to be admitted to the bar through public law schools *and* TWU. Others would not share this advantage.

E. Conclusion

32. The decision of the Law Society not to approve TWU's proposed law school for eligibility to admit candidates to the bar was reasonable. It should be restored.

PART 4 - NATURE OF ORDER SOUGHT

33. The Advocates' Society seeks an Order that it be permitted to make oral submissions to the division hearing the appeal. Further, The Advocates' Society does not seek costs and asks that no costs be awarded against it.

34. All of which is respectfully submitted.

Dated at Vancouver, British Columbia, this 19th day of April, 2016.

M. Pongracic-Speier,
Counsel for The Advocates' Society

³⁹ *Mouvement laïque québécois v. Saguenay*, 2015 SCC 16, [2015] 2 S.C.R. 3 at para.

APPENDIX: ENACTMENTS**LEGAL PROFESSION ACT**

[SBC 1998] CHAPTER 9

Object and duty of society

- 3** It is the object and duty of the society to uphold and protect the public interest in the administration of justice by
- (a) preserving and protecting the rights and freedoms of all persons,
 - (b) ensuring the independence, integrity, honour and competence of lawyers,
 - (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
 - (d) regulating the practice of law, and
 - (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

LIST OF AUTHORITIES

Authorities	Paragraph #
Cases	
<i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	25
<i>Bruker v. Markovitz</i> , 2007 SCC 54, [2007] 3 S.C.R. 607	16
<i>Doré v. Barreau du Québec</i> , 2012 SCC 12, [2012] 2 S.C.R. 584	12, 19
<i>Alberta v. Hutterian Brethern of Wilson Colony</i> , 2009 SCC 37, [2009] 2 S.C.R. 567	18
<i>Law Society of British Columbia v. Dempsey</i> , 2005 BCSC 1277	6
<i>Loyola High School v. Quebec (Attorney General)</i> , 2015 SCC 12, [2015] 1 S.C.R. 613	12, 17, 19, 20, 26
<i>Mouvement laïque québécois v. Saguenay</i> , 2015 SCC 16, [2015] 2 S.C.R. 3	31
<i>Pearlman v. Manitoba Law Society Judicial Committee</i> , [1991] 2 S.C.R. 869	8
<i>Quebec (Attorney General) v. A.</i> , 2013 SCC 5, [2013] 1 S.C.R. 61	22
<i>R. v. Oakes</i> , [1986] 1 S.C.R. 103	13, 20
<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11, [2013] 1 S.C.R. 467	17, 19, 24
<i>Trinity Western University v. British Columbia College of Teachers</i> , 2001 SCC 31, [2001] 1 S.C.R. 772	4, 13, 20
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