Court of Appeal File No. CA43367
Supreme Court File No. 149837
Vancouver Registry

**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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# FACTUM OF THE INTERVENORS CANADIAN SECULAR ALLIANCE and THE BRITISH COLUMBIA HUMANIST ASSOCIATION

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## CHRONOLOGY

The Canadian Secular Alliance and the British Columbia Humanist Association (the "Intervenors") adopt the chronology as set out in the factum of the Appellant, the Law Society of British Columbia (the "Law Society").

## OPENING STATEMENT

Trinity Western University ("TWU") seeks to open a law school that would, through a mandatory requirement to sign a Community Covenant (the "Covenant"), discriminate against students who are LGBTQ, women, and those who do not share evangelical Christian beliefs and ethics. TWU nonetheless claims it is entitled, by virtue of freedom of religion under s. 2(a) of the *Canadian Charter of Rights and Freedoms*, to the benefit of accreditation from the Law Society. The first question is therefore whether s. 2(a) is infringed by the denial of accreditation. The Intervenors submit it is not, for two reasons.

First, the conduct for which TWU claims protection under s. 2(a) is not religious in nature. The belief that homosexuality is sinful is undoubtedly sincerely held, but the analysis under s. 2(a) must be more specific: is the study of (secular) law a religious activity, and does evangelical Christianity hold that it ought only be pursued with classmates who comport with evangelical Christian ethics? The answer is plainly no. A law school is not a seminary and studying law is a secular activity. As with other Canadian law schools, TWU would embrace academic freedom and critical debate, and admission to the law school would be open to students of all faith traditions (or none). It would be entirely acceptable, for instance, for TWU law students to dispute the tenets of evangelical Christianity (including on homosexuality) precisely because the study of law is not a religious practice and need not be pursued within a community of shared belief.

Second, TWU's requirement that all students comply with evangelical Christian ethics even if they do not share the underlying beliefs amounts to religious compulsion and falls outside the protection of s. 2(a). Freedom of religion protects the right of each individual to hold, express and act upon according to their own beliefs and consciences. It does not protect efforts to coerce anyone's compliance with religious beliefs or ethics. Similarly, freedom of religion is not infringed by exposure to beliefs or ethics that contradict one's own. Section 2(a) just defends against state conduct that actually limits the ability to hold, profess or practice one's own religious beliefs. The Law Society's decision to deny accreditation does nothing of the kind and does not infringe s. 2(a).

## PART 1 – STATEMENT OF FACTS

1. Students at TWU are expressly not required to hold evangelical Christian beliefs in order to attend the university; TWU accepts, and the evidence shows, that its student body includes students of all faiths and denominations, including non-believers.[1] Admissions to law school would similarly be open to all, with admissions criteria, as with other Canadian law schools, focused on the "key factors" of GPA and LSAT score.[2] There are therefore students at TWU – and there would be law students – for whom adherence to the Covenant is not a matter of religious belief or practice.

2. TWU states that it is committed to the principles of academic freedom as part of its role as a liberal arts university and that it would carry that through its proposed law school.[3] Students are not required to sign the university's Statement of Faith and are free to hold and express opinions on moral, ethical and religious issues that diverge from evangelical Christianity views on those issues, including homosexuality and same-sex relationships.[4] All students are, however, required to sign the Community Covenant affirming that they will not engage in certain "Biblically condemned" conduct, including sex outside of a marriage between one man and one woman.[5]

## PART 2 – ISSUES ON APPEAL

3. The Intervenors submit that the trial judge erred in concluding that the Law Society did not reasonably balance and resolve the *Charter* rights and values at issue. Freedom of religion under s. 2(a) of the *Charter* is not engaged on the facts of this case and there is as a result no infringement to take into account in a balancing process.

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[1] Affidavit of Dr. Robert Wood, A.B. Vol. I, at paras. 16, 67 ("Wood Affidavit"); Affidavit of Dr. Janet Epp-Buckingham, A.B. Vol. III, at para. 82 ("Epp-Buckingham Affidavit").

[2] Epp-Buckingham at paras. 81-82.

[3] Wood Affidavit at para. 46, Ex. P; Epp-Buckingham Affidavit at paras. 10, 78-80.

[4] Wood Affidavit at paras. 48, 51; Epp-Buckingham Affidavit at para. 10.

[5] Wood Affidavit at paras. 65-67.

## PART 3 – ARGUMENT

4. The Intervenors intervene in this appeal to address the proper scope and approach to freedom of religion under s. 2(a) of the *Charter*. Under the *Doré* framework, the Court must first determine whether a decision engages the *Charter* by limiting its protections – in other words, whether a *Charter* right is infringed.[6] Courts should not treat this stage of the analysis in a perfunctory manner, leaving any concerns about the strength of the rights claim or the impact of the impugned decision for consideration in the "balancing" analysis. Where a party claims that s. 2(a) is engaged, the court should carefully assess the claimant's asserted belief or practice in order to determine whether it falls within the scope of the freedom and whether the state has interfered with the exercise of that freedom. The Intervenors submit that, given the limits to the freedom under s. 2(a), freedom of religion is not engaged in this case. There was as a result no need to proceed to the balancing stage of the analysis.

5. The decision in *Trinity Western University v. British Columbia College of Teachers*[7] is not determinative of the question of whether s. 2(a) is engaged in this case. The context and evidence here differ from the case before the Court in 2001. The College imposed a requirement that TWU students attend a further course of study in a secular school, out of concern that the religious views represented by the Covenant would "limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools."[8] The impugned action was directly aimed at students' expression of their own religious beliefs; the Court was therefore bound to find that the regulation infringed s. 2(a).

6. In the case at bar, the Law Society's decision was not concerned with any

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[6] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12; *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, [2015] 1 S.C.R. 613 at para. 39; *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*, 2015 BCCA 352 at paras. 47, 54.

[7] [2001] 1 S.C.R. 772, 2001 SCC 31 ("*TWU v. BCCT*").

[8] *TWU v. BCCT* at para. 32.

alleged detrimental effect flowing from TWU students' voluntary expression of their own beliefs. Rather, it was grounded entirely in the *mandatory* nature of the Covenant and the invidious decision put to LGBTQ persons, women, non-evangelical Christians and conscientious objectors, either to deny themselves a limited opportunity to attend a Canadian law school or to deny profoundly personal and cherished aspects of themselves while doing so. At issue in *TWU v. BCCT* was the *College's* limitation of students' freedom to express and conduct themselves according to their own evangelical Christian beliefs. At issue in this case is the *mandatory Covenant's* limitation of the freedom to conduct oneself according to personal values and ethics that differ from those of evangelical Christianity.

## A. THE INTERNAL LIMITS OF FREEDOM OF RELIGION

7. Section 2(a) of the *Charter* is designed to protect individuals from state coercion or constraint of religious belief or practice:

> The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. ... Freedom can primarily be characterized by the absence of coercion or constraint. ... Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience. [Emphasis added.][9]

8. In essence, s. 2(a) protects the right to hold and manifest our own beliefs or non-beliefs. Two internal limits on the scope of the freedom can be divined from this purpose: first, s. 2(a) does not and cannot apply where what is sought is the ability to compel belief or conduct on the part of another; and, second, exposure to the beliefs practices of others is not an interference with an individual's freedom under s. 2(a).

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[9] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at pp. 336-37; see also *R. v. Edwards Books and Art Ltd.*, [1986] 2 S.C.R. 713 at p. 759.

***1) Section 2(a) does not protect practices that coerce or constrain others***

9. Where a s. 2(a) claim is based on an activity that restrains or prescribes the conduct of non-believers, or otherwise involves a belief that others must behave in a certain way, it falls outside the scope of the right. Any other conclusion would contradict the very principles underlying s. 2(a); a right designed to shield individuals from religious coercion cannot be used as a sword to coerce religious practice. As stated by Dickson J. in *Big M*:

> The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.[10] [Emphasis added.]

10. This Court expanded on this point in *Ktunaxa Nation v. British Columbia (Forests, Lands and Natural Resource Operations)*.[11] In that case, the Ktunaxa Nation claimed that their religion required that all persons refrain from developing a particular area of land. The Court found that the religious custom the Ktunaxa invoked was one that would have to be performed by all people, of every faith or creed. The Court concluded that s. 2(a) does not include the freedom to control or modify the behaviour of others as a method of preserving the vitality of a religious community.[12] The Court distinguished between cases where the state's regime interfered with how a voluntarily-created community passed on its religious values and cases where an organization seeks to impose religiously-based conduct on individuals who do not share the underlying religious beliefs.[13] Of those cases, the Court commented:

> It is not, in my view, consonant with the underpinning principles of the *Charter* to say that a group, in asserting a protected right under s. 2(a) that implicates the vitality of their religious community, is then capable of

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[10] *Big M* at p. 346. See also *Syndicat Northwest v. Amselem*, [2004] 2 S.C.R. 551, 2004 SCC 47 at paras. 61-62; *P.(D.) v. S.(C.)*, [1993] 4 S.C.R. 141 at p. 182.

[11] *Ktunaxa* at paras. 68-70, leave to appeal to SCC granted.

[12] *Ktunaxa* at paras. 73-74.

[13] *Ktunaxa* at paras. 72-73.

> restraining and restricting the behaviour of others who do not share that belief in the name of preserving subjective religious meaning.[14]

11. The *Ktunaxa* decision is consistent with the Supreme Court's direction in *Amselem* that freedom of religion is a personal and subjective freedom that is "a function of personal autonomy and choice."[15] The freedom is based on the idea "that no one can be forced to adhere to or refrain from a particular set of religious beliefs."[16] It does not extend to allow a person to impose on the personal choice and religious beliefs of another, let alone claim a constitutionally-protected right to do so. Indeed, it would be antithetical to the philosophy underlying s. 2(a) to recognize a claim that requires non-believers to "adhere or refrain from a particular set of religious beliefs" or act contrary to their own beliefs. As Iacobucci and Major JJ. stated in their concurring opinion in *B.(R.) v. Children's Aid Society of Metropolitan Toronto*,[17] "'[f]reedom of religion' should not encompass activity that so categorically negates the 'freedom of conscience' of another."

12. The respondents argue that by refusing to accredit TWU's proposed law school the Law Society is constraining their religiously-motivated desire to teach and study law in a program in which all students are required to adhere to a prescribed set of evangelical Christian practices. However, the only religious constraint that arises from these facts is TWU's imposition of the observance of evangelical Christian religious practices on its students, regardless of their religious or conscientious beliefs. By restraining and coercing the behaviour of others, the Covenant undermines the very principles that animate s. 2(a).

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[14] *Ktunaxa* at para. 73.

[15] *Amselem* at paras. 42-43.

[16] *Loyola* at para. 59; see also *Mouvement laique quebecois v. Saguenay (City)* 2015 SCC 16 at para. 69; and *Congrégation des témoins de Jéhovah de St-Jérôme-Lafontaine v. Lafontaine (Village)*, 2004 SCC 48, [2004] 2 S.C.R. 650 at para. 65.

[17] [1995] 1 S.C.R. 315 at p. 437. The majority dealt with the s. 2(a) claim under s. 1, whereas Iacobucci and Major J. dealt with it at as a question of scope.

***2) Exposure to other beliefs and conduct is not an infringement of s. 2(a)***

13. Further, exposure to the beliefs or practices of others is not an interference with an individual's protected freedom of religion. It does not interfere with an evangelical Christian student's religious freedom to sit in law school classroom with a person involved in a homosexual relationship. In *S.L. v. Commission scolaire des Chênes*,[18], the Court concluded that exposing children to a variety of religious facts, although potentially a "source of friction", did not infringe their or their parents' religious freedom; rather, it was a fact of life in a multicultural society.[19] The Court expanded on this concept in *Loyola High School v. Quebec (Attorney General)*, where the majority held that freedom of religion was engaged where the government mandated a curriculum that would force teachers at a Roman Catholic school to teach Catholicism from a "neutral" perspective.[20] In the majority's view, this amounted to "requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism."[21] However, the majority then went on to conclude that a curriculum which required Loyola to teach students about <u>other</u> religions and ethics from a neutral perspective did not constitute an interference with freedom of religion. Abella J. concluded that asking Loyola's teachers to teach other religions and ethical positions "as objectively as possible" was not a "requirement that they shed their own beliefs." The fact that their personal religious views were not at the forefront in the teaching of ethics and other religions did "not mean that the Loyola teacher is silenced, or forced to forego his own beliefs, or even appears to be doing so."[22]

14. The Ontario Superior Court of Justice reached a similar conclusion in *Hall (Litigation guardian of) v. Powers*,[23] where a student at a Roman Catholic high school

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[18] 2012 SCC 7, [2012] 1 S.C.R. 235.

[19] *S.L.* at para. 40.

[20] *Loyola* at paras. 62, 64.

[21] *Loyola* at para. 63.

[22] *Loyola* at para. 78.

[23] (2002), 213 D.L.R. (4th) 308, 59 O.R. (3d) 423 (Sup. Ct.).

sought an injunction that would allow him to attend the school's prom with his boyfriend. The principal and the School Board denied his request on the basis that approval was contrary to their understanding of Catholic beliefs about homosexual sexual activity. The court, in granting the injunction, rejected this position, concluding that permitting Mr. Hall to attend prom with his boyfriend would not impair the freedom of religion of the principal or School Board, as it "will not compel or restrain teachings within the school and will not restrain or compel any change or alteration to Roman Catholic beliefs."[24]

15. As *Loyola* and *Hall* make clear, freedom of religion does not protect every activity undertaken by members of a religious organization or the teachers and students at educational institutions with a religious character. Inevitably, many of the activities they undertake will be secular in nature. The freedom under s. 2(a) is only engaged by state conduct that actually limits the ability to hold, profess, or practice religious beliefs. Freedom of religion is not limited or interfered with by exposure to other religious or ethical viewpoints. Section 2(a) does not entitle us to ideological uniformity and it is not infringed by seeing other people exercise their own freedom of religion.[25]

16. In this case, evangelical Christians are not forced to forego, silence or constrain their personal beliefs. Members of the evangelical Christian faith who attend TWU, along with teachers and staff at TWU, are free to adhere to the standards of conduct described in the Covenant. The Law Society's decision does not go so far as to deny students the option of a voluntary Covenant. Students or teachers who feel that their religion requires that they undertake a contractual obligation to adhere to the Biblical standards of behaviour in question are not forced to forego that belief or refrain from acting in accordance with it. A hypothetical evangelical Christian student in TWU's law school is not being asked to engage in or approve any activity associated with other students' Biblically-condemned acts. Sitting in the same law school classroom as a classmate in a same-sex marriage does not implicate the student in that marriage or

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[24] *Hall* at para. 55.

[25] Section 27 of the *Charter* requires that s. 2(a) be "interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians."

otherwise interfere with the students' personal religious beliefs or conduct in any way.

## B. THE REQUIREMENT FOR A RELIGIOUS PRACTICE

17. As discussed, Section 2(a) is only engaged by state conduct that actually limits the ability to hold, profess, or practice religious beliefs. The claimant's belief or practice must be religious in content: only "beliefs, convictions and practices rooted in religion, as opposed to those that are secular, socially based or conscientiously held, are protected by the guarantee of freedom of religion."[26] While the beliefs that underlie the Covenant are plainly religious in nature and sincerely held by many TWU students, the evidence does not establish that the conduct for which the respondents seek the protection of s. 2(a) – studying law only among those who have signed a covenant to refrain from Biblically-condemned practices – is a precept or belief of evangelical Christianity sincerely held by TWU students.[27] Attending law school is not a religious rite or practice, but a secular activity. While that conclusion necessarily flows from the very nature of Canadian law schools, it is also demonstrated by TWU's stated respect for academic freedom and open debate along with its open admissions policy regarding

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[26] *Amselem* at para. 39.

[27] The evidence contradicts this position: Affidavit of Dr. Samuel Reimer, A.B. Vol. IV, para. 43, states that evangelical Christians are an "engaged subculture" who develop an understanding of their distinctiveness through interaction with non-evangelicals. A number of evangelical Christian TWU alumni deposed that they would have considered (but not necessarily attended) TWU Law as an option if available, and identified a Christian-focussed curriculum and a learning environment that encouraged discussion of Christian values as possible benefits of the proposed law school: Affidavit of Brayden Volkenant, A.B. Vol. I, paras. 13, 22, 29; Affidavit of Jessie Legaree, A.B. Vol. IV, para. 23; and Affidavit of Natalie L. Hebert, A.B. Vol. IV, para. 17. In the Affidavit of Jody L. Winter, A.B. Vol. IV, at para. 34, the affiant deposes that it was "easier to remain committed to my religious values living in a community like TWU's" but does not say that learning in an atmosphere with mandatory prohibitions on Biblically-condemned behaviour is an expression of religious faith.

religious belief, such than an atheist student is welcome to attend the law school and voice points of view contrary to evangelical Christian belief on such issues as the definition of marriage or the (non-)existence of god(s).

18. TWU's proposed law school is not a seminary or a s. 93 denominational school. But in even in those kinds of educational settings, the protection of s. 2(a) does not extend to every activity. In *Loyola* freedom of religion in an educational context was directly linked to the interest in transmitting religious beliefs to children.[28] And even in a denominational school focused on that objective, only the study of Catholicism itself – not the study of other religions – was found to fall within the religious sphere for Loyola's students. Plainly the teaching and study of law falls even farther outside. The nexus between the conduct in question and religion just is not present in this case.

## C. INSTITUTIONAL FREEDOM OF RELIGION

19. The respondents claim that s. 2(a) is engaged because the Covenant embodies TWU's evangelical Christian values; the Provost of TWU, Dr. Robert Wood, deposed that the Covenant ensures that TWU "maintains its religious character" as a distinctly evangelical Christian institution.[29] No majority of the Supreme Court of Canada has ever held that corporations or institutions are protected by s. 2(a) in their own right; in *Loyola* the majority would only go so far as to say that claims involving religious organizations involved the communal aspect of the freedom of religion of the individuals who make up the membership of the religious organization in question.[30] The minority reasons of McLachlin C.J. and Moldaver J. went further, establishing the current high water mark for a "corporate" view of s. 2(a), saying that the communal character of religious freedom means that "protecting the religious freedom of individuals requires protecting the religious freedom of religious organizations."[31]

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[28] *Loyola* at paras. 61, 64.

[29] Wood Affidavit at paras. 65-67.

[30] *Loyola* at paras. 33-34.

[31] *Loyola* at para. 91.

20. However, even if one accepted the position that TWU is a religious organization that is entitled to claim the constitutional protection of s. 2(a) of its own accord, the analysis above is unaffected. If s. 2(a) does provide protection for institutions, then, as seen in the quote cited above, it does so in order to protect the religious freedom of individuals. The result is that, if institutions enjoy freedom of religion, then they do so only to the extent that it gives effect to individual religious freedom. It would inconsistent with the very purpose of s. 2(a) to protect the religious practices or precepts of an organization that had the effect of interfering with the religious freedom of that organization's own members. Whether freedom of religion is individual or corporate, the same internal limitation arises: freedom of religion cannot be used to restrict the freedom of religion of someone else. That is precisely the effect and indeed the purpose of a *mandatory* Covenant, and it therefore cannot fall within the protection of s. 2(a).

21. Further, rather than asserting s. 2(a) to protect its own religious practices from state interference, TWU relies on it to compel the grant of a secular benefit (accreditation) it says the state is obligated to provide. However, in all but exceptional circumstances[32] s. 2(a) does not require the state to fund or otherwise facilitate the practice of religion,[33] and there is no evidence of systemic discrimination against evangelical Christians that might compel the state to facilitate a law school of their own.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated: April 19, 2016

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[32] *Lafontaine (Village)* at para. 77, *per* Bastarache J.

[33] *Adler v. Ontario*, [1996] 3 S.C.R. 609, *per* McLachlin C.J. (as she then was), dissenting; L'Heureux-Dubé J., dissenting; and Sopinka J., concurring (the majority did not address the freedom of religion claim).

## LIST OF AUTHORITIES