No. S-149837
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and
BRAYDEN VOLKENANT

PETITIONERS

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

AND:

ATTORNEY GENERAL OF CANADA, THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, THE CATHOLIC CIVIL RIGHTS LEAGUE, THE FAITH AND FREEDOM ALLIANCE, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, OUTLAWS UBC, OUTLAWS UVIC, OUTLAWS TRU AND QMUNITY

INTERVENERS

WRITTEN SUBMISSIONS OF THE INTERVENORS EVANGELICAL FELLOWSHIP OF CANADA and CHRISTIAN HIGHER EDUCATION CANADA

D. GEOFF COWPER, Q.C.
GEOFFREY TROTTER
STEPHEN HSIA
Fasken Martineau DuMoulin
2900 - 550 Burrard Street
Vancouver BC V6C 0A3

Tel: (604) 631.3131
Fax: (604) 632.3185
Email: gcowper@fasken.com; gt@gtlawcorp.com; shsia@fasken.com

Counsel for the Intervenors, Evangelical Fellowship of Canada and Christian higher Education Canada

CONTENTS

I. INTRODUCTION

1. These intervenors appear as representatives of the Canadian evangelical community[1] – a religious and cultural minority of about 11-12% of the Canadian population – whose members will be the primary attendees of the proposed TWU school of law which would add 2.4% to the total number of Canadian law school seats.[2] These interveners submit that the Law Society's outright rejection of TWU law school graduates intentionally and directly interferes with the evangelical community's exercise of its religious liberty. The Law Society's defence of its Decision is premised on a flawed view of religion as solely an exercise of individual choice, and a flawed view of religious liberty as restricted to protecting individual expression and practice.

2. By contrast, from the evangelical community perspective, Christian faith and practice have always necessarily been exercised within minority associations whose members have collectively organized their intellectual, economic and intimate lives in ways that depart from mainstream society. The evangelical conception of religion is an inherently communal one, and religious liberty in Canadian law has always included protection for this communal dimension.

3. Any suggestion that the principles enunciated by the Supreme Court of Canada in *TWU v. BCCT* have been eclipsed by social or legal changes is answered by the reaffirmation of its principles in *Loyola* and *Saguenay*. The decision of Justice Campbell in Nova Scotia stands squarely within the arc of the Supreme Court's jurisprudence. The decision of the Ontario court stands starkly outside it.

4. It is obvious that lawyers from various religious communities can serve the public in accordance with professional standards and Canadian law; they have done so throughout our history. Early arguments before the Federation and the Benchers that lawyers trained at TWU would be unfit have been abandoned.

5. Canadian law consistently prohibits state actors like the Law Society from excluding or marginalizing religious communities or their members on the basis of majority values that are irrelevant to the public goals at stake. Yet the Law Society's impugned Decision excludes evangelical Christians without doing anything to improve access to legal education for the LGBTQ community.

6. Similar arguments were more recently used to perpetuate the exclusion of non-citizens from membership of the Law Society even in the post-*Charter* era.[3] We now recognize that categorical exclusion of persons from membership as lawyers on grounds not intimately related to fitness is unjust and unconstitutional. Those hard-won insights must be applied in this case.

II. CODES OF CONDUCT ARE A WELL-ESTABLISHED FEATURE OF THE COLLECTIVE EXERCISE OF FREEDOM OF RELIGION UNDER THE *CHARTER*

7. The evangelical Christian community in Canada has always been a minority, even when other strains of Christianity may have been regarded as collectively forming a majority. Canadian evangelicals have long depended on a robust freedom of religion as articulated by the Supreme Court of Canada in *Big M* where Dickson C.J.C. expressly spoke of protection for "codes of conduct", "practice" and "teaching and dissemination"[4].

8. Evangelicals have always been a minority both in Britain and in Canada where the Anglican (or in Quebec: Catholic) church was the state religion. Indeed, "nonconformists" were banned from becoming lawyers

---

[1] The Evangelical Fellowship of Canada ("EFC") is the largest organization of Canadian evangelical Christians, representing 42 Protestant denominations (including TWU's home denomination) whose adherents make up approximately half of Canadian evangelicals. Christian Higher Education Canada ("CHEC") represents virtually all evangelical Christian higher education institutions in Canada.

[2] Affidavit #1 of Dr. Jeffrey P. Greenman, at para. 39; Affidavit #1 of Dr. W. Robert Wood, at para. 16; and *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, at para. 247 ["*TWU v. NSBS*"].

[3] A special committee of the Benchers unanimously recommended ending the exclusion of non-citizens in the 1980s. The Benchers narrowly rejected the recommendation and were affirmed by a special general meeting of the Law Society membership. The S.C.C. overturned the decision in *Andrews v. LSBC*, [1989] 1 S.C.R. 143.

[4] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at 336 ["*Big M*"].

until 1833.[5]

9. There is a well-documented history of exclusion from participation in the legal profession in the Anglo-Canadian tradition, including British Columbia in particular.[6] This Court should be concerned about that history of excluding minorities, including religious minorities, as it scrutinizes the Law Society's claim that its exclusion of TWU graduates is in furtherance of diversity.

10. In *Loyola*, the Supreme Court of Canada affirmed that religious freedom must account for "the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions" and stated that religious freedom "includes both the individual and collective aspects of religious belief... Religion is about religious beliefs, but also about religious relationships".[7]

11. The uncontested expert evidence before the court, and the findings of fact in Nova Scotia[8] and Ontario[9], is that evangelical Christians constitute a distinct religious subculture in Canada.

12. Since Roman times, Christians have self-defined, in part, through Statements of Faith, and the Codes of Conduct which emanate directly from them. Both aspects – shared affirmation of belief, and the communal living in accordance with those beliefs – are essential components of a Christian subculture. Justice Campbell accepted that "within the Evangelical Christian expression of faith, the practice of faith cannot be separated from personal obedience to standards of sexual conduct."[10]

13. EFC's forty-two member denominations incudes a catalogue of European religious minorities including various Baptist, Mennonite, Methodist, Wesleyan, and evangelical free church denominations (including TWU's own denomination) which in recent centuries were often persecuted for living out their beliefs which diverged from the established church of each country.[11] The Supreme Court recently stated that the scope of the guarantee of freedom of religion is "derived from its history", and that freedom of association "has its roots in the protection of religious minority groups."[12]

14. Whether persecuted, grudgingly tolerated, or accorded a degree of official religious freedom, evangelicals have a deep and rich history of maintaining their distinctiveness from the dominant culture through codes of conduct. TWU's Community Covenant serves the same legitimate functions as such codes have historically played, is aligned with its Statement of Faith, and strengthens evangelicalism – an objective found to be legitimate and constitutionally protected in *Loyola*.[13]

15. The Supreme Court of Canada has recognized that TWU is a religious community[14]. This is clearly

---

[5] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250, at para. 22 ["*TWU v. LSUC*"]; S.U.C. 1833, c. 13. Furthermore, nonconformists could not hold property until 1828: (U.C.) 9 Geo. IV, c. 2 (1828); S.U.C. 1833, c. 13; nonconformist ministers could not solemnize marriages until at least the 1820s: (U.C.) 38 Geo. III, c. 4 (1798); (U.C.) 1 Wm. IV, c. 1 (1829), and full religious freedom was not granted until the *Freedom of Worship Act*, (Can.) 14 & 15 Vict., c. 175 (1851).

[6] See generally Joan Brockman, "Exclusionary Tactics: The History of Women and Visible Minorities in the Legal Profession in British Columbia" in Hamar Foster and John McLaren, eds., *Essays in the History of Canadian Law: British Columbia and the Yukon, 6ed.* (Toronto: The Osgoode Society, 1995) 508. **Asians** were excluded through the requirement to be registered voters. **Women** were not considered "persons". **Aboriginals** who became lawyers lost their Indian status. **Communists** were excluded through the "good repute" requirement: *Re Martin*, [1949] 1 D.L.R. 105 (LSBC); *In Re Martin* [1949] 1 W.W.R. 993 (S.C.); *Martin v. LSBC*, [1950] 3 D.L.R. 173 (B.C.C.A.).

[7] *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at para. 59 ["*Loyola*"].

[8] *TWU v. NSBS*, at paras. 28, 122-127.

[9] *TWU v. LSUC*, at paras. 10-11.

[10] *TWU v. NSBS*, at footnote 17.

[11] Affidavit of Bruce Clemenger, at para. 3.

[12] *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1 at paras. 35, 56, 57, 48 ["*Mounted Police*"].

[13] See generally affidavits of Dr. Gerald Longjohn Jr. and Dr. Samuel H. Reimer; see Written Argument of TWU, *TWU v. LSBC*, B.C.S.C. Action No. S-149837, at paras. 384-85 and related footnotes ["*TWU v. LSUC*"] ["TWU Argument"].

[14] *Trinity Western University v. BC College of Teachers*, 2001 SCC 31 at paras. 3, 23, 24, 73 ["*TWU 2001*"].

expressed in both its mission statement[15] and the Community Covenant.

16. For evangelicals and an evangelical university, providing and receiving a legal education while simultaneously shaping students' character in following Christ is a vocation and a form of worship. Universities are a mechanism through which many evangelicals put their faith into practice. TWU offers a valuable opportunity for evangelicals to enter the legal world through a path that allows them to learn in a community environment that is framed by their religious faith and practice; this is an opportunity which is not available in Canada's public law schools. TWU is not just a collection of students and teachers – it is a communal religious enterprise where everyone – students, faculty, and staff – choose to commit to the Community Covenant which in turn creates a community of mentors, friends, and co-labourers in a common purpose and task. This is something that can be achieved *only communally*.

17. Thousands of Canadian evangelicals voluntarily sign the Community Covenant because they prioritize developing – both intellectually and as people more broadly – in a religious community of higher learning which embodies and nurtures their worldview. Similarly, hundreds of Canadian evangelicals voluntarily elect to work as faculty and staff at TWU because they wish to prioritize teaching the next generation, honing their craft, and conducting their research, in an institution of higher learning which embodies their worldview. This permits them to pursue their work in a place which celebrates and encourages, rather than quietly tolerates (or worse), the open exploration of every field of knowledge within the Christian worldview which informs the learning community as a whole.

18. TWU is the only institution in Canada where an education of this type in nursing and law is extended to the evangelical community. A handful of evangelicals in each of the public law schools cannot recreate what is available at TWU. The Law Society's rejection of TWU graduates is a denial of the rights of TWU's students, faculty, and staff, to study or work at a Canadian evangelical law school. The breach of the rights of both students and teachers were expressly recognized in *Loyola*.[16]

19. If upheld by this court, the Decision's denial of freedom of religion will have many layers of impact. First, it will impact the entire sector of Christian higher education in Canada – 31 of CHEC's 34 member institutions have community standards documents similar to TWU's. Second, it will impact the entire network of private evangelical associations, many of whom have religious codes of conduct.

20. More broadly, the Law Society's rejection of TWU graduates will impact *the Canadian evangelical community as a whole*. Due to the status of TWU as a flagship[17] evangelical Canadian university, a rejection of its graduates *for religious reasons* will send the message to all Canadian evangelicals – students and parents; pastors and academics; professionals and workers – that the Canadian state has declared that there is no room in Canada for a distinctly evangelical Christian university. The evangelical community will know that they are not welcome in the legal profession (and presumably, by extension, other professions) on their own terms, but only on the terms of those who consider the collective manifestation of their religious beliefs to be against the public interest. In the face of the Law Society's constitutional duty to "respect" religious difference,[18] the Law Society will be sending a profoundly *disrespectful* message which amounts to a rejection of evangelicals' very identity. In the words of the Supreme Court in *Saguenay*:

> ... religious belief is more than an opinion. ... Religion is an integral part of each person's identity. ... when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.[19]

21. The Law Society's position before this court is that it has no problem with evangelical Christian lawyers

---

[15] TWU Argument, at para. 23.
[16] *Loyola*, at para. 6.
[17] Affidavit #1 of Dr. Samuel H. Reimer, at para. 54.
[18] *Loyola*, at para. 43.
[19] *Mouvement laïque québécois v. Saguenay*, 2015 SCC 16, at para. 73 (citing Professor R. Moon) ["*Saguenay*"].

or law students, or even their beliefs about sexual morality.[20] Where the Law Society draws the line[21], it says, is when those beliefs are 'institutionalized'.

22. Law Society's position evinces an atomized, individualistic approach to religion which is contrary to Canadian law. This view was thoroughly rejected in *TWU v. BCCT*. Far from retreating from its view of religious liberty over the last 14 years, the Supreme Court reaffirmed in *Loyola* that institutionalization of religious belief and practice is protected by the *Charter*: "... individuals may sometimes require a legal entity in order to give effect to the constitutionally protected communal aspects of their religious beliefs and practice, such as the transmission of their faith."[22]

23. A substitution of the proper nouns in paragraph 62 of *Loyola* demonstrates how directly it speaks to this case: "To tell [an evangelical Christian] [university] how to [manifest] its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational [university]."

24. Communal religious exercise is essential both to the fulfillment of evangelical belief, and to the continuation of its community. As the court held in *Loyola*, "an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions."[23] The Court further stated that "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom."[24] This freedom extends not only to participating in institutions to communicate *information* about religious *beliefs*, but participating in institutions to *participate*, i.e. *practice living*, all of life in light of those beliefs.

25. The robust freedom of religion protected by the *Charter* guarantees the Canadian evangelical community the right to create educational institutions at every level, from pre-school to university, which embody evangelical Christianity in both word and deed. The Law Society correctly identifies the purpose of the Community Covenant as putting faith into practice and promoting evangelicalism,[25] but errs in characterizing this as something meriting state censure. The Supreme Court says that these objectives are valid in our pluralist, multi-cultural society and protected by the *Charter*.

III. THE IMPACT OF THE LAW SOCIETY'S BREACH IS SERIOUS

26. Both the Nova Scotia and Ontario courts[26] state that even if those law society resolutions against TWU stand, those law societies need to conduct a case-by-case assessment of individual TWU law graduates.[27] That middle ground is not available in British Columbia, where the purpose of the Law Society's Decision was to prevent the law school from opening at all.[28] It had the desired effect: the Minister of Advanced Education revoked his approval for the JD program based solely upon the Law Society's rejection of TWU's graduates. This is an outright denial by the state of the right of the evangelical community to have a law school.

27. The Law Society at various places either denies that its refusal to accept TWU law school graduates

---

[20] Amended Response to Petition of the Law Society of British Columbia in this proceeding at para. 12 ["LSBC Amended Response to Petition"].
[21] LSBC Amended Response to Petition, at paras. 212-13, 229, 293.
[22] *Loyola*, at para. 33.
[23] *Loyola*, at para. 64 (emphasis added).
[24] *Loyola*, at paras. 61, 64, 67; see also Summary of the Final Report of the Truth and Reconciliation Commission of Canada (Ottawa: TRCC, 2015) at 1: "*Cultural genocide* is the destruction of those structures and practices that allow the group to continue as a group. States that engage in cultural genocide set out to destroy the political and social institutions of the targeted group".
[25] LSBC Amended Response to Petition, at paras. 55, 212.
[26] *TWU v. NSBS*, at paras. 16, 262; and *TWU v. LSUC*, at paras. 68, 127-128.
[27] This acknowledgment exposes the duplicity of the Law Society's position. If individual evangelicals have the right to have their credentials assessed on their merits by virtue of the *individual* protection for freedom of religion, they cannot lose that right by exercising the equivalent *communal* right by studying at TWU.
[28] This is in direct contrast to the situation in Ontario: *TWU v. LSUC*, at paras. 68, 120.

engages freedom of religion *at all*,[29] or that it has only a *de minimis* or very minor impact, referring to the Community Covenant as "not required" or "not necessary".[30] The Ontario court nearly accepted this argument by equivocating over whether s. 2(a) was *even engaged*.[31]

28. The religious freedom claim advanced in this case is at the core of the constitutional protection, not its periphery. The framework for religious liberty advanced by the Law Society and would exclude many evangelical institutions from participating in society unless they renounce their identity.

29. The *Charter* reserves to the evangelical community, not to the Law Society, the freedom to decide for itself what its religious beliefs state about the importance of moral standards within its own voluntary religious community.[32] The expert evidence in this case is uncontradicted and was correctly summarized by Justice Campbell: "Learning in an environment with people who promise to comply with the code is a religious practice and an expression of religious faith. There is nothing illegal or even rogue about that. That is a messy and uncomfortable fact of life in a pluralistic society."[33] The Supreme Court of Canada is clear that exposure to opposing viewpoints and even minority stress is an unavoidable feature of living in a pluralistic society, and does not breach anyone's *Charter* rights.[34]

30. The Supreme Court jurisprudence from *Amselem* to *Loyola* states that the Law Society is out of place to submit to this court that a non-mandatory covenant is a better expression of evangelical Christianity.[35] In the words of Justice Campbell: "That is a sincerely held belief and it is not for the court or for the [Law Society] to tell [Canadian evangelicals] that it just isn't that important."[36]

31. The Law Society's submission also defies logic. An optional covenant is no longer a *community* covenant. Every evangelical Christian law student at Canadian public law schools can choose to abide by TWU's Community Covenant, but that does not create a Christian learning environment. Justice Campbell recognized this;[37] the Ontario court did not.[38] Evangelical law students have the constitutional right to study together in a community of faith rather than apart.[39]

32. The Law Society seeks this court's endorsement to force TWU to choose between maintaining its integrity as an evangelical community, or offering a legal education. Endorsing that approach by a state actor would have far-reaching consequences for other professional programs at TWU and other evangelical institutions contributing to Canadian society, including CHEC's member colleges and universities, all of whom have affirmed the EFC Statement of Faith, and the vast majority of whom have community standards documents.

---

[29] LSBC Amended Response to Petition, at para. 11.
[30] LSBC Amended Response to Petition, at paras. 261, 273, 282, 284.
[31] *TWU v. LSUC*, at para. 86.
[32] Per *Syndicat Northcrest v. Amselem*, 2004 SCC 47, [2004] 2 S.C.R. 551, at para. 50. The uncontested evidence here, accepted by the Nova Scotia and Ontario courts, is that there are clearly articulated and sincerely held religious reasons for the Community Covenant and that the Law Societies' resolutions amount to breaches of s. 2(a): *TWU v. NSBS*, at paras. 124, 230-236; and *TWU v. LSUC*, at paras. 76, 81, 83.
[33] *TWU v. NSBS*, at para. 11.
[34] *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at paras. 64-66; and *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 40 ["*S.L.*"] (quoted in *Loyola*, at para. 21). See also *TWU v. NSBS*, at paras. 8, 180, 204-205.
[35] LSBC Amended Response to Petition, at para. 278.
[36] *TWU v. NSBS*, at para. 230. See also *Big M* at 337: "What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The Charter safeguards religious minorities from the threat of 'the tyranny of the majority'".
[37] *TWU v. NSBS*, at paras. 232, 236, 270.
[38] *TWU v. LSUC*, at paras. 78, 80.
[39] Section 2(d) specifically protects against such "state-enforced isolation and empower[s] individuals to achieve collectively what they could not achieve individually": *Mounted Police*, at para. 62. Communal religious rights, like language rights, can by definition only be exercised in community: *R. v. Beaulac*, [1999] 1 S.C.R. 768, at para. 20.

IV. STATE NEUTRALITY AND THE PUBLIC INTEREST

A. The Law Society's Duty of Neutrality

33. The Law Society concedes that "The discretion to establish 'requirements' beyond those necessary to ensure academic competence for admission to the bar is not unfettered. These powers must be referable to and directed at the broader purposes and objects of the Act"[40].

34. Those purposes and objects must, in turn, be delimited by the State's constitutional duty of religious neutrality (a corollary to citizens' rights to freedom of religion under the *Charter*) and the proper understanding of the State's secular nature as articulated in *Loyola* and *Saguenay*.

35. First, *Saguenay* has finally put religious and 'non-religious' actors on equal footing by recognizing that religious belief and non-belief is equally protected by s. 2(a).[41]

36. Second, *Saguenay* has confirmed that the state must not adopt either the perspective of the believer or 'unbeliever'; rather: "True neutrality presupposes abstention."[42] "The concept of neutrality allows churches and their members to play an important role in the public space where societal debates take place, while the state acts as an essentially neutral intermediary in relations between the various denominations and between those denominations and civil society."[43]

37. On a micro level, state neutrality is about protecting the rights of individuals and private associations. On a macro level, however, it is about safeguarding a robust pluralism at the heart of our liberal democracy. As recognized by the Supreme Court of Canada a few months ago, "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection of freedom of religion".[44]

38. The Law Society's stated objective[45] of seeking to cause the Canadian evangelical community, including TWU, to change its religious beliefs, is an invalid objective akin to Parliament's invalid objective in *Big M* which was fatal to the state's ability to justify the infringement.[46] Sections s. 2(a) and s. 27 of the *Charter* prohibit the Law Society from using its coercive regulatory power to implement what Justice Campbell called a "secularizing mission".[47] As the Supreme Court of Canada stated at para. 43 of *Loyola*: "The pursuit of secular values means respecting the right to hold and manifest different religious beliefs. A secular state respects religious differences, it does not seek to extinguish them."

B. The evangelical community's religious liberty depends upon a clear distinction between government and private associations

39. The evangelical community has always depended upon a recognized separation between state actors and private evangelical institutions. The Law Society's argument conflates that crucial distinction without which religious liberty is eviscerated of its collective dimension.

40. The Law Society takes the position that its respecting TWU's *Charter*-protected freedom would be for the state to 'condone', be 'complicit in' or give its 'imprimatur' to the Community Covenant, and that accrediting TWU's law school will "injure the public interest in the administration of justice, and hence the public confidence in the legal profession."[48] These arguments – accepted by the Ontario court[49] – are logically

---

[40] LSBC Amended Response to Petition, at para. 124.
[41] *Saguenay*, at para. 70.
[42] *Saguenay*, at para. 134.
[43] *Saguenay*, at para. 71 (citing *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontainev. Lafontaine (Village),* 2004 SCC 48, [2004] 2 S.C.R. 650, at paras. 66-67).
[44] *Mounted Police*, at para. 64 (*per* majority, citing Abella J.'s dissent in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567).
[45] LSBC Amended Response to Petition, at para. 253.
[46] *Big M* at 334a and 349j-350a.
[47] *TWU v. NSBS*, at para. 19.
[48] LSBC Amended Response to Petition, paras. 229, 245, 249, 252, 279.

and constitutionally flawed.

41. TWU, a private religious institution, is neither government nor performing a governmental function. Nothing that TWU does, or which the Law Society 'permits' TWU to do, is a state action. The Law Society's equating of TWU to the municipal government of Saguenay, Quebec, or to the Alberta legislature is fundamentally misconceived.[50] Receiving regulatory approval of its JD program does not convert TWU into government any more than receiving an equivalence exemption for its ethics and religion course converted Loyola High School into government.

42. The proper ambit of the Charter, in light of this critical distinction was recognized by Justice Campbell when he said "The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state."[51]

43. The heart of liberalism is the preservation of a robust pluralism where people can, alone and in association with religious and non-religious association with others, determine their vision of the good life and pursue it. To insist that all sub-communities share the same ethos is homogenization, not pluralism; such an approach undermines the very diversity which the *Charter* seeks to foster, it evinces "civic totalism" (rejected by the Supreme Court in *Saguenay*)[52], and threatens "rights fundamental to Canada's liberal democratic society"[53] By contrast, our Constitution calls for the "open secularism" articulated by Charles Taylor where pluralism can flourish.[54]

44. It is the state and the Law Society, not TWU, that must be neutral and inclusive, because only the state has the power to exclude by force, as opposed to by choice. In the educational sphere, the constitutional arrangement in Canada is clearly delineated by the interplay between *S.L.* and *Loyola*: (1) The state's public schools and public universities must be equally accessible to all and so must abstain from religious instruction or requirements; (2) Individuals and voluntary associations are free to form their own religious schools which can legitimately have among their aims the perpetuation of that religious community; and (3) the fact that these schools and universities can grant state-recognized diplomas and degrees does not in any way mean that the state is affirming their distinctive religious beliefs. This arrangement is the defining characteristic of the jurisprudence in this area.[55]

45. The Law Society alleges[56] – and the Ontario court erred in finding[57] – that TWU seeks to use s. 2(a) to "compel" or "require" the Law Society to give its approval. TWU seeks no such thing. TWU seeks only the right to have its law school proposal adjudicated on its merits – just like any public law school – without the Law Society placing an *additional and irrelevant religious requirement* for TWU to abandon its community covenant. The Law Society's demand is a breach of the state's duty of abstention on a matter of religious belief and practice which exists precisely "to ensure that the state is, and appears to be, open to all points of view regardless of their spiritual basis. Far from requiring separation, true neutrality requires that the state neither

---

[49] *TWU v. LSUC*, at paras. 116.
[50] LSBC Amended Response to Petition, at paras. 213, 246 (citing *Vriend v. Alberta*, [1998] 1 S.C.R. 493).
[51] *TWU v. NSBS*, at para. 11; and *Saguenay*, at para. 74.
[52] On civic totalism, see Written Argument of the Canadian Council of Christian Charities in this proceeding at Section E ["CCCC Argument"].
[53] *Mounted Police*, at para. 48.
[54] Jocelyn Maclure and Charles Taylor, *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011) at 3, 10-12, 19, 40, 46-48.
[55] *S.L.*; *Loyola* (including concurring minority opinion at para. 108); *Caldwell et al. v. Stuart et al.*, [1984] 2 S.C.R. 603 (cited in TWU Argument, at para. 317); *Daly v. Ontario (AG)* (1999), 44 O.R. (3d) 349 at 362 (C.A.): "Religious faith on the part of the teachers is a valid consideration if the aim of the school to create a community of believers with a distinct sense of the Catholic culture is to be achieved".
[56] LSBC Amended Response to Petition, at para. 293.
[57] *TWU v. LSUC*, at para. 115

favour nor hinder any religion, and that it abstain from taking any position on this subject".[58]

C. 'Public Perception' and the Public Interest

46. The Constitutional prohibition on the Law Society carrying out a secularizing mission cannot be avoided by its claim that the public will perceive 'acceptance' of TWU law graduates as state sanction of the community covenant, and that this will in turn bring the administration of justice into disrepute, such that its public interest mandate compels the exclusion of TWU graduates.[59]

47. First, TWU is not seeking the Law Society's approval of the Community Covenant. It could not give that approval even if it wanted to.[60] The State must exercise restraint and not take sides in matters of religious morality; this is the lifeblood of robust pluralism in a liberal democracy.

48. Second, there is no principled difference between the Law Society invoking its public interest mandate to disapprove the TWU law school entirely, as it has done and seeks to defend, and invoking its public interest mandate to apply a different set of qualifying criteria to individual evangelicals (or any other religious minority) for admission to the bar regardless of which law school they attended. Not even the Law Society contends that such an individual qualifying test would be in the public interest (or even within the Law Society's jurisdiction); yet this was the intended purpose and effect of the Decision to exclude TWU law graduates from the bar *as a group*. This is unprecedented.

49. The public interest which the Law Society is mandated to uphold must take its content not from the intolerance of the majority of BC lawyers towards evangelical Christian practice as expressed in the referendum, but by the freedoms guaranteed by the Constitution, including not just the toleration of, but *respect* for, freedom of religion and the religious diversity which is celebrated in s. 27 of the *Charter*[61], and the express statutory recognition that holding diverse views on marriage is fully consistent with the public interest.[62] *Charter*-compliant interpretations of legislative grants of discretion are presumed.[63]

50. The public interest lies in the Law Society respecting the diversity of religious beliefs and expression which enable all Canadians, including evangelicals, to participate in public service. Requiring evangelicals to deny their identity as the price of public participation is against the public interest and contrary to the *Charter*.

51. The implications of the Law Society's position that any interaction with a regulatory arm of government enables the government to impose *Charter* obligations on private associations[64] were called "disturbing" by the SCC in *TWU 2001* and condemned by Justice Campbell who recognized that, when the state performs a regulatory function, it must abstain from expressing a view on religious matters.[65] EFC adopts the submissions of TWU and other interveners about the truly frightening implications of the Law Society's argument.[66]

---

[58] *Saguenay*, at para. 137.
[59] LSBC Amended Response to Petition, at paras. 5, 249-50, 319.
[60] See *Saguenay*.
[61] *Loyola*, at paras. 43, 54.
[62] See references in CCCC Argument, at Section B and Appendix B. See also *Obergefell v. Hodges*, 576 U.S. ___ (2015), Majority opinion, Section IV, final paragraph.
[63] *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038 at 1079 (dissent, as adopted by majority).
[64] LSBC Amended Response to Petition, at para. 279.
[65] *TWU v. NSBS*, at para. 15: "There is a difference between recognizing the degree and expressing approval of the moral, religious, or other positions of the institution." Nor is the State giving approval to the religious beliefs of a church when it approves it for charitable status, municipal zoning, or a health inspection; or to an individual when the State licenses the person as a marriage commissioner or chaplain in the Canadian Forces, Correctional Services, or the hospital. The system must be fair; the individual participants can and should be as diverse as possible.
[66] *TWU 2001*, at para. 183; and *TWU v. NSBS*, at paras. 188, 222. Written Argument of the Christian Legal Fellowship, *TWU v. LSBC*, at section D; CCCC Argument, at sections D and E; Written Argument of the Justice Centre for Constitutional Freedoms, *TWU v. LSBC*; and TWU Argument, at para. 291. Indeed, the Law Society's position appears to be that evangelical Christian institutions should not be permitted to require their members (or even their leaders) to even be evangelical Christians: LSBC Amended Response to Petition, at para. 54. By contrast, the BC legislature clearly does not consider TWU and its Community Covenant to be against the public interest: see TWU Argument, at para. 293.

52. If some members of the public might *perceive* the Law Society's acceptance of TWU law degrees as an approval of the Community Covenant, they simply need to be educated – by the court if necessary – that the State's duty of neutrality means that acceptance of TWU law degrees is *neither a condonation nor a rejection* of the Community Covenant since the Law Society is constitutionally obliged to abstain from expressing a view on that subject. Justice Campbell recognized this; the Ontario court did not. The only thing that a reasonable member of the public can conclude from the Law Society's approval is that TWU has a solid legal education program which will educate competent lawyers, which is true. Justice Campbell's analysis of why even the LGBTQ+ community could not reasonably make this 'perception' claim is instructive, as is his enunciation of why the state cannot justify the breach of a minority's *Charter* rights by invoking the public's confidence.[67] Giving effect to the Law Society's "perception" argument justifies discrimination against evangelicals in order to appease those who are intolerant of them.

53. The Law Society's error in identifying its statutory mandate and statutory objectives is very much akin to the Minister's fatal error in *Loyola* of treating any learning community which was not identical to a public school as "necessarily inimical to the state's core objectives."[68] The Supreme Court expressly rejected as untenable the "assumption that a confessional program cannot achieve the objectives" of the ERC.[69]

54. As correctly noted in the TWU Argument and in Justice Campbell's judgment,[70] when the rights at issue are properly delineated, there is no clash of rights in this case. The court's scrutiny of the Law Society's infringement of the rights of TWU and its students and faculty under *Doré* is to be "a robust one [which] 'works the same justificatory muscles' as the *Oakes* test" and which "give effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate."[71] This is minimal impairment at work in the administrative context. The focus of any balancing must be on the Law Society Admission Program's objectives and whether the community covenant interferes with achieving them. It categorically does not.[72]

V. AUTHENTIC DIVERSITY

55. The Law Society defends the rejection of TWU graduates as a move to further diversity within the legal profession.[73] But as observed by Justice Campbell, the only effect of the Decision is the exclusion of people who wish to attend a law school based on evangelical Christian principles without doing anything to improve access to legal education for members of the LGBTQ community. State-sponsored exclusion of some is "not how social progress is achieved in a liberal democracy … The [Law Society] has made serious and meaningful efforts to deal with discrimination and particularly discrimination against LGBT people. This just isn't one of them."[74]

56. Lawyers enjoy a privileged position in our constitutional arrangement[75] in order that we can serve our clients with undivided loyalty. A genuinely diverse Law Society will include lawyers from the full breadth of Canadian society, in order that clients from every sector of society may find lawyers who can advise them from the client's own perspective, including evangelical clients who seek legal advice from lawyers who share their

---

[67] *TWU v. NSBS*, at paras. 254, 264:"mak[ing] a statement of principle so as to not appear to be hypocritical … is hardly a pressing and substantial purpose justifying the infringement of a *Charter* right". If it were, individual evangelical lawyers could be disbarred: *TWU v. NSBS*, at paras. 258-260. Cf. *TWU v. LSUC*, at para. 118.

[68] *Loyola*, at para. 68.

[69] See *Loyola*, at paras. 69, 79 (*per* majority), and 150 (minority, concurring). The basis of the Minister's error was the assumption that a religious independent school could only achieve the objectives of the ERC if it provided an education that was identical to that provided in public schools. Such an approach "renders illusory" the protections contemplated by s. 2(a) of the *Charter* and s. 41 of the *Charter of human rights and freedoms*, CQLR, c. C-12. The LSAP's objectives, like those of the ERC, can be equally attained in a religious university.

[70] TWU Argument at 357; *Reference re Same-Sex Marriage*, 2004 SCC 79, at paras. 52-53; and *TWU v. NSBS* at para. 213.

[71] *Loyola*, at paras. 39, 40 (citing *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R 395, at para. 5).

[72] See *Loyola*, at para. 56.

[73] Amended Response to Petition, at paras. 65, 143, 242-43, 248, 271.

[74] *TWU v. NSBS*, at paras. 247, 263.

[75] *Canada (Attorney General) v. Federation of Law Societies of Canada*, 2015 SCC 7, [2015] 1 S.C.R. 401.

religious perspective.[76]

57. A scholarly account of the exclusion of a communist from the BC bar in 1950 through the "good repute" requirement concludes as follows:

> Nearly a quarter century later and fifty years after his exclusion from the legal profession, the Law Society of British Columbia issued a formal apology. In 1998, its treasurer (i.e., president), Trudi Brown, said to the Victoria Times Colonist: "'It's a sorry tale,'... But it could not happen now because 'we are only concerned if a person is competent.'"[77]

58. Clearly the legal community has a number of people who feel passionately about preserving diversity and condemning intolerance against the LGBTQ community. On this occasion their defence of one minority is being misdirected against evangelicals whom they seek to exclude on the basis of religious beliefs and practices when in all relevant respects evangelicals are fit to practice law in BC. The Law Society's Decision, if upheld, would diminish diversity rather than increase it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Date: July 27, 2015

Geoffrey Cowper
Geoffrey Trotter
Stephen Hsia

Lawyers for the Interveners EFC and CHEC

[76] Affidavit #1 of Dr. Janet Epp Buckingham, at para. 78.
[77] W. Wesley Pue, "Banned from Lawyering: William Martin, Communist" (2009) 162 *BC Studies* 111 at 136.