The legal revolution against the accommodation of religion: the secular age versus the sexular age

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6 THE LEGAL REVOLUTION ON THE MARCH: THE CASE OF TWU LAW SCHOOL

6.1 Introduction

Kuhn observes that there is a point during a scientific revolution when the paradigm crisis reaches a "Eureka Moment": a moment when a scientist, or a small group of scientists, connects the dots so that a bigger picture outside of the current paradigm is seen. It's an "Aha!" discovery. Things click. These scientists realize that the research anomalies point to the fact that the current paradigm is no longer valid. A new paradigm is necessary to explain the scientific phenomena under study.

The common law is not without its own "Eureka Moments". Such moments often occur as a result of a "hard case" or a "great case" that changes the way things were. These are the cases that "push the law" along or "nudge it" toward a new way of looking at the law. For example, the *Carter*[777] case overturned the previous law against medical assistance in dying; and the *Reference re: Same-Sex Marriage*[778] said the Parliament of Canada had the jurisdiction to redefine marriage from the heterosexual norm.

The standard common law explanation is that the law is constant and evolves slowly over time, making incremental changes building upon previous precedents. The *stare decisis* principle says that the decisions made by the higher courts stand in judgement of future litigants in similar circumstances in the lower courts. Judges are bound to follow the legal principles enunciated by a higher court. Although the Supreme Court of Canada has been willing to take a more flexible approach on the doctrine, it nevertheless remains applicable.[779]

The standard argument is that any modification of a precedent requires jurists "to show that incremental adaptation is not simply a cover for radical realignment and … that the balance between stability and change is neither ad hoc nor unpredictable."[780] It cannot be simply an ideological preference.

Professor Allan C. Hutchinson argues "that the common law is more of a political, unruly, and open-ended process than traditional scholars are prepared or able to admit."[781] In his view, and one that I maintain helps explain the revolution on the legal place of religion, a great case is only great "as long as the lawyers and judges are prepared to treat it as one or as long as the broader community is not prepared to reject lawyers' animating values."[782] Kuhn similarly observed that the scientific community, as a whole, had to agree that the new scientific paradigm was what it claimed to be. The legal community, like the scientific community, is driven to some extent by the social dynamic of peer pressure. What is the

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[777] *Carter v. Canada (Attorney General),* 2015 SCC 5, [2015] 1 S.C.R. 331 [*Carter*].
[778] *Same-Sex Marriage, supra* note 178.
[779] *Canada (Attorney General) v. Confédération des syndicats nationaux*, 2014 SCC 49, [2014] 2 S.C.R. 477, at para 24, "Of course, the doctrine of stare decisis is no longer completely inflexible. As the Court noted in Bedford, [*see: Canada (Attorney General) v. Bedford,* 2013 SCC 72, [2013] 3 S.C.R. 1101, at paras 38 and 43-46, per McLachlin C.J.)] the precedential value of a judgment may be questioned "if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate" (para 42). Where, on the other hand, the legal issue remains the same and arises in a similar context, the precedent still represents the law and must be followed by the courts (Bedford, at para 46)."
[780] Allan C. Hutchinson, *Evolution and the Common Law* (Cambridge: Cambridge University Press, 2005), 125-126.
[781] *Ibid* at 126.
[782] *Ibid* at 131.

acceptable opinion on a subject will be determined by the prevailing opinion within the profession.

Hutchinson observes that "[o]nce the values that underpin a case no longer garner sufficient support or the informing context has changed substantially, a great case will fall by the wayside and be consigned to the ditch of errors, mistakes, and anomalies."[783] Instead, maintains Hutchinson, the great cases should be seen as "temporary lighthouses":

> designed with a particular purpose in mind, constructed with available materials, and with a limited working life. As society moves, the need for such construction fades, and other, more useful devices are designed to take their place … As with celebrity, greatness in law is no less dependent on passing trends and shifting contexts. Depending on the audience, today's star is yesterday's wanna-be or tomorrow's has-been.[784]

This is particularly evident in constitutional cases, says Hutchinson, where it is the "substantive effects, not formal attributes" of the cases that are the markers of whether they will be great cases.[785] In essence, neither the "canonical tradition" nor the "social tradition" can be used "to ground constitutional interpretation" as they are so "imprecise and open that they can justify almost any reading."[786] "Great cases have to earn their authority in the political squares of legal and popular opinion," say Hutchinson. "Once that opinion begins to shift, the canonical force of such cases will be affected accordingly; talk or error or mistake is a rhetorical device to justify a particular substantive position or a change in the law."[787]

The opposition to TWU's law school proposal is evidence that the legal revolution on the status of religion is now in the crisis stage.[788] There is a significant group within the legal profession that would deny TWU's right to rely upon the current legal paradigm on religion.[789] For lack of a better term I will apply to them the label "the anti-TWU group."[790] This anti-TWU

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[783] *Ibid*.
[784] *Ibid* at 131-132.
[785] *Ibid* at 139.
[786] *Ibid* at 139-140.
[787] *Ibid* at 145.
[788] While the TWU case is Canadian, I suggest the same principles are at stake for the legal profession in every liberal democratic country.
[789]For example, the Schulich School of Law OUTlaw Society, in its factum at the Nova Scotia Court of Appeal (see *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59 [*TWU* NSCA 2016], Factum of the intervener, C.A. No. 438894), argued, at paras 29–31, that "the fact that TWU is not subject to the *Charter* is irrelevant." In other words, the current paradigm that exempts private religious universities from *Charte*r scrutiny since the *Charter* only applies to government means nothing. The law, therefore, is apparently immaterial because "*Charter* values" of "equality and respect for human dignity" trump.
[790] By using the term "anti-TWU group" I am not meaning it in a disparaging manner. It is descriptive. This group of academics and legal professionals are of the view that TWU represents the old bigotry of years gone by. They see TWU as not only anachronistic in its religious beliefs and practices but somehow dangerous to liberal democracy. This is most unfortunate as there is every indication that TWU and its graduates have been exemplary in providing university education and service. The Law Society of BC conducted its own investigation into whether TWU graduates were involved in discriminatory conduct at BC's three public law schools. They came up empty. What they did find from the University of Victoria was that the 2011 gold medalist was a former TWU student. (See Memorandum from the Law Society of British Columbia, Policy and Legal Services Department, to The Benchers (31 March 2014), Subject "Follow up to Enquiries from February 28, 2014 Benchers Meeting," Appendix 9, online: (pdf) <https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-memo1.pdf>). The fact that the Law Society felt that this investigation was even necessary shows, in my view, a stereotypical anti-

group, which acts as abolitionists in that they *de facto* argue for the elimination of religious accommodation by identity politics, advocates for a new paradigm that takes away religious accommodation, as historically understood,[791] especially when religious belief and practice are at odds with its own norm on human sexuality.[792] This anti-religion faction has been highly influenced by legal academics who have advocated this position for a number of years.[793]

As indicated by the decisions on TWU in the Supreme Courts of Nova Scotia[794] and British Columbia,[795] there yet remains, at least within the judiciary, some allegiance to religion's special legal status as historically understood. Their decisions on TWU suggest that the proposal of the new paradigm is still too radical a departure from the law. However, even the judiciary is not unified, as evidenced by the decisions of the Ontario Divisional Court,[796] the Ontario Court of Appeal,[797] and now, the Supreme Court of Canada, against TWU.

As this legal revolution against religion travels on the same trajectory that scientific revolutions have in the past, there are a number of long-term implications that need to be considered. This section will outline the legal revolution on religion and consider its implications.

6.2 Paradigm

6.2.1 Trinity Western University Education Degree Accreditation

To understand the TWU law school case you first need to be aware that this is not the first time that Trinity Western University has had to face protracted litigation over its

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religious bias against TWU. It is reasonable to imagine the public outcry if a similar investigation was conducted on graduates of BC public universities. "Anti-TWU group" seems therefore appropriate but it is indicative of all academics and legal professionals who wish to expunge from the law any semblance of traditional protections given to religion in the law that TWU has been relying on in its defense.

[791] The justices of the Ontario Division Court challenged the argument that TWU's discriminatory Covenant is entitled to the protection of exemptions in human rights legislation. Said the Court, "…discrimination is still discrimination, regardless of whether it is unlawful. The fact that, for policy reasons, a Provincial Legislature has chosen not to make certain acts of discrimination actionable under human rights legislation does not mean that those acts are any less discriminatory. The Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people. It is, therefore, by its very nature, discriminatory." See *TWU* ONSC 2015, *supra* note 776 at para 108.

[792] Paul Bramadat, "Managing and Imagining Religion in Canada from the Top and the Bottom: 15 Years After," in Benjamin L. Berger & Richard Moon, eds, *Religion and The Exercise of Public Authority* (Oxford: Hart, 2016) at 67, describes the opposition to the TWU law school on the basis that "the covenant: a) discriminates against individuals engaged in lawful sexual activities, b) is not in keeping with the ostensibly secular professional standards governing other law programmes and legal societies in Canada, and c) is contrary to the spirit and the letter of the *Charter of Rights and Freedoms* that protects same-sex relationships."

[793] See, for example, Robert Wintemute, "Religion vs. Sexual Orientation: A Clash of Human Rights?" (2002) 1 J.L. & Equal. 125; MacDougall, *supra* notes 214, 483; MacDougall & Short, *supra* note 483; Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25 Can. J. Women & L. 148 ["Rejecting Trinity"]; Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (2014) 37 Dalhousie L.J. 621 ["A Reply"].

[794] *TWU* NSSC 2015, *supra* note 775; *TWU* NSCA 2016, *supra* note 789.

[795] *Trinity Western University v. Law Society of British Columbia* 2015 BCSC 2326 [2015] B.C.J. No. 2697 [*TWU* BCSC 2015]; *TWU* BCCA 2016, *supra* note 478.

[796] *TWU* ONSC 2015, *supra* note 776; *TWU* ONCA 2016, *supra* note 701.

[797] *TWU* ONCA 2016, *supra* note 701.

admissions policies. TWU's admissions policies, though wording has changed from time to time, have consistently required students to abstain from sexual relations outside of the traditional marriage relationship. Such criteria would normally be unacceptable as it violates human rights legislation. However, TWU is exempt from the B.C. human rights legislation because it is a religious university, and as such is free to determine and maintain its religious character through a faith-based code of conduct.

In 2001, the Supreme Court of Canada ruled[798] that the British Columbia College of Teachers (BCCT) was wrong to deny accreditation to TWU's education degree. The BCCT was of the view that TWU's admissions policy was discriminatory against the LGBTQ community.[799]

In particular, the BCCT argued that TWU graduates, after being educated in the TWU Christian environment, would discriminate against LGBTQ students when they became teachers in the public school system. The SCC rejected BCCT's argument, saying that "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[800] So "the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence."[801] The Court recognized that TWU is a private institution, exempt from the British Columbia human rights legislation and to which the *Charter* does not apply.

Further, the Court noted that the *Charter* equality rights are not engaged when there is a "voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution."[802] The 2001 SCC's analysis made it clear:

> TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools. Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected. The BCCT did not weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.[803]

6.2.2 BCCT Arguments Reject Religion's Status

The BCCT denied TWU's education degree accreditation because its Council believed "the proposed program follows discriminatory practices which are contrary to the public interest and public policy which the College must consider under its mandate as expressed in the Teaching Profession Act."[804] In its May 22, 1996 letter to TWU, the BCCT specifically referenced TWU's requirement that students sign a contract of their responsibilities that

[798] *TWU* 2001, *supra* note 26.
[799] *Ibid* at para 25.
[800] *Ibid*.
[801] *Ibid*.
[802] *Ibid*.
[803] *Ibid* at para 33.
[804] *Ibid* at para 5.

included their keeping traditional sexual norms.[805] Later in a newsletter the BCCT referenced the fact that Canadian and BC human rights legislation prohibits discrimination on the basis of sexual orientation as a segue into a statement highlighting that the *Charter* and human rights acts "express the values which represent the public interest."[806] The labelling of homosexual behaviour as sinful excludes gays and lesbians.

What was said next is telling: "The Council believes and is supported by law in the belief that sexual orientation is no more separable from a person than colour."[807] It is then because of that "belief" that "Persons of homosexual orientation, like persons of colour, are entitled to protection and freedom from discrimination under the law."[808]

The use of the word "belief" is intriguing. The BCCT obviously recognized that science has yet to definitively prove[809] that sexual orientation is "no more separable from a person than colour."[810] Therefore, it was necessary for them to state it as a "belief."

In essence, BCCT demanded TWU reject its belief on the matter of human sexuality (based on Scripture) for BCCT's belief (based on its view of the "public interest"). When it comes to controversial issues, as indeed sexual orientation remains so, the best course for the courts is to allow these matters to play themselves out. This is referred to later in my reference to William Eskridge's call for courts not to "constitutionalize" these controversial matters.

Nowhere, in the 2001 case, was BCCT concerned about the state of the law in protecting TWU's religious freedom rights. Nor was there any recognition that TWU was not subject to the *Charter* or the human rights legislation. BCCT's sole concern was its "belief." It did not see any public interest in allowing TWU its belief. BCCT had no evidence of TWU graduates discriminating against public school students. But lack of evidence appeared not to be a major concern when "belief" seems to have been the motivating factor. It is ironic therefore to hear

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[805] *Ibid* at para 6.
[806] *Ibid*.
[807] *Ibid* (emphasis added).
[808] *Ibid*.
[809] There is an increasing number of studies that suggest sexual orientation is not akin to race or "skin colour" as suggested by BCCT. Here are but a few studies: Sergey Gavrilets & William R Rice, "Genetic models of homosexuality: Generating testable predictions" (2006) 273 Proceedings of the Royal Society 3031; J Michael Bailey, Michael P Dunne & Nicholas G Martin, "Genetic and Environmental Influences on Sexual Orientation and Its Correlates in an Australian Twin Sample" (2000) 78 Journal of Personality and Social Psychology 3, 524, 533-534; N E Whitehead, *"My Genes Made Me Do It": Homosexuality and the Scientific Evidence*, 4th edition (Whitehead Associates, 2016), 35-36; Lawrence S Mayer & Paul R McHugh, "Sexuality and gender: Findings from the Biological, Psychological and Social Sciences" (2016) 50 The New Atlantis 7, 39-41; Jacon Felson, "The Effect of religious Background on Sexual Orientation" (2011) 7:4 Interdisciplinary Journal of Research on Religion 9; Elizabeth M Weiss, et al, "A Qualitative Study of Ex-Gay and Ex-Ex-gay Experiences" (2010) 14:4 Journal of Gay & Lesbian Mental Health 291, 314. J Michael Bailey, et al, "Sexual Orientation, Controversy and Science" (2016) 17:2 Psychological Science in the Public Interest 45, 56.
[810] Consider the following from Mayer & McHugh's study, *supra* note 809, at 34:

> The genetic influences affecting any complex behaviours – whether sexual behaviours or interpersonal interactions – depend in part on individuals' life experiences as they mature. Genes constitute only one of the many key influences on behaviours in addition to environmental influences, personal choices and interpersonal experiences. The weight of evidence to date strongly suggests that the contribution of genetic factors [to same sex attraction] is modest. We can say with confidence that genes are not the sole, essential cause of sexual orientation; there is evidence that genes play a modest role in contributing to the development of sexual attractions and behaviours but little evidence to support a simplistic 'born this way' narrative concerning the nature of sexual orientation.

legal academics accuse TWU of being incapable of critical thought because of its religious beliefs.

The BCCT attempt to limit TWU's religious freedom was a direct challenge to the legal status given to religion and religious organizations. BCCT is a state actor that maintained a different belief on the matter of sexual orientation than TWU. Its refusal to accredit TWU's education degree was an attempt to coerce a religious institution to change its religious belief. This pattern would be repeated by the law societies when TWU sought accreditation for its law degree. Rather than accept the state of the law, BCCT thought to challenge what it considered an unjust law. That challenge ultimately failed at the SCC but it did lay the groundwork for the current struggle.

6.2.3 Religion's Status Conditionally Maintained

The Supreme Court of Canada rejected BCCT's challenge to TWU's religious requirements for its students. As a result, the SCC upheld the traditional deference the law has given to religion and religious organizations.

The factual context required an assessment of the "…place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation."[811] The Court highlighted[812] the fact that many Canadian universities have religious affiliations; the Constitution made special provisions for religious public education; and the human rights legislation specifically made exemptions for religious institutions. The B.C. legislature also passed five bills in favour of TWU between 1969 and 1985. The reasonable conclusion is that it was not against the public interest to have post-secondary schools based on Christian philosophy. These references by the SCC to religion's role in establishing universities, the constitutional provisions for religion in education and the exemptions found in human rights legislation are tacit recognition of the special place that religion had in the law. In reconciling the rights, the Court maintained that "the proper place to draw the line in cases like the one at bar is generally between belief and conduct."[813] As there was no evidence of TWU graduates discriminating against public school students, the BCCT was wrong in its decision and the Court ordered the accreditation of the TWU teacher training program. The robust dissent of Justice L'Heureux-Dubé, in an 8-1 decision, was scathing. She maintained that in this context the "public interest" only required an evaluation of equality considerations. Other *Charter* values such as freedom of religion "…are not germane to the public interest in ensuring that teachers have the requisites to foster supportive classroom environments in public schools."[814]

For Justice L'Heureux-Dubé, the BCCT should have been given due deference as they were not a human rights tribunal and did not need to consider the human rights implications for teachers – their interest was that of the non-discriminatory atmosphere for students in the public schools. By signing the code of conduct the students of TWU, as potential teachers in the public-school system, were complicit in an act of discrimination. And there were consequences for private belief.

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[811] *TWU* 2001, *supra* note 26 at para 34.
[812] *Ibid*.
[813] *Ibid* at para 36.
[814] *Ibid* at para 60.

She also took umbrage with the claim of TWU that one can separate condemnation of the "sexual sin" of homosexual behaviour from the tolerance of the person with a homosexual orientation. The rubric is "Love the sinner but hate the sin." She challenged "the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood."[815] The anti-TWU position does not consider it appropriate that religious communities have the ability to deprive their members of sexual pleasure.

Despite L'Heureux- Dubé's dissent, the SCC reiterated that equality rights cannot eclipse freedom of religion. There must be a proper balance as to the effects a decision would have on the respective interests. In the BCCT case, the "public interest" not only included the equality rights of the public-school students, it also included the religious freedom concerns of teachers, and religious institutions such as TWU.

The Court affirmed BCCT's role in considering the equality principles of the *Charter* and human rights law in evaluating its decisions, but reiterated that in doing so it must look at the whole context – the interrelationship with other rights and people affected. The Constitution is to be viewed from a broad perspective – s. 15 rights include not only sexual orientation but religion, s. 2(a) freedom of religion, s. 93 of the *Constitution Act 1867* educational rights – all exhibit a Canadian system of support for the widest possible tolerance of a broad spectrum of beliefs and practices.

Considering BCCT's failure to respect TWU's religious freedom it is not uncharitable to suggest that BCCT was willing to ride roughshod over the long-standing legal protections given to religion. Running through the BCCT argument and Justice L'Heureux-Dubé's dissent is the view that religion has no place in the "public sphere" when it comes to matters involving sexuality. In light of the SCC's 2018 decisions they were ahead of their time.[816] The law has now caught up to their revolutionary position.

6.3 Crisis: Trinity Western School of Law Accreditation

6.3.1 Law School Proposal

TWU's School of Law proposal is unique in that it is geared to ensuring that the TWU graduate has developed practical skills for law practice.[817] Most law schools are centred on the theoretical dimensions of law but TWU "will integrate into its curriculum the formation of professionalism including the nature of the profession of law, ethics and client relations" and will have upper year core competencies including "drafting documents, negotiation and advocacy."[818]

The TWU approach is to hire faculty who are serious about teaching the practical side of legal practice. The TWU student will also be placed in a mentorship "with a practitioner mentor

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[815] *Ibid* at para 69.

[816] Indeed, at the LSUC Convocation on 10 April 2014, politician and lawyer Marion Boyd quipped, "those of you who know Claire [L'Heureux-Dubé] know that she's fond of saying, 'Well, when I dissent, the law changes in 10 years,'" *supra* note 487 at 166.

[817] Trinity Western University, "Proposal for a School of Law at Trinity Western University" (June 2012), Submission for accreditation by the Federation of Law Societies of Canada, online (pdf): *Trinity Western University* <https://www.twu.ca/sites/default/files/assets/proposal-for-a-school-of-law-at-twu.pdf> ["Submission for Accreditation"].

[818] *Ibid*, at 10.

for the first year. Mentors will be asked to invite students to their law firm to help them see first-hand how a law practice works and the ethical and professional framework at work in law offices."[819] The purpose is to ensure that TWU graduates are confident and capable of practicing law immediately.

"What we are wanting to focus on is to graduate practice-ready lawyers like a medical school that produces ready to work doctors," said Professor Janet Epp-Buckingham in a CBC Radio interview.[820] "Right now the law schools across Canada have a more theoretical focus and they count on the articling year for law students to learn the actual practise skills. What we want to do here is to create a law school based on Christian values that's like a super high-quality medical school."[821]

Buckingham explained that while most law schools have some focus on the "hard legal skills" like legal research, writing, advocacy, and negotiating, they do not have as much focus on drafting documents. "We also want to look at 'soft skills' like teamwork, leadership, problem solving, relationship building, and at a Christian law school I would also add being a reconciler. We want to look at lawyers who can diffuse stress and conflict rather than promote it."[822]

TWU's proposal is also focused on several underserved areas of legal practice. First, in keeping with TWU's "rich history of outreach and volunteerism within needy communities," it emphasizes non-profits and charities law.[823] This is a significant sector which very few Canadian universities address.[824]

In fact, TWU would be the first and only law school in the country to offer a specialization in charity law. One intention is to advocate for marginalized groups such as those living on the streets of Vancouver's Downtown Eastside where TWU proposes a pro-bono legal clinic. Second, there will be a focus on small businesses and entrepreneurs so that its graduates will be competent to assist in small start-up enterprises. Third, TWU's emphasis on developing the practical skills of law will equip its graduates with the competencies to practice in small and medium size law firms. This is a needed shift from the current model of law schools catering to the larger urban firms.

Finally, the proposal has a strong emphasis on ethics – TWU's website explained:

> Leadership, integrity, and character development are central to TWU's Christian identity, worldview and philosophy of education. We encourage students to see the practice of law as a high calling, and for that reason we will challenge them to confront, debate, and ponder the great questions of meaning, values, and ethics. Our hope is that TWU School of Law graduates will believe in and demonstrate a different perception of

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[819] *Ibid*, at 17.

[820] Interview of Janet Epp-Buckingham by Anna Maria Tremonti (29 March 2013), on *The Current*, CBC Radio, Toronto: "Would a law school at a private Christian University discriminate against gays and lesbians?".

[821] *Ibid.*

[822] *Ibid*.

[823] "Submission for Accreditation," *supra* note 817 at 10.

[824] Only three Canadian law schools have a course in charity law: University of Ottawa, "Charities and non-Profit Organizations" (CML4122), online: <http://ottawa.courseguru.ca/cml4122-charities-and-non-profit-organizations-300-3-cr/>; University of Victoria, "Nonprofit Sector Law" (Law 396) online: https://web.uvic.ca/calendar2016-05/CDs/LAW/396.html; and the University of Manitoba, "Philanthropy and the Law" (Law 3120) online: <http://law.robsonhall.com/current-students1/course-descriptions/philanthropy-and-the-law/>. See also this student perspective for more courses and training in charity law: Benjamin Miller, "Making charity law a part of your legal education," *Canadian Lawyer Magazine* (21 November 2016), online: <http://www.canadianlawyermag.com/article/making-charity-law-a-part-of-your-legal-education-3449/>.

professionalism than the current marketplace promotes. TWU-educated lawyers will be expected to be not just legal technicians, but also trusted advisors who serve clients of every kind.[825]

Blair A. Major observes that "TWU's proposed law school pushes away from the centralized and tacit knowledge of the legal profession and toward the active engagement of legal professionals (and law students) with the foundational discourse of the legal professional community."[826] In short, TWU proposed to practically implement the practice of law's virtures in everyday life. It would do so by ensuring that the student body would not only learn the law but understand its ethical foundations in real life practical experience.

6.3.2 Federation of Law Societies of Canada

When TWU's law school proposal was submitted to the Federation of Law Societies of Canada (FLSC) in June 2012 it created a stir among legal academics. The Canadian Council of Law Deans was among the first to raise opposition against TWU's admissions policy. Dean Bill Flanagan, of Queen's University (in Kingston, Ontario), wrote, "We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law." He also asked that the Federation "consider this covenant and its intentionally discriminatory impact on gay, lesbian, and bisexual students when evaluating TWU's application to establish an approved common law program."[827]

Flanagan noted that this was "a matter of great concern" for the Law Deans, insisting "[d]iscrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools."[828]

Flanagan's letter is worth noting because it fails to give recognition to religious accommodation in the law. It is particularly telling that there is no mention of the Supreme Court of Canada's 2001 decision, addressing TWU's admissions policy in a similar situation. In the ordinary course, when providing a public good or service, discrimination based on sexual orientation is unlawful. However, whether an action is unlawfully discriminatory is contextually driven. As a private, religious university TWU has been granted a right to reaffirm its religious identity by the British Columbia human rights legislation.[829] This was explicitly recognized by the SCC in 2001 when it acknowledged "that a religious institution is not considered to breach the [BC Human Rights Code] where it prefers adherents of its religious

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[825] "Submission for Accreditation," *supra* note 817.

[826] Blair A. Major, "Trinity Western University Law: The Boundary and Ethos of the Legal Community," *Alberta Law Review* (2017) 55:1, 167, at 196.

[827] Letter from Bill Flanagan, President of the Canadian Council of Law Deans, to J. L. Hunter and Gérald R. Tremblay, President, Federation of Canadian Law Societies (20 November 2012), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUCouncilofCdnLawDeansNov202012.pdf> [Bill Flanagan Letter].

[828] *Ibid.*

[829] *Human Rights Code*, RSBC 1996, c 210, s. 41 (1):

> 41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, sexual orientation, gender identity or expression, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

constituency".[830] A decade later, there can be no doubting that the Law Deans were aware of TWU's legal history, including the SCC's declaration that TWU was not subject to the anti-discriminatory provision of the BC human rights legislation. In other words, the BC human rights legislation permits religiously-based discrimination for religious institutions such as TWU. Therefore, TWU is compliant with the legislation.

It is difficult to make sense of the Law Deans' concern about illegality given TWU's religious identity, past litigation, and success at the SCC in 2001 representing the current state of the law. The only reasonable conclusion is that the Law Deans were displeased with the law's accommodation of religious communities that have, in their view, an anachronistic understanding of human sexuality.

In other words, the law's current state, in the minds of the Law Deans, is unjust. It must be changed. There must be a challenge – or to use Kuhn's parlance, a revolution – against the law's paradigm.

This would explain the additional and most revealing claim in Flanagan's letter – the notion that TWU's discrimination is "fundamentally at odds with the core values of all Canadian law schools." Therein lies the rub. TWU would not be congruent with the other law schools that do not discriminate based on sexual orientation. To further emphasize their opposition, the Law Deans subsequently amended their constitution to ensure that TWU's law dean, if TWU were to be successful in its bid for a law school, would not be able to have a seat at the Canadian Council of Law Deans.[831] As far as the Law Deans are concerned they have drawn a "line in the sand" and they are not willing to back away from it – the law be damned.

Given that such an important and influential body as the Law Deans spoke so stridently against TWU, it did not take long for other members of the legal community to voice similar opposition.

6.3.2.1 The Canadian Bar Association

In a March 18, 2013 letter, the Canadian Bar Association Sexual Orientation and Gender Identity Conference (SOGIC) rejected the Federation's "perceived limitations," arguing the FLSC had a duty to look beyond the academic standards of TWU's proposal.[832] It suggested that the Supreme Court of Canada's decision in *Doré*[833] required law societies to "act consistently with the values underlying the grant of discretion, including *Charter* values."[834] The letter suggests that the College of Teachers case is no longer relevant. One argument given is that in the 2001 case the BCCT did not directly apply the *Charter* or human rights legislation but that *Doré* now requires it. *Doré* is therefore the preferred decision to follow, not the 2001 TWU decision.

The CBA misread the 2001 decision. The SCC did base its decision on both the *Charter* and the human rights legislation and expected BCCT to have done so. For it stated that BCCT

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[830] *TWU* 2001, *supra* note 26 at para 35.

[831] Section 2.3 was added to the Council of Canadian Law Deans Constitution to read, "Membership is limited to Deans of Law schools which are committed to principles of equality and non-discrimination in access to, and in the provision of, legal education." See "Consitution" (as amended 8 November 2013), online: *CCLD/CDFDC* <http://www.ccld-cdfdc.ca/index.php/about-us/constitution>.

[832] Letter from Amy Sakalauskas, Robert Peterson & Level Chan, Canadian Bar Association, to Gérald Tremblay (18 March 2013), online (pdf): *Federation of the Law Societies of Canada* http://www.docs.flsc.ca/_documents/TWUCdnBarAssnMarch182013.pdf [CBA Letter].

[833] *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 [*Doré*].

[834] *Ibid* at para 24.

was "also required to consider issues of religious freedom" in the *Charter*.[835] Therefore, even without *Doré*'s analysis, a similar approach was in fact followed in the 2001 ruling.

The CBA also argued that Justice L'Heureux-Dubé's dissent in 2001 was subsequently endorsed by the SCC. But, as noted above, it is not that simple. The SCC still maintains that "[g]enuine comments on sexual activity are not likely to fall into the purview of a prohibition against hate."[836] It is a misreading of the *Whatcott* case to suggest that TWU is prohibited from having its Community Covenant based on Justice L'Heureux-Dubé's dissent in 2001. As John B. Laskin noted in his letter of 2013:

> Just as in BCCT, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect. … lawyers in Canada are subject to ethical duties to treat others with respect and avoid discrimination. But in BCCT, the Supreme Court was acutely sensitive to the role of teachers as a "medium for the transmission of values." The Court considered it "obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers."
>
> The Court nonetheless had no difficulty concluding that graduates of TWU would "treat homosexuals fairly and respectfully."
>
> If the TWU teachers program could be relied upon to equip its graduates to be respectful of diversity, there appears to be no reason to conclude that its law program cannot do the same. It seems very unlikely that evidence could be mounted that lawyers educated at TWU would actually engage in harmful conduct.[837]

However, the CBA suggested that the 2001 case did not analyse the human rights prohibition of discrimination on the basis of sexual orientation. According to SOGIC, "in light of evolving notions of human rights and the increased legal and societal recognition afforded to LGBTT individuals and their relationships" the Covenant's compliance with human rights legislation is now "an open question."[838]

Finally, the CBA argued that removing or modifying the Covenant to allow LGBTQ students and faculty to join the campus would not threaten the beliefs or conduct of TWU's community or damage its affiliation with the Evangelical Free Church of Canada.[839] The CBA exposed a lack of understanding of the dynamics of religious communities that maintain a traditional view of sexuality. Having to abide by the CBA's understanding of sexual matters would mean TWU would not be free to pursue its religious belief and practices.[840] The CBA, like the BCCT in the 2001 case, showed its disdain for the religious views of TWU, apparently seeing

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[835] *TWU* 2001, *supra* note 26 at para 28.

[836] *Whatcott*, *supra* note 702 at para 177.

[837] Federation of Law Societies of Canada, "Special Advisory Committee On Trinity Western's Proposed School of Law Final Report" (December 2013), at 6, online (pdf): http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf ["Special Advisory Committee Report"].

[838] CBA Letter, *supra* note 832 at 4.

[839] *Ibid* at 5.

[840] As former Chief Justice Dickson noted, "If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free," in *Big M Drug Mart, supra* note 4 at para 95.

TWU's application for a law school as an opportunity to challenge the current state of the law accommodating religion.[841]

6.3.2.2 Other Legal Groups Against TWU

Similar themes surfaced in the correspondence to the Federation from other legal groups such as the Legal Leaders for Diversity (LLD), a group of some 70 general counsel from Canadian corporations, which called upon the Federation to ensure that TWU does not violate "the spirit of the legal profession and Canadian law."[842] This is reminiscent of the claims made by the CBA, as noted above.

Immediately one is confronted with the concept of the inconsistency between the law – that allows for TWU to exist and have its law school – and the "spirit" (or at least the perceived spirit as envisioned by these groups) of the *Charter* and human rights legislation that is against discrimination.

The Osgoode Outlaws, along with several other student groups from around the country, took their cues from the same song sheet,[843] and argued that since law schools "propagate the values of the Canadian legal system, including those set out in the *Charter of Rights and Freedoms*" and though the *Charter* does not apply to TWU, nevertheless "all law schools should seek to uphold it." That is a troubling position in that it would make the *Charter* applicable to private entities when it is only applicable to government actors. If successful, such an argument would make human rights legislation superfluous. The burden of the *Charter* would become the responsibility of the citizen, something that was never intended. Nor would citizens have the ability to maintain difference. For the OUTlaw students, it mattered not that the law gave TWU an exemption, based upon religious belief and practice, from the anti-discrimination laws. For them, discrimination was and is unacceptable without exception. This has become a common theme throughout the TWU struggle, as similar arguments were made in Nova Scotia, Ontario and British Columbia. In short, such a position is without precedent in our law. Yet, as will be noted below, it does appear to have found some traction in the Ontario courts.

Likewise, the University of Ottawa Outlaw group were concerned that TWU's references "to the marital union of one man and one woman exclude trans* identified people, polyamorous relationships, other forms of nonmonogamy, unmarried same-sex couples, married same-sex couples, any other form of sexual expression—effectively rendering LGBTQ

[841] After TWU lost its accreditation at the SCC, the CBA took credit that it was "ahead of the curve" in being able to present arguments that the Court ultimately adopted. My study would suggest that they were not as much "ahead of the curve" as they were part of the legal revolutionaries that refused to accept the law on religious accommodation. See: "CBA Was Ahead Of The Curve On TWU", June 26, 2018, online: <https://www.cba.org/Our-Work/cbainfluence/cbainterventions/Curve-on-TWU>.

[842] Letter from Legal Leaders for Diversity to Gérald Tremblay (16 August 2013), at 2, online (pdf): *Federation of Law Societies of Canada* http://www.docs.flsc.ca/_documents/TWULegalLeadersforDiversityAug162013.pdf.

[843] These groups had obviously collaborated in writing virtually the same letter, with minor variations, to the Federation. They include the Osgoode OUTlaws, University of Alberta OUTlaws, University of Saskatchewan College of Law Gay/Straight Alliance, and University of Victoria Law Students. See: "Submissions to the Federation regarding the Proposed Accreditation of Trinity Western University's Law Program" (last accessed 25 October 2018), online: *Federation of Law Societies of Canada* <https://flsc.ca/law-schools/submissions-to-the-federation-regarding-the-proposed-accreditation-of-trinity-western-universitys-law-program/>.

families and marginalized sexualities invisible."[844] Exactly how a private religious school would put in danger such a kaleidoscope of sexual groupings was not explained.

It is worthy of note that a group of ten UBC law students sent a letter supporting TWU, noting that "Every law school reflects a set of beliefs. As it stands, law schools have a secular emphasis in which religious views are in the minority, and are, in our experience, often openly derided." This letter suggests that the open, inclusive, and diverse public law schools in Canada may not be so open for religious students. In their view "the legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views."[845]

Professors Roderick A. MacDonald and Thomas B. McMorrow observed that "Over the years, one of us has heard dozens of conservative Christians lament their sense of exclusion at McGill [University] and the hostility they feel from their classmates and even professors."[846] They concluded that these religious students described their barriers to participate in law school life in "language very similar to the claims of silencing advanced by women, people of colour, and the LGBTQ communities."[847] For these authors the "decision to close ranks by the Canadian Council of Law Deans in opposing TWU's proposed law school [is] evidence of how swiftly and definitively the movement of the herd can be. Moreover, we consider it a sign of how the intense pressure to conform, both within and among law schools, militates against a legal educational landscape reflective of the diversity of belief and aspiration of those who people it."[848]

The evidence of these professors suggest that indeed Christian law students are now ostracized by the secular law schools. They are the ones no longer "safe" in the hostile environment of the public law schools. The anti-TWU sentiment, being proxy for anti-Christian sentiment, suggests evangelical Christians would benefit from their own institutions including their own law school.

6.3.2.3 Decision of Federation

Despite the opposition, and an investigation by the special Advisory Committee,[849] the Federation decided on December 16, 2013 to give its approval to the TWU law school.[850] "The

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[844] Letter from University of Ottawa OUTlaws to Gérald R. Tremblay, et al (18 March 2013), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUUofOttawalawstudentsOUTlawsMarch182013.pdf>.

[845] Letter from UBC JD Candidates & Graduates to Gérald R. Tremblay, et al (19 March 2013), online (pdf): *Federation of Law Societies of Canada* <http://www.docs.flsc.ca/_documents/TWUUBCJDcandidatesgraduatesMarch192013.pdf>. The letter also astutely notes that "Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judges and lawyers, regardless of their personal beliefs, are expected to apply the law" (at 2).

[846] Roderick A. MacDonald & Thomas B. McMorrow, "Decolonizing Law School" (2013-14) 51 Alta. L. Rev. 717, 733 at note 54.

[847] *Ibid.*

[848] *Ibid* at 733-734.

[849] "Special Advisory Committee Report", *supra* note 837.

[850] *Ibid* at 19: "It is the conclusion of the Special Advisory Committee that if the Approval Committee concludes that the TWU proposal would meet the national requirement if implemented as proposed there will be no public interest reason to exclude future graduates of the program from law society bar admission programs."

Federation followed a fair, rigorous and thoughtful process", said Federation President Marie-Claude Bélanger-Richard, Q.C. She added, "We took into account and listened very carefully to all points of view that were expressed about this proposal."[851] In the end, the Federation accepted the current state of the law. "Public interest" did not extend to evaluating the admissions criteria of a law school. What mattered was the competence of the law graduates to take the bar licensing exams at the respective law societies.

6.3.3 Law Society of British Columbia

Once the FLSC gave preliminary approval to TWU's proposed law school, that meant the school became an approved faculty of law for the purposes of enrolment in the Law Society of British Columbia's (LSBC) admissions program. This operated as a matter of course since the LSBC had delegated its authority on approving new law schools to the FLS. On December 17, 2013, the BC Minister of Advanced Education approved TWU's proposed law program and authorized TWU to grant JD degrees.

However, academics, such as Professor Elaine Craig, called for the individual law societies to "show more courage" and take back authority from the FLS to conduct their own investigation into the TWU's proposal.[852]

Accordingly, the LSBC decided to conduct its own investigation and encouraged the public to send in written submission as to whether it should approve TWU's proposal. To my knowledge, nothing like this has ever been done for any other law school proposal. The invitation for a public response was emulated by other law societies. The society received approximately 138 submissions were in favour of TWU with some 150 opposed. Those submissions represented many more people as some had scores of signatures.

6.3.3.1 Review of Federation's Decision

On April 11, 2014 the LSBC Benchers voted down (20-6) the motion[853] that would have removed TWU's faculty of law approval. In addition to the public input, the LSBC commissioned a number of reports and legal opinions to assist the Benchers.

The Approval Committee followed with its own approval, stating: "TWU's proposed school of law will meet the national requirement if implemented as proposed. The proposed program is given preliminary approval." See Canadian Common Law Program Approval Committee, "Report on Trinity Western University's Proposed School of Law Program" (December 2013), online (pdf): *Federation of Law Societies of Canada* <http://docs.flsc.ca/ApprovalCommitteeFINAL.pdf>.

[851] Federation of Law Societies of Canada, News Release, "Federation of Law Societies of Canada Grants Preliminary Approval of Trinity Western University's Proposed Law Program" (16 December 2013), online (pdf): <http://docs.flsc.ca/FederationNewsReleaseFIN.pdf>.

[852] Elaine Craig, "Law societies must show more courage on Trinity Western application," *The Globe and Mail* (18 December, 2013), online: <http://www.theglobeandmail.com/opinion/law-societies-must-show-more-courage-on-trinity-western-application/article16023053/> ["More Courage"].

[853] The motion read: "Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed Faculty of Law at Trinity Western is not an approved faculty of law." See Law Society of British Columbia Bencher Meeting, Transcript (11 April 2014), at 7, online (pdf): <https://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf> [LSBC Bencher Transcript].

The transcript of the debate reveals a very thoughtful and considered approach to the question at hand. Overwhelmingly, the Benchers were convinced that they had a duty to protect the public interest and that included upholding the law despite their personal views on TWU's discriminatory admissions policy. They were persuaded by the various legal opinions about the applicability of *TWU* 2001 to the current case. This sense of duty to the law is remarkable, in hindsight, given what unfolded in the following months. The Benchers would go from the April 11 meeting confirming that the rule of law required TWU's approval, to, a few months later, reversing that decision on October 31. This was remarkable. Despite their commitment to the law they ultimately succumbed to the popular opinion of their membership. Politics within the legal community ultimately won at the Law Society level. It would take the BC courts to re-establish the primacy of law, which was short-lived until the SCC ruled in favour of the Law Society.

During the debate on the motion, Joseph Arvay, Q.C., a very well-respected and competent human rights lawyer, objected to what he described as "the metaphorical sign at the gate of the law school which says, 'No LGBT students, faculty or staff are welcome.'"[854] Since the Law Society is required to respect the rights and freedoms of everyone in BC it must refuse TWU. He noted that the Federation's report recognized that TWU would be "an unwelcome place for LGBT students and faculty even if it was not a complete ban."[855] Thus, "a sign that says 'LGBT are not welcome' is as bad as a sign that says 'you cannot apply.'"[856]

Mr. Arvay had no problem with a religious law school, even one with a core belief "that same-sex marriage and sexual intimacy that this entails being a sin."[857] Rather he opposed "that belief being imposed on those who do not share that belief."[858]

"We are the law," Arvay declared later in the meeting, after listening to a number of his fellow benchers say they had to keep with the law even though they decried TWU's admissions policy. "I am nonetheless very troubled by the very many comments to the effect that the community covenant is repugnant, it's hurtful, it's discriminatory, it's hypocritical, it's heartless, but we're bound by the law," said Arvay.[859] He continued with resolve, "I don't recognize that law, that kind of law in this country. I don't recognize a law that is so divorced from justice that we are bound by it. We are the law; we are the law-making body charged with making a decision at hand."[860]

Arvay's comments reiterates my point in this work – advocates for equality are so adamant in their position that they are willing to knock down any legal impediment that would deny the dominance of their definition of sexual equality. It matters not that the law provides a space for private religious institutions, like TWU, to believe and practice traditional marriage on campus.

Even those who felt bound by the law to support TWU were strident in their criticism of TWU. That contemptuous attitude toward TWU ultimately led to the events that were to follow in BC – the referendum and the rejection of TWU's accreditation by the same Benchers. They had so compromised their support of the law through their vilification of TWU that they

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[854] *Ibid* at 8.
[855] *Ibid*.
[856] *Ibid*.
[857] *Ibid* at 10.
[858] *Ibid* at 11.
[859] *Ibid* at 46.
[860] *Ibid*.

poisoned the chalice going forward. Just a few examples of this attitude should suffice in explaining why Mr. Arvay could say what he said.

David Mossop, Q.C. described a sinister reality regarding the state of the BC Bar and its relationship to TWU. While TWU has "a great curriculum" that is not enough. "[T]o be a successful law school in British Columbia or in Canada, you have to have broad support within the legal community. You do not have that broad support. There are significant members of this profession who are against your approval. There is nothing the Law Society can do about that."[861] In other words, BC lawyers will not hire qualified TWU graduates simply because of opposition to the Community Covenant. The CCA will be "a millstone around your neck."[862] Using such language to ostracize a religious minority law school for doing something that it has a legal right to do appears harsh.

Elizabeth Rowbotham hardly supported the current state of the law when she found "…it very disturbing that people can be discriminated against on the basis of sexual orientation simply because an institution is a private institution. However, that is our law in Canada and I think that if it's to be challenged, this is not the forum to do so."[863]

Cameron Ward insisted:

> In my view, making people feel unwelcome anywhere because of their personal characteristics is a particularly repugnant form of discrimination. As a Bencher, as a lawyer, and as a Canadian citizen, I feel I have the duty to oppose such discrimination, not to promote or to condone it. In my opinion, TWU's community covenant is an anachronism, a throwback that wouldn't be out of place in the 1960s. The Law Society recently invited the university to amend it, to remove its discriminatory language. TWU refused. The Trinity Western University is stubborn enough to stick to its principles, I'm stubborn enough to stick to mine. I will proudly be voting in favour of the resolution."[864]

David Crossin, Q.C., felt that, although "[TWU] chose a path that is effectively discriminatory, certainly hurtful, and to many highly hypocritical" he nevertheless was bound by the law.[865]

Pinder Cheema, Q.C., likewise asserted:

> In my opinion, TWU's perspective is antithetical to Canadian values of tolerance and respect that are enshrined in our *Charter*. I find this covenant abhorrent and objectionable and it saddens me greatly that TWU has persisted in this outdated, outmoded view. However, as has been echoed by a number of my fellow Benchers, it is our obligation above all else to uphold the rule of law.[866]

Jamie Maclaren declared, "It is TWU's institutional and apparently non-negotiable act, in other words conduct of discrimination, that is an affront to the human dignity of LGBTQ people

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[861] *Ibid* at 21.

[862] *Ibid*. He predicted, "That's an individual thing for individual lawyers. That will be, if I could use the biblical example, a millstone around your neck. And over time, the pressure will come from the faculty and from the student bodies at the law school to change the covenant. Maybe eight to 15 years from now, you will change the covenant and at that time, those people in charge will say, why did we ever do this in the first place?"

[863] *Ibid* at 30. Note that Rowbotham ignores the deeper importance of maintaining private institutions: the fact that privacy is an indication of freedom. By contrast, in totalitarian regimes, there is no "private" – everyone must conform to the same rules.

[864] *Ibid* at 31-32.

[865] *Ibid* at 37.

[866] *Ibid* at 42.

and it diminishes their public standing, that demands our disapproval in the name of equity and fairness."[867]

Dean Lawton noted, "I suspect why this caused so much concern among those opposed to accreditation is not the pledge of celibacy, but the statement of marriage being sacred exclusively between a man and a woman. Were it not for the statement about marriage, I expect we would not be considering this matter today."[868] Dean Lawton's view is indeed my point.

Given such statements it is not surprising that Mr. Arvay said what he did. Indeed, his position is a common one among the anti-TWU elites. They have no problem with a religious law school and its beliefs if the school does not "impose" those beliefs on others who do not share the same convictions. Context is everything here – we are talking about a religious law school, not a secular law school. That is key. A religious law school, such as TWU, is not imposing on anyone but is saying, "If you believe as we do on these issues you are welcome to join us. If not, then there are other options for you."[869] *TWU* 2001 certainly understood this basic idea. Yet, Mr. Arvay and the many other anti-TWU advocates refused to accept that position as an answer. They argued it was not fair that those LGBT students who were offended by TWU's policies would be ineligible for those law student positions. Such students, they maintained, would be in an unequal position and the Law Society should not give its imprimatur to such a school.

There are many reasons why this position is untenable. First, a religious school does not cease to be a religious school because it teaches law or has its degrees recognized by the state. Second, state accreditation of TWU degrees is not state endorsement of TWU's religious beliefs or practices. It is simply an acknowledgement that academic requirements have been met. The same principle applies when a church-run nursing home is licensed to operate; the state is not endorsing the religious motivations or the religious practices of that nursing home, merely its capacity to provide adequate care. Third, it is curious why in this discussion there is no mention of the fact that TWU offers many other academic programs, including history, business, education, theology and nursing. If it is wrong for the Law Society to approve TWU then it is also wrong for the province of British Columbia to approve other degrees for the same reasons. Such logic taken to its ultimate conclusion would mean that it is unacceptable to even have a religious school such as TWU.[870] That outcome does nothing for diversity in a liberal

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[867] *Ibid* at 43.

[868] *Ibid* at 24.

[869] Despite ultimately agreeing with the law societies in *TWU 2018*, *supra* note 14, Chief Justice McLachlin pointed out at para 133 that "Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion."

[870] Further, it would lead to excluding individuals from the profession on the basis of one's faith or church affiliation. The SCC expressed that view in *TWU* 2001, *supra* note 26 at para 33: "Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church. The diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected." Justice Jamie S. Campbell, of the Nova Scotia Supreme Court, was aware of this at para 17 of his decision, *TWU* NSSC 2015, *supra* note 775. He also noted at para 15: "There is a difference between recognizing the degree and expressing approval of the moral, religious, or other positions of the institution. The refusal to accept the legitimacy of institutions because of a concern about the perception of the state endorsing their religiously informed moral positions would have a chilling effect on the liberty of conscience and freedom of religion. Only those institutions whose practices were not offensive to the state-approved moral consensus would be entitled to those considerations".

democracy. It seems that the field of law is being singled out as somehow special from the other areas of study. That reeks of legal arrogance.

6.3.3.2 Ultimate Rejection of Federation's Approval

After the April 11, 2014 vote, some LSBC members requisitioned a Special General Meeting which was held on June 10, 2014 to vote on a non-binding resolution calling on the Benchers to declare that TWU was not an approved faculty of law. The resolution passed 3,210 to 968.

On September 26, 2014, the Benchers voted to hold a referendum on the issue and agreed that the results would be binding on the LSBC. The October 30, 2014 results were 5,591 votes against TWU and 2,088 for. The next day, the Benchers reversed their April 11, 2014 approval of TWU and refused to approve TWU's JD degree. TWU went to the BC Supreme Court for judicial review.

6.3.3.3 Judicial Review

6.3.3.3.1 BC Supreme Court[871]

Chief Justice Hinkson allowed TWU's judicial review of the LSBC decision. The court held that the Benchers improperly fettered their discretion under the Legal Profession Act (LPA) and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program. Further, the decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore could not stand.

Unlike the Ontario Divisional Court, Hinkson was not persuaded that the circumstances or the jurisprudence respecting human rights had so fundamentally shifted the parameters of the debate as to render *TWU* 2001 other than dispositive of many of the issues in this case. He was bound by *TWU* 2001 to apply the correctness standard to the question of the LSBC's jurisdiction to disapprove of TWU's proposed faculty of law.

The LSBC has the jurisdiction to use its discretion to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedures and employs the correct analytical framework in doing so.

The evidence was clear to Justice Hinkson that the Benchers permitted a non-binding vote of the LSBC membership to supplant their judgment. In so doing, the Benchers disabled their discretion under the LPA by binding themselves to a fixed blanket policy set by LSBC members. The Benchers thereby wrongfully fettered their discretion.

TWU was entitled to but was deprived of a meaningful opportunity to present its case fully and fairly to those who had the jurisdiction to determine whether the JD degrees of the proposed law school's graduates would be recognized by the LSBC.

The LSBC decision infringed TWU's right of religious freedom. The LSBC had the constitutional obligation to consider and balance the religious freedom rights of TWU and the equality rights of the LGBT community.[872] The Benchers weighed the competing *Charter* rights

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[871] *TWU* BCSC 2015, *supra* note 795.

[872] It is unfortunate in the TWU law school case the courts, in all three jurisdictions, did not recognize the fact that religion is an equality right as much as sexual orientation. Religious freedom vis a vis equality right is not the complete picture as there is also the issue of equality rights being plural – religion and sexual orientation.

of freedom of religion and equality before voting on the April Motion, but the record does not permit such a conclusion to be reached with respect to the Benchers' vote of October 31, 2014. In light of the inappropriate fettering of its discretion by the LSBC and its failure to attempt to resolve the collision of the competing *Charter* interests in the October Referendum or the subsequent decision, the appropriate remedy was to quash the decision and restore the results of the April 11, 2014 vote.

6.3.3.3.2 BC Court of Appeal[873]

In dismissing the Law Society's appeal, the Court ruled that the Law Society had authority, under the Legal Profession Act (LPA or Act), to consider factors beyond academic education in approving a law school. The Benchers were wrong in passing a resolution that regardless of the referendum results those results would be consistent with their statutory duties.

When *Charter* values are implicated and *Charter* rights might be infringed as a result of an administrative decision, the decision maker is required to balance, or weigh, the potential *Charter* infringement against the objectives of the administrative regime. The October 31, 2014, declaration of the Benchers did not engage in any exploration of how the *Charter* values at issue could best be protected in view of the objectives of the Act. The Benchers conflated the role of the courts with their own role.

The Court held that the Law Society did not balance the *Charter* rights in accordance with the *Doré*[874] decision. The September 26, 2014 resolution to accept the referendum results was not only an improper fettering of their discretion by binding themselves to the decision of the majority but it abdicated their duty as an administrative decision-maker to properly balance the objectives of the Act and the *Charter*. While the *TWU* 2001 decision is not dispositive, its essential legal analysis has not changed appreciably with respect to the obligation to balance statutory objectives with the *Charter* rights affected by an administrative decision.

The starting premise cannot be that equality rights advocated by the BC Law Society trump TWU's religious freedom. The *Charter* rights must be balanced against the statutory objectives of the Law Society. The balancing exercise goes beyond considering the competing rights and choosing to give greater effect to one or the other, with either course of action being equally reasonable. The nature and degree of detrimental impact on the rights must be considered.

In reviewing the respective impacts, the Court held that the impact on the religious freedom of TWU is "severe."[875] TWU graduates would not be able to practice law, nor would TWU be able to operate a faculty of law contrary to what the Ontario Court of Appeal assumed. The main function of a faculty of law is to train lawyers. On the other side of the ledger, the impact on sexual orientation equality rights, should TWU be accredited, would be insignificant in real terms.

In the Court's view, while in principle LGBTQ students would be discriminated against, there is no evidence that their access to law school and the legal profession would be impeded.[876] The Special Committee of the Federation of Law Societies of Canada found that

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[873] *TWU* BCCA 2016, *supra* note 478.
[874] *Doré, supra* note 833.
[875] *TWU* BCCA 2016, *supra* note 478 at para 168
[876] *Ibid* at para 175.

TWU's law school would not result in any fewer choices for LGBT students. Rather, an overall increase in law school places in Canada seems certain to expand the choices for all students. It is incontrovertible that refusing to recognize the TWU faculty will not enhance accessibility. So, it is the Covenant's refusal to recognize same-sex marriage that is at issue here. The Law Society was prepared to approve the law school if the Covenant was amended to remove the offensive portions. Even without that, few LGBTQ students would wish to apply.

The Court rejected the argument that to approve the law school would be an endorsement of the Covenant. Such a view "is misconceived". TWU is not seeking a public benefit as in the Bob Jones University Case.[877] Accreditation is not a benefit but a regulatory requirement to conduct a lawful business. Even if the Covenant were amended and the school was approved TWU's beliefs on marriage would remain. This underscores the weakness of the Law Society's premise that it would be endorsing TWU's religious beliefs by accrediting the school. In a diverse and pluralistic society, this argument must be treated with considerable caution. Licensing of religious care facilities and hospitals would also fall into question.[878]

Ultimately, the Court was of the view that "state neutrality and pluralism lie at the heart of this case."[879] Said the Court:

> State neutrality is essential in a secular, pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled. While the state must adopt laws on some matters of social policy with which religious and other communities and individuals may disagree (such as enacting legislation recognizing same-sex marriage), it does so in the context of making room for diverse communities to hold and act on their beliefs. This approach is evident in the *Civil Marriage Act* itself, which expressly recognizes that "it is not against the public interest to hold and publicly express diverse views on marriage".[880]

The Court recognized that while the Covenant is deeply offensive and hurtful to the LGBTQ community as noted by the Ontario Court of Appeal, which is not to be minimized, there is no *Charter* or other legal right to be free from views that offend or contradict an individual's strongly held beliefs absent hate speech.[881] The Court was aware that hurtful commentary was also levelled at TWU:

> Indeed, it was evident in the case before us that the language of "offense and hurt" is not helpful in balancing competing rights. The beliefs expressed by some Benchers and members of the Law Society that the evangelical Christian community's view of marriage is "abhorrent", "archaic" and "hypocritical" would no doubt be deeply offensive and hurtful to members of that community.[882]

The TWU community has a right to hold and act on its beliefs absent evidence of actual harm. The Law Society's decision to not approve TWU's faculty of law denies these evangelical Christians the ability to exercise the fundamental religious and associative rights of s. 2 of the *Charter*. Given the severe impact of non-approval and the minimal impacts on LGBTQ persons along with the fact that *Charter* rights are to be limited no more than is necessary, the Law Society's decision was unreasonable. In conclusion the court noted:

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[877] *Bob Jones University v. United States*, 461 U.S. 574 [*Bob Jones University*]. See discussion in Chapter 6.
[878] *TWU* BCCA 2016, *supra* note 478 at para 184.
[879] *Ibid* at para 132.
[880] *Ibid* at para 185.
[881] *Ibid* at para 188, also quoted earlier.
[882] *Ibid* at para 189.

> A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal.[883]

Not surprisingly the Law Society of British Columbia appealed the decision to the Supreme Court of Canada.[884] However, this decision, along with the decision of Justice Jamie S. Campbell of the Nova Scotia Supreme Court, gave the TWU position the best results in a long saga of legal wrangling. It was the last appellate decision to be made. Eighteen provincial judges (6 each in BC, ON, and NS) heard the TWU case. Twelve of those judges ruled in TWU's favour. The six who went against TWU were all in Ontario.

The Ontario Courts[885] adopted the interpretation of the *Charter* that was publicized by the law deans in their letter to the Federation and by Professor Elaine Craig. As noted above, Dean Bill Flanagan's letter avowed, "Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools."[886] There was no acknowledgement of the necessary religious exemptions from generally applicable law. This academic thinking has resulted in what William Galston calls "civic totalism."[887] The law deans and other academics were willing to broker no other view of discrimination but their own. Five members of the BC judiciary rejected the elite view of constitutional law. That is sobering. Up until the BCCA's decision, the deans and their faculty controlled the narrative on TWU. The BCCA ruling can be interpreted to mean that the law deans' decision has been reviewed and found wanting.

Iain T. Benson was prescient in an article published in BC's *The Advocate* when he chided the law deans, stating, "it is wrong in principle to seek to impose one's views on others under the guise of 'liberalism' or 'equality,' both of which should admit of different approaches, depending upon the context." Otherwise, "without context-sensitive exceptions to general rules of equality or discrimination, religious differences and associational liberty would not long exist." The BCCA's view parallels Benson's approach.[888]

6.3.4 The Law Society of Upper Canada (Ontario)

The Law Society of Upper Canada (LSUC) went through a two-step decision making process. On April 10, 2014, the Benchers discussed TWU's application and raised questions for TWU. TWU was then given an opportunity to respond in time for a second meeting on April 22, 2014 when a decision was made based on all the information. The Benchers voted 28-21 rejecting TWU's proposed law school. TWU sought judicial review at the Ontario Divisional

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[883] *Ibid* at para 193.
[884] LSBC News Release, "Law Society to seek leave to appeal TWU decision to the Supreme Court of Canada," (8 November 2016), online: <https://www.lawsociety.bc.ca/page.cfm?cid=4289&t=Law-Society-to-seek-leave-to-appeal-TWU-decision-to-the-Supreme-Court-of-Canada>.
[885] *TWU* ONSC 2015, *supra* note 776; and *TWU* ONCA 2016, *supra* note 701.
[886] Bill Flanagan Letter, *supra* note 827.
[887] Galston, *supra* note 621 at 46-47.
[888] Iain T. Benson, "Law Deans, Legal Coercion and the Freedoms of Association and Religion in Canada" (2013) 71 The Advocate, Part 5, 671-675.

Court which was dismissed. An appeal of that decision was also dismissed at the Ontario Court of Appeal. TWU then appealed that decision to the Supreme Court of Canada.

The Ontario decisions exhibit the extent to which the legal revolution against the special status of religion has gone. They reject the current paradigm accommodating religion. Both courts have made it clear that supporting the traditional, heterosexual norm of marriage is no longer an acceptable opinion (or practice) for religious organizations to maintain. Their refusal to provide religious accommodation deserves a close examination.

6.3.4.1 Ontario Divisional Court[889]

The Ontario Divisional Court dismissed TWU's judicial review application to overturn the LSUC's decision. The Divisional Court held that though the religious freedom of TWU was infringed, the LSUC's decision was justified because it was reasonable to take into consideration the discriminatory nature of TWU's admissions policy when deciding to accredit the proposed school. However, the Court did say that the LSUC "will be duty bound to properly consider" the individual accreditation requests of TWU graduates to ensure their religious rights are minimally impaired.[890]

The Divisional Court appears to have adopted the view that state actors can be preferential for or against religious beliefs and, based on that view, can refuse to accredit religious institutions. This is revealed in its determination that TWU cannot compel the Law Society to accredit its law school "and thus lend [the Law Society's] tacit approval to the institutional discrimination…."[891] Otherwise, "TWU could compel the [LSUC], directly or indirectly, to adopt the world view that TWU espouses."[892]

That telling statement is out of place with the recent comments of the Supreme Court of Canada. Like the BCCA the SCC said the state cannot take sides on religious matters – it must be neutral.[893] It cannot deny a service to a citizen because it disagrees with that citizen's worldview. Herein lies the heart of this case. It is a matter of competing "worldviews". The Divisional Court appears to be saying that if the Law Society does not like TWU's worldview on marriage (which is legally valid), then it can deny accreditation. This view runs contrary to the SCC's *Saguenay*[894] decision requiring the state to be neutral on religious beliefs. "By expressing no preference," said the SCC:

> the state ensures that it preserves a neutral public space that is free of discrimination and in which true freedom to believe or not to believe is enjoyed by everyone equally, given that everyone is valued equally. I note that a neutral public space does not mean the homogenization of private players in that space. Neutrality is required of institutions and the state, not individuals (see *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, at paras. 31 and 50-51). On the contrary, a neutral public space free from coercion, pressure and judgment on the part of public authorities in matters of spirituality is intended to protect every person's freedom and dignity. The neutrality of the public

[889] *TWU* ONSC 2015, *supra* note 776.
[890] *Ibid* at para 128.
[891] *Ibid* at para 115.
[892] *Ibid*.
[893] *Saguenay, supra* note 358 at para 75. The SCC said there is a "democratic imperative" which is "the pursuit of an ideal: a free and democratic society." The state is required to "encourage everyone to participate freely in public life regardless of their beliefs."
[894] *Saguenay, supra* note 358.

space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in s. 27 the Canadian *Charter*. Section 27 requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the Canadian *Charter*, but also with a view to promoting and enhancing diversity.[895]

6.3.4.1.1 Discrimination

The Divisional Court took issue with the term "discrimination". It noted that the belief system of TWU does discriminate and rejected TWU's argument that it was not discriminating. TWU argued that because its admission's policy is not unlawful it cannot be considered legally discriminating. Unfortunately, TWU's position has only confused the matter. Of course, TWU is discriminatory and it is entitled to be. However, the Divisional Court appears to be taking the concept further and is openly challenging the Supreme Court of Canada's 2001 decision that recognized that TWU is not for everyone.[896]

The Divisional Court took umbrage at TWU's position "To assert that that result [to attend TWU means to disavow one's beliefs and, for LGBTQ, their identity] is not, at its core, discriminatory is to turn a blind eye to the true impact and effect of the Community Covenant."[897] Indignation was not only directed at TWU but at the very reasoning of *TWU* 2001 that recognized TWU's right to discriminate on its campus.

Further, the Divisional Court was not impressed by TWU's position that it treats everyone with fairness, courtesy and open-mindedness. Such "does not change the fact that notwithstanding TWU's stated benevolent approach … in order for persons, who do not hold the beliefs that TWU espouses, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practise them. The only other option … is to engage in an active deception … with dire consequences if their deception is discovered."[898]

The Divisional Court's discomfort with the TWU Community Covenant is a discomfort with religious institutional rights.[899] Religious institutions by their very nature establish rules

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[895] *Ibid* at para 74.

[896] *TWU* 2001, *supra* note 26 at para 25:

> "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."

[897] *TWU* ONSC 2015, *supra* note 776 at para 106.

[898] *Ibid* at para 112.

[899] The BC and NS courts appeared not to be worried about the concept of TWU having religious freedom in its corporate capacity. The NSSC noted, "The NSBS resolution and regulation infringe *on the freedom of religion of TWU* and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were reasonably balanced within a margin of appreciation" (emphasis added, see *TWU* NSSC 2015, *supra* note 775, at para 270). The BCCA stated, "As Justice Abella made clear in *Loyola*, the *Charter* right to freedom of religion recognizes and protects the 'embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions', including private educational institutions" (*TWU* BCCA 2016, supra note 478 at para 167). The SCC referred to the "communal"

of admission based upon religious beliefs and practises. The Court noted that "sexual conduct is an integral part of a person's very identity," but so too are the religious beliefs and actions of a person and the religious institution to which she belongs. The Divisional Court's uneasiness with the internal administration of TWU is a challenge to the very idea of religious community and its institutions. The fact that the Court may find certain beliefs abhorrent gives it no right to deny TWU every benefit of the law including the exemption from the *Charter* and from human rights legislation. This the Court did not do.

6.3.4.1.2 Why Should a Religion Run A University

The Divisional Court expressed reservations about whether evangelical Christians should have a right to claim protection of religious freedom for religious beliefs and practises that are not mandatory, such as running a university. Said the Court:

> There is no evidence before us that the ability of an evangelical Christian to gain a legal education requires that they study at a law school that only permits the presence of evangelical Christian beliefs and only permits the attendance of those persons who commit to those beliefs. Indeed, the contrary would appear to be obvious from the fact that evangelical Christians have been attending secular law schools, and successfully becoming lawyers, for decades, if not longer.[900]

That rationale runs contrary to the current paradigm of religious accommodation. First, the Divisional Court appears to have misunderstood TWU's position. It is not that evangelical Christians are required by their religious beliefs to study law at a Christian law school. Rather, it is that they choose to do so, and they have that right. Second, the Divisional Court appears to be directly at odds with the *Amselem* decision[901] of the Supreme Court of Canada where the Court stated:

> Consequently, both obligatory as well as voluntary expressions of faith should be protected under the Quebec (and the Canadian) *Charter*. It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties.[902]

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aspect of religious freedom (see *LSBC v. TWU* 2018, *supra* note 14 at para 64). See also, Kathryn Chan, "Identifying the Institutional Religious Freedom Claimant" (2017) 95 The Canadian Bar Review, 1.

[900] *Ibid* at para 78. There is a lack of historical understanding of Christian involvement in university education both in the running of law schools and in the study of law (see Pierre Riché, *Education and Culture in The Barbarian West Sixth Through Eighth Centuries* (Columbia, South Carolina: University of South Carolina Press, 1976). TWU's School of Law is in line with the traditional Christian pursuit of legal academic scholarship. Law and religion scholar, Harold J. Berman, observed that Western legal systems, "are a secular residue of religious attitudes and assumptions which historically found expression first in the liturgy and rituals and doctrine of the church and thereafter in the institutions and concepts and values of the law. When these historical roots are not understood, many parts of the law appear to lack any underlying source of validity." See Berman, *supra* note 46 at 166. To say that evangelical Christians do not need a Christian law school to gain a legal education is beside the point. TWU has every right to operate a Christian law school in accordance with its religious beliefs and when it does so it is following the very long tradition of Christian communities running their own law school. This is further evidenced by the multitude of Christian law schools around the world.

[901] *Amselem*, *supra* note 7 at para 47.

[902] *Ibid*.

"Plagued with difficulties" is an apt description of the Divisional Court reasoning. To limit religious freedom by suggesting, in essence, that since law schools are not required by the evangelical Christian community, they are therefore not something to be protected under the *Charter*, is to totally ignore the *Charter* right of religious freedom. However, as will be seen, SCC Justice Rowe accepted this view. In the end, the Divisional Court did not allow this rationale to deny protection under s. 2(a) of the *Charter* but it nevertheless reveals an underlying pre-supposition that regards the current paradigm of religious freedom with scepticism.

The Divisional Court's unorthodox approach, vis a vis the current paradigm, is incongruent with the decisions of Justice Jamie S. Campbell[903] (whom the Ontario Division Court snubbed as "a judge in Nova Scotia") and the BC Court of Appeal. But this perspective ultimately found favour at the SCC. The Ontario decision has called into question the right of a religious institution to determine its own internal operations in accordance with its religious beliefs and practices.

The Divisional Court held that the *TWU* 2001 decision is not binding because it involved different facts, a different statutory regime, and a fundamentally different question.[904] It is debatable that the differences between the 2001 case and the current case were so significant. However, what is not different, which the BC Court of Appeal and the Federation recognized:

> Just as in BCCT, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect.[905]

That is what the Divisional Court did not do. There was no proper analysis of the actual harm that the LGBT community would suffer if the Law Society of Upper Canada accredited TWU. The Divisional Court's assertion that LGBT students' "likelihood of gaining acceptance to any law school is decreased" if TWU were accredited because of its discriminatory policies[906] simply does not constitute as serious a consequence when compared to the failure of TWU gaining accreditation. TWU's school would not exist.[907] That is very harsh compared to the fact that prospective LGBT applicants would have no different outcome should TWU be accredited.

Further, the Divisional Court stated that even without the LSUC accreditation, TWU graduates could still become members of the bars in those provinces where TWU's law school has been accredited.[908] That is a remarkable position because the TWU graduates would still have access to apply to LSUC through the National Mobility Agreement.[909] The Court appears to be suggesting that TWU can still have its school, albeit in a limited capacity since its graduates would not be able to practice law right away in Ontario, and that the main effect of the LSUC's

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[903] *TWU* NSSC 2015, *supra* note 775.
[904] *TWU* ONSC 2015, *supra* note 776 at para 60.
[905] John B. Laskin, "Memorandum Re: Trinity Western University School of Law Proposal – Applicability of Supreme Court Decision in *Trinity Western University v. British Columbia College of Teachers*," to Gérald R. Tremblay & Jonathan G. Herman, Federation of Law Societies of Canada (21 March 2013), at 6, being Appendix C of the Special Advisory Committee Final Report, online (pdf): <http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf> [Laskin Memo].
[906] *TWU* ONSC 2015, *supra* note 776 at para 67.
[907] The Minister of Advanced Education revoked TWU's approval after the Law Society in BC refused accreditation. "Statement on Trinity Western University's School of Law" (11 December 2014), online: *BC Gov News* <https://news.gov.bc.ca/07542>.
[908] *TWU* ONSC 2015, *supra* note 776 at para 68.
[909] "National Mobility Agreement" (August 2002), online (pdf): *Federation of Law Societies* <http://flsc.ca/wp-content/uploads/2014/10/mobility1.pdf>

decision is to make a statement or send a message that it did not agree with TWU's position on marriage. Otherwise, as the Court stated, "Condoning discrimination can be ever much as harmful as the act of discrimination itself."[910] They would rather be seen as supporting LGBTQ individuals (though it will have no effect on increasing their law school seats) rather than a religious belief and practice perceived as discriminatory.

This is also evident in the Court's reasoning that "TWU can hold and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education. It is at that point that the right to freedom of religion must yield."[911] This description of the limits of religious freedom is a non-sequitur. It does not logically follow from all of our previous understandings of religious freedom. First, it only makes sense if TWU is subject to the *Charter* as a government actor. That is because remaining neutral and ensuring equal opportunities for education are the responsibilities of the government, not a private school like TWU. TWU, being private, has the right to require its students to agree to abide by a Community Covenant as the basis of attending the school. Religious freedom does not yield in such a case. Second, the Divisional Court is taking a position against TWU's beliefs on religion. That has never been the position of the law. A court may find a religious belief distasteful but if the belief does not result in criminal activity a court has no jurisdiction to deny a community a right to practice its faith. Again, religious freedom does not yield in such a case.

The Divisional Court's decision is the first decision since the Marc Hall case[912] that outlines in distinct terms the legal revolution against the special status that the law has historically given to religion. In both cases the issue that has brought about this change has been the issue of sexuality. The traditional sexual norms that have been practiced by religious communities for thousands of years have become the flashpoint. It is the place where the law now finds itself in crisis.

6.3.4.2 Ontario Court of Appeal[913]

The Ontario Court of Appeal upheld the Divisional Court's decision. It agreed that the *TWU* 2001 involved different facts, a different statutory regime, and a fundamentally different question. And, that the regulator's argument is different because the BCCT argued discrimination of the TWU graduates but the LSUC argues it is not in public interest to accredit a law school that prevents access through a discriminatory policy. However, *TWU* 2001 is still relevant to solve some of the issues in balancing the rights.

The standard of review is that of reasonableness and not correctness as it was in *TWU* 2001. There is no qualitative difference between decisions of Law Society discipline tribunals and the decision to accredit a law school. Administrative tribunals are required to take account of and to act consistently with *Charter* values as they make decisions. There is no question of jurisdiction here. Adequacy of reasons is not a standalone basis for quashing a decision.

The Ontario Court of Appeal held that LSUC's decision was reasonable.

The *Charter* right of religious freedom was engaged individually by members of the TWU community and collectively, though the Court did not elaborate on the extent of TWU's corporate *Charter* right to religious freedom. The Court was of the view that LSUC cannot

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[910] *TWU* ONSC 2015, *supra* note 776 at para 116.
[911] *Ibid* at para 117.
[912] *Hall v. Powers* (2002), 59 O.R. 3d 423, [2002] O.J. No. 1803.
[913] *TWU* ONCA 2016, *supra* note 701.

compel TWU to do anything. Even absent accreditation TWU is free to operate its law school in the manner it chooses. There is no evidence that the LSUC decision would have so dramatic an effect as closing TWU's law school. The decision's interference is more than trivial as TWU would face an increased burden in attracting students. While freedom of religion is not absolute it is appropriate to adopt a broad definition of freedom of religion at this stage and consider impact at the second stage of the analysis.

Statutory objectives of LSUC as contained in s. 4.1 and 4.2 of the Law Society Act[914] requires that it govern the legal profession in the public interest. In maintaining standards of learning, professional competence and conduct it can include the promotion of a diverse profession. Quality of those who practice law is based on merit and it excludes discriminatory classifications. The LSUC is subject to the *Charter* and the Human Rights Code (HRC) and it is appropriate for the LSUC to consider its statutory objective informed by the values found in the *Charter* and HRC.

To assess accreditation in the public interest the LSUC was required to balance the statutory objectives based on merit and exclude discriminatory classifications with religious freedom. The LSUC decision interfered with religious freedom. The Community Covenant discriminates against the LGBTQ community contrary to s. 15 of the *Charte*r and s. 6 of the Human Rights Code. TWU's Community Covenant is "deeply discriminatory to the LGBTQ community and it hurts."[915]

The process adopted by the LSUC to consider TWU's application was excellent. The record had TWU's application and supporting material, material reports of the Federation of Law Societies of Canada, 3 legal opinions for guidance and 210 submissions from the profession and the public. It took place in two stages with TWU having opportunity to address Convocation for 1.5 hours; with 4.5 hours of 29 Bencher speeches. The Benchers understood the historic significance of their decision and engaged in a fair balancing of the conflicting rights. Not all Benchers engaged in the precise style of reasoning as the *Doré* analytical framework but all received and reviewed a legal opinion on the topic and heard all the speeches. To focus on Benchers' speeches in minute detail misses the bigger picture of a group that is mostly democratically elected undertaking a democratic process. The appellants' argument that the Benchers ignored their legal obligation to balance the *Charter* rights with the statutory objectives is rejected.

Was the LSUC's decision reasonable? The answer is 'Yes', indeed 'Clearly yes', for the following reasons: first, the LSUC is one of two gatekeepers to the legal profession – law schools and law societies. There is nothing wrong with a law society, acting in its jurisdiction, scrutinizing the admissions process to decide whether to accredit a law school. LSUC could pay heed to the fact that a homosexual student would not be tempted to apply to TWU. All law schools currently accredited provide equal access to all applicants. TWU would be an exception. Second, TWU may not be subject to HRC but the LSUC is. Third, there is an important distinction when a religious institution exercises its religious beliefs in a manner that discriminates against others. LSUC was entitled to consider the discriminatory policy against LGBTQ community as in the example of the US case of Bob Jones University (BJU). TWU, like BJU is seeking access to a public benefit – accreditation. LSUC must meet its statutory mandate to act in the public interest. The decision does not prevent TWU the practice of a religious belief itself rather it denies a public benefit because of the impact on the LGBTQ community. Fourth, human rights law and international treaties bind Canada. Fifth, religious neutrality does not

[914] *Law Society Act*, R.S.O. 1990, c. L.8.
[915] *TWU* ONCA 2016, *supra* note 701 at para 119.

mean that the state must refuse to take positions on policy disputes that affect religion. LSUC was entitled to take a position and it was reasonable. While TWU may find it more difficult to operate its law school the LSUC decision does not prevent it from doing so. Instead, it denies a public benefit that LSUC was entrusted with bestowing based on concerns in line with its statutory objectives.

6.3.5 Nova Scotia Barristers' Society

On April 25, 2014, the Nova Scotia Barristers' Society (NSBS) refused approval of TWU's law school unless TWU either exempted law students from signing the Community Covenant or amended the Community Covenant for law students in a way that would cease to discriminate.[916]

On July 23, 2014, the Society's Council amended its regulations so, notwithstanding FLSC approval, the Council had the discretion to act in the public interest and determine whether a law school "unlawfully discriminates" in its law admissions or enrolment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act*.[917]

TWU applied to the Court for a judicial review, claiming NSBS did not have authority to make the decision and that it violated TWU's religious freedom as guaranteed by the *Canadian Charter*. The hearing was held during the week of December 16-19, 2015, in Halifax.

6.3.5.1.1 Nova Scotia Supreme Court

On January 28, 2015 Justice Jamie Campbell exposed and soundly rejected a blind spot of Canada's legal academia when he held that the Nova Scotia Barristers' Society (NSBS) had no authority to reject Trinity Western University's law degree.[918] TWU had been described by the Law Society in the December hearing as a "rogue" law school. Campbell, J. objected to this characterization. The school could only be so considered "…in the sense that its policies are not consistent with the preferred moral values of the NSBS Council and doubtless many if not a majority of Canadians."[919] However, he noted, "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."[920]

Justice Campbell recognized that Canadians have the right to attend a religious university that imposes a religiously based code of conduct, even if that code excludes or offends others who will not or cannot comply. He observed, "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."[921] To demand that right to be sacrificed for

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[916] Nova Scotia Barristers' Society, "Council votes for Option C in Trinity Western University law school decision," (accessed 18 October 2018), online: <http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>.
[917] *Human Rights Act*, RS 1989, c 214 as amended by 1991, c 12; 2007, c 11; 2007, c 14, s 6.
[918] *TWU* NSSC 2015, *supra* note 775.
[919] *Ibid* at para 10.
[920] *Ibid*.
[921] *Ibid* at para 11.

state recognition of professional education is an infringement of religious freedom that cannot be justified.

Campbell, J. was also rigorous in his assessment of the Society's error in refusing to recognize the TWU law school and its degree. He rejected the position that the Community Covenant was "unlawful discrimination." "It is not unlawful," said Campbell, J. "It may be offensive to many but it is not unlawful. TWU is not the government. Like churches and other private institutions, it does not have to comply with the equality provisions of the *Charter*."[922] He noted that TWU "was not in breach of any human rights legislation that applies to it."[923]

What Justice Campbell's decision laid bare for all to see is the moral judgement against religion by the legal profession. It is a blind spot that sees religion and religious views as having absolutely no place outside of the churches, mosques, and synagogues of the nation. By attempting to bifurcate religious practise into a "public" and a "private" sphere, it misapprehends what religious beliefs and practices mean to the believer. Trinity Western's application for recognition of its law school has been characterized as moving into the "public" sphere. As University of Victoria Law School Dean, Jeremy Webber, argued, a private institution cannot "escape scot-free, especially if they want to enjoy public recognition."[924] However, that position fails to recognize that religion permeates every aspect of a believer's life with a long history of legal protection. TWU provides academic education in an institution that is Christian in character which, as Campbell, J. noted, is not an insignificant part of who evangelical Christians are. He went on, "Being Christian in character does not mean excluding those of other faiths but does require that everyone adhere to the code that the religion mandates. Going to such an institution is an expression of their religious faith. That is a sincerely held believe [sic] and it is not for the court or for the NSBS to tell them that it just isn't that important."[925]

Given the stark contrast between Justice Campbell's decision and the public pronouncements of the legal profession – particularly the legal academics – it makes one wonder whether the profession was taken aback by the decision. Perhaps this is the result of the academic assumption that religion will become less of a force as society becomes more secular. This secularization theory has permeated a number of fields of study including law. The Canadian Council of Christian Charities stated in its brief to the Nova Scotia Court that the decision of the NSBS "amounts to nothing less than a rejection of Canada's religious heritage. It strikes a devastating blow to the very heart of religious civil society and has the effect of reducing the rich tapestry of Canadian society. The long-term preservation of freedom, diversity, integrity and Canada's social capital requires the law to be willing to accept differences of belief and practise on such controversial issues as marriage."[926]

> Lawyers for the NSBS took umbrage at that characterization, stating:
> Needless to say all of those words are very strong words, all of those words are very negative words, and all of those words are about an institution that has regulated the legal profession in this province for more than two hundred years. So how did it come

[922] *Ibid* at para 10.
[923] *Ibid.*
[924] Jeremy Webber, "Opinion: Religion vs. Equality: Issue of accreditation of TWU's Law program is complicated" *Vancouver Sun* (8 April 2014), online: <http://www.vancouversun.com/life/Opinion+Religion+equality/9715430/story.html>.
[925] *TWU* NSSC 2015, *supra* note 775 at para 230.
[926] *Ibid* (Brief of the Intervener, Canadian Council of Christian Charities, Hfx. No. 427840, online (pdf): https://www.cccc.org/documents/courtdocs/cccc_intervener_s_brief_filed_twu_v._nsbs.pdf).

> to be that the Nova Scotia Barristers' Society, a statutory entity charged with regulating the public interest and upholding the public interest in the practise of law – how did it come to be that the Society stands here today on the receiving end of a judicial review application where it is alleged that it has done nothing less than reduced the rich tapestry of Canadian society and rejected Canada's rich religious heritage?[927]

The answer, I propose, is as blunt as it is simple – professional arrogance. As legal professionals we all suffer from this same occupational hazard from time to time. It would be arrogant, said Campbell, J., to suggest that British Columbia "has a less genuine respect for human rights values than Nova Scotia"[928] when you consider the fifty years that Trinity Western University has been offering degrees and has never been found in violation of the BC human rights legislation. Campbell, J. reiterated the fact that TWU is a private university to which the *Charter* does not apply.

Arrogance may also be seen in the manner in which the Nova Scotia Barristers' Society refused to be governed by *TWU* 2001. The NSBS argued that the 2001 decision was no longer good law or at least not applicable to the facts before it. In one sense, we might not want to be too harsh on the NSBS for taking that position for two reasons: first, they were buttressed by academic opinion that the 2001 decision did not apply;[929] and second, they were evidently inspired by the opinion, which has been especially persuasive since the *Charter*, that "A good lawyer needs to understand and assist the evolution of the law."[930] However, as Campbell, J. rightly points out in his decision, the argument against the 2001 decision is simply an unacceptable reach.

"On its face, the *TWU v. BCCT* decision is very much on point,"[931] Campbell, J. held. It was on point because, in both cases, (1) the regulatory bodies were required to make a decision about accreditation acting in the public interest; (2) the central concern was about requirements to abstain from behaviour that restricted LGBT students; (3) there was no evidence that a TWU graduate would act in an intolerant or discriminatory manner. However, Campbell, J. recognized that the NSBS argument was "somewhat more subtle" than the arguments of the College of Teachers in the 2001 case. The NSBS was not saying that TWU graduates would be discriminatory. Rather, they were concerned that "accepting a law degree from the institution would amount to condoning discrimination."[932] It was a matter of public perception.

Justice Campbell's view is either that of a lone wolf crying in the judicial wilderness or a correct and just interpretation of the law. It is the latter realization that is bound to be disconcerting to all those who have publicly declared that the law of equality has advanced to such a degree that it eclipses the right of a religious university to set admissions criteria in harmony with its creed.

Justice Campbell's assessment is bound to raise questions about the prevailing opinion in the law faculties that are opposed to TWU's Law School. Questions about one's position can be an unsettling experience. However, none of us are immune to probing questions. That is what makes our society so great – we question, we critically analyze to determine what is right

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[927] Marjorie Hickey, Q.C., in *TWU* NSSC 2015, transcript *supra* note 477 (Oral hearing, 18 December 2014).
[928] *TWU* NSSC 2015, *supra* note 775 at para 245.
[929] Craig, "Rejecting Trinity," *supra* note 793.
[930] Webber, *supra* note 924.
[931] *TWU* NSSC 2015, *supra* note 775 at para 193.
[932] *Ibid* at para 194.

and what isn't, and we analyze what works and what doesn't. No doubt, there will be a significant amount of questioning legal positions that have, up until now, relegated religion to the back row of rights talk.

Justice Campbell's decision has painted a bright line of demarcation between the current state of the law that allows for religious belief and practise and the emerging legal theories such as "deep equality" which suggests that accommodating religious practises such as traditional marriage "is a framework that continues unfair and unjust power relations that impede rather than promote the equality of minority groups."[933] Deep equality demands an "assumption of equality, rather than … the notion that one group is entitled to give and another to receive."[934] It is a process "owned" by ordinary people in everyday life and "is a vision of equality that transcends law, politics, and social policy…."[935] Deep equality requires identities, including religious identity, to be fluid. "[R]eligious identities," says Lori Beaman, "block our vision to the complexities of social life and press us into corners that trap us in identities that we often ourselves do not recognize, want, or know how to escape."[936] Such a concept is inimical to our understanding of religious freedom as discussed in this book.

How is it that we are in such a predicament? I suggest that the legal faculty is so enamoured by the promise of equality that they see the law only through the "equality lens." We are witnessing a "groupthink" phenomena with only one preferred interpretation of the *Charter* – all other interpretations are now deemed passé, save that which promotes equality, as they understand it.[937] Surprisingly, even the rule of law safeguard is not enough to hold back the passionate opinion that equality trumps religion. But the irony goes further. Religion is also an equality right. Not only are the critics elevating one right over another right enumerated in the *Charter*, but they are conveniently emphasizing only one portion of that right.

Returning to the closing submissions of the NSBS at the December hearing, the appropriate question is: "…how did it come to be that the Society stands here today on the receiving end of a judicial review application where it is alleged that it has done nothing less than reduced the rich tapestry of Canadian society and rejected Canada's rich religious heritage?"[938] While appropriate for the Nova Scotia Barristers' Society it is also appropriate for the law faculties and law deans across the land who opposed TWU.

Arrogance is a problem both for the religious as well as the non-religious. It is a fact of our existence. Campbell, J. eloquently described the blinding light of arrogance that flows from the moral judgements that favour religion or equality. One moral matrix makes it possible to say: "Homosexual acts are a sin. That is the word of God. There is nothing to debate here."[939] The other moral matrix makes it possible to say, "A law school that discriminates is just wrong. There is nothing to debate here."[940]

Tolerance is a process that engages both moral views while accepting the discomfort of views that may be "incomprehensible … contemptible or … detestable" to our own.[941]

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[933] Lori Beaman, ed, *Reasonable Accommodation: Managing Diversity* (Vancouver: UBC Press 2012), 220.
[934] *Ibid* at 212.
[935] Beaman, *Deep Equality in an Era of Religious Diversity* (Oxford: Oxford University Press, 2017), 13.
[936] *Ibid* at 197.
[937] What is left out in much of the analysis is the fact that religion is also an equality right under s. 15 of the *Charter*.
[938] Hickey, *supra* note 927.
[939] *TWU* NSSC 2015, *supra* note 775 at para 273.
[940] *Ibid* at para 272.
[941] *Ibid* at para 275.

Ironically, the legal blind spot exposed by Justice Campbell's decision suggests that we need to make more room, not less, for academic enquiry that views the law from different lenses. Therefore, a law school such as the one proposed by Trinity Western University would add a fresh counterweight of critical legal analysis to the present legal orthodoxy amongst Canada's current common law schools.[942] The overwhelming opinion of the law faculties, at the court of first instance, was weighed and found wanting. Campbell's view became the prominent view of the courts in BC and Nova Scotia. The Ontario judiciary thought otherwise, as we have seen.

6.3.5.1.2 Nova Scotia Court of Appeal[943]

The NSBS appealed Justice Jamie Campbell's decision to the Nova Scotia Court of Appeal (NSCA) which decided the matter on administrative law issues and did not address the constitutional issue. NSCA focused on the NSBS's Amended Regulation that gave the Society power to determine whether a proposed law school "unlawfully discriminates … on grounds prohibited by either or both of the Charter of Rights and Freedoms or the Nova Scotia Human Rights Act."[944] In the end the Court held that the Amended Regulation is ultra vires the *Legal Profession Act*[945] (LPA).

The Court stated that there is a presumption of validity of the impugned regulation and that it is ultra vires only if it is irrelevant, extraneous or completely unrelated. The LPA aims to uphold and protect the public interest in the practice of law, allowing NSBS to enact regulations on education and other requirements for membership, improve administration of justice and pass resolutions consistent with the Act.

In this case the NSBS resolution states that the NSBS "determines" whether the University "unlawfully discriminates." If the University has a sustainable defence to a hypothetical challenge under the *Charter* or the *Nova Scotia Human Rights Act* (HRA) the University would not act "unlawfully". The resolution directs the NSBS Council to make a free-standing determination whether the University "unlawfully" contravened the HRA and the *Charter.*

However, the Court noted that the *Charter* does not apply to TWU since it is a private institution. TWU's conduct occurred in BC not Nova Scotia. The Nova Scotia HRA applies to acts in Nova Scotia. Without expressing a supportive word in either the LPA or the HRA, the legislature could not have intended that the Society's Council had autonomous jurisdiction concurrent with that of a human rights board of inquiry. Neither does the LPA contemplate Council may enact a regulation establishing itself as a court of competent jurisdiction under the *Charter* with the authority to rule that someone's conduct in British Columbia unlawfully violated the *Charter*. On April 25, 2014, the Council did not adjudicate the "unlawfulness" of TWU's conduct since that criterion did not yet exist in the regulations. After April 25, 2014, there was no adjudication of anything, merely the enactment of the Amended Regulation by

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[942] Pippa Feinstein & Sarah E. Hamill, "The Silencing of Queer Voices in the Litigation Over Trinity Western University's Proposed Law School" (2017) 34 Windsor Y B Access Just, 156 ["Silencing of Queer Voices"]. At 157 the authors simultaneously argue against TWU while asserting that "Canadian law schools and law societies are increasingly recognizing that a diverse legal profession that is representative of minorities will better fulfil the obligations of the profession". Evidently diversity and plurality are laudable only if the minority views are agreeable to the legal elite. The courts in Nova Scotia and British Columbia beg to differ.

[943] *TWU* NSCA 2016, *supra* note 789.

[944] *Ibid* at para 37.

[945] *Legal Profession Act,* (Nova Scotia) Chap. 28, of the Acts of 2004, amended 2010, c. 56.

Council on July 23. The Amended Regulation's key criterion that Council "determines" that the University "unlawfully discriminates" is completely unrelated to the Council's regulation-making authority under the LPA.

The NSBS Resolution itself was invalid because, first, it is premised entirely on the Amended Regulation which is ultra vires the LPA. Second, it assumed that TWU contravened the standard of "unlawfully discriminates" in the Amended Regulation. The *Charter* does not apply to TWU nor does the HRA apply. Therefore, the resolution is unauthorized and unreasonable.

The Court respectfully declined NSBS's invitation to redraft the regulation. The Court held that the NSBS does not have stand-alone authority over the public interest in the administration of justice. The Court agreed with Justice Campbell's holding that NSBS has no authority to regulate a law school outside of Nova Scotia. Any attempt to fashion requirements for membership based on features of the law graduate's institution, as opposed to the law degree, is ultra vires the LPA.

The Court pointed out that the NSBS' concern is with TWU's Community Covenant not with TWU law graduates. Trinity Western's law graduate is not Trinity Western's alter ego to be punished by NSBS. The graduate is a vital stakeholder in his or her own right and must be protected from the unauthorized action of the Society.

6.3.6 The Supreme Court of Canada

The Supreme Court of Canada's decisions in the TWU law school matter are given extra review and analysis here given their importance to the basic argument of this work: that there is a legal revolution against the special status of religion in the law. The SCC's decisions have solidified the argument. There is now little doubt that the legal elites, offended by religious beliefs and practices on fundamental human life issues such as marriage, are intent on limiting the special status once given to religion.

6.3.6.1 Intervention Decisions

On November 30 and December 1, 2017, The Supreme Court of Canada held two days of hearings on the case. Originally, only one day was set aside for the hearing by Chief Justice Beverley McLachlin. The story of how the second day got added to the Court's agenda is both telling and relevant to this work. It involved the Court's decision on who could intervene in the case. An intervening party is not directly subject to the litigation and is thought not to have any role in supporting one litigator as against the other, but is to share its concerns with the court about the potential impacts the litigation will have on those who are not parties, like the intervener. Whether an intervener can participate is at the discretion of the Court based on long-established criteria.[946]

On July 27, 2017, in an initial decision[947] that surprised many lawyers, Justice Richard Wagner denied seventeen intervener applications (comprising twenty-three groups) for

[946] See SC Rules, (SOR/2002-156) Part 8, r 42(3), Appeals and Cross-appeals, Factum on Appeal, online: <http://laws-lois.justice.gc.ca/eng/regulations/SOR-2002-156/FullText.html#s-42> and see Eugene Meehan, Q.C., Marie-France Major & Thomas Slade, "Getting In, Getting Heard, Getting Practical: Intervening In Appellate Courts Across Canada" (January 2017) 46:3 The Advocates' Quarterly, 261.

[947] *Law Society of British Columbia v. Trinity Western University, et al.,* SCC 37318; and *Trinity Western University, et al. v. Law Society of Upper Canada*, SCC 37209; online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>.

intervener status. The LGBTQ group applicants were denied. Several religious groups were also denied. Justice Wagner did not provide written reasons for his undoubtedly principled decision, which is the normal course for the Supreme Court on interventions. Intervention has always been understood as being within the complete discretion of the Court. However, one could infer that Justice Wagner was motivated by a desire to save time and avoid duplicate arguments and not by some nefarious or misguided position against any particular group.

With only one day set for the hearing, Justice Wagner evidently decided the Court did not have the time to hear all twenty-six applications. It was likely the case, as can be gleaned from the news release of the Court,[948] that Justice Wagner was initially told that there would be one full day hearing. Two appeals plus twenty-six intervener applications simply cannot be crammed into a single day. Justice Wagner's selection could be viewed as giving priority to those interveners who were more education-oriented and less advocacy-oriented.

Whatever the rationale, the Court granted intervener status to only nine groups. Seven of the groups were related to the legal profession in some capacity, such as the Christian Legal Fellowship and the Canadian Bar Association. Only two of the nine, the Association for Reformed Political Action (ARPA) and the National Coalition of Catholic School Trustees, were not associated with the legal profession. ARPA addressed its arguments on the relationship between the equality rights (s. 15 of the *Charter*) and religious freedom rights (s. 2(a) of the *Charter*). The National Coalition of Catholic School Trustees argued that there needed to be a proper balance with competing rights; there is no hierarchy of rights and not priviledging one right over another respects all rights.

6.3.6.2 Groups Denied

None of the various LGBTQ groups that applied were granted intervener status at the Court. The Court may have concluded that the two law societies (along with the granted interveners Canadian Bar Association, the Advocates' Society, the Lawyers Rights Watch, the Criminal Lawyers' Association, and the Canadian Civil Liberties Association) were adequately advancing the LGBTQ groups' arguments. Indeed, it was the opposition from the LGBTQ advocates that successfully persuaded the British Columbia, Ontario, and Nova Scotia law societies to reject the approval of TWU by the Federation of Law Societies Canada. All three accepted the LGBTQ arguments that TWU's admissions policy was discriminatory and, though TWU would provide competent legal education to its students, that policy was sufficient reason to deny TWU's Law School accreditation.

In addition, the Evangelical Fellowship of Canada, the Seventh-day Adventist Church in Canada, Canadian Council of Christian Charities, the Canadian Conference of Catholic Bishops and the Roman Catholic Archdiocese of Vancouver were among the religious communities that were denied intervener status.

Given the positions of TWU, and the religious interveners in the lower courts, perhaps the Supreme Court was of the view that there was enough on the record for the judges to mull over. Further, perhaps the various arguments and counter-arguments were sufficient for justice to be served in this matter.

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[948] As Chief Justice McLachlin noted, "[t]he hearing of these appeals, previously set down for one day, will occupy two days," *supra* note 947, online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37209>. See also: Judgments of the Supreme Court of Canada, News Release (2 August 2017), online: <https://scc-csc.lexum.com/scc-csc/news/en/item/5590/index.do>.

Whatever the rationale, to grant only nine out of twenty-six applications is significant for two reasons. First, this was a very high profile case that garnered a lot of media attention; and second, "the Court typically grants more than 90 per cent of the requests to intervene."[949] In fact, Professors Alarie and Green concluded upon an empirical study of interventions at the SCC that the Court "appears to be using the interventions to better understand the impacts of its decisions."[950] From their perspective "[t]he increase in the number of interveners" at the Court "seems to be a positive development."[951] One has to conclude that the restriction was unusual, especially since it was so quickly reversed.

6.3.6.3 Second Decision – Chief Justice McLachlin – July 31, 2017[952]

Chief Justice McLachlin "varied" Justice Wagner's order after only four days, following a weekend of protests, primarily by upset members of the LGBTQ community.[953] All twenty-seven groups were allowed to file a ten-page factum and make a five-minute oral argument at the hearing. Because some of the groups filed jointly the total number of intervener briefs was to be twenty-six (twenty-seven counting the Attorney General of Ontario). Given that the number of participants at the hearing tripled, the Court extended the hearing to two days.

While there was some confusion as to the first decision, from a legal standpoint it was even more perplexing as to why the Court changed its mind.[954] To see the SCC being influenced by such public pressure is a first – or, at least, it is a first to observe the Court being influenced in such a blatantly obvious manner.[955] Unlike what we saw in the lower courts of this case, the SCC initially did not issue reasons for its decisions on intervention. The Court's statement to explain what occurred emphasized that it "does not give reasons for decision in motions for intervention. To do so would disproportionately burden the Court's workload. In this instance, however, the concerns raised by some LGBTQ+ groups and others call for a response. … [S]cheduling issues informed Justice Wagner's decision not to grant all applicants the right to intervene."[956]

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[949] Benjamin R. D. Alarie & Andrew J. Green, "Interventions at the Supreme Court of Canada: Accuracy, Affiliation, and Acceptance" (2010) 48 Osgoode Hall L. J. 381, 383.
[950] *Ibid* at 410.
[951] *Ibid*.
[952] *Supra* note 947, online: <https://www.scc-csc.ca/case-dossier/info/dock-regi-eng.aspx?cas=37318>.
[953] Paula Kulig, "Chief justice's rare order in Trinity Western case ensures 'all voices could be heard'" (2017) *Lawyers Daily*, online: <https://www.thelawyersdaily.ca/articles/4375>.
[954] Perhaps to address the confusion, the SCC did issue a news release on August 2, 2017, clarifying its decisions, *supra* note 947.
[955] In truth, the Court has always been sensitive to public opinion. However, this case has brought it to a whole new level because of the speed with which the Court reacted. See the discussion below on the Chief Justice's response to the public criticism his Court received for not opening the intervention policy. What, in the 1980s, took years to resolve, in the TWU case took one weekend. Interestingly enough, in an interview in 2000, Chief Justice Beverley McLachlin, Justice Michel Bastarache and Justice John Major denied that interveners were "hijacking" the Court's decisions, arguing the Court still had a "sense of responsibility", and noting that "the reason the court has opened its doors to listen to special interest groups after the *Charter* was adopted was because we had a new type of legislation which forced the court really to adopt a really contextual approach." See Luiza Chwialkowska, "Rein in lobby groups, senior judges suggest: 'We've opened the door probably too widely,' Supreme Court justice tells Post," *National Post* (6 April 2000), online: <http://www.fact.on.ca/news/news0004/np000406.htm>
[956] *Supra* note 948 at para 3.

By the Court's own admission, it was the "concerns raised by some LGBTQ+ groups" that moved the Court to action. Sean Fine of the *Globe and Mail* noted that Justice Wagner "chose nine [interveners], among which he believed the views of LGBTQ advocates were well represented. But when he was made aware of concerns on social media, he sought out Chief Justice McLachlin to see what could be done."[957] This entire event appears to be an anomaly. It was a historical reversal of fortunes for interveners in *Charter* litigation. The Court was not prepared, as were the courts in BC (and Nova Scotia), to adopt a "liberal approach" at first instance. After all, the Court had plenty of notice for those applications to enable it to have made an extra day available long before it faced its embarrassing weekend of regret.

It is reasonable to assume that had there been no outcry from the LGBTQ community the Court would have gone on with the one-day hearing as planned. No one would have thought more of it. But the indignation of the activists and the reaction of the Court to that criticism requires us to contemplate its meaning. The Court's response was to open the doors for all interveners without exception and allow all to file up to a ten-page brief and have a five-minute oral presentation. There appeared to be no considered thought on who should or should not be given the priviledge. This could have long term implications for the Court as it will have a hard time squaring future restrictions, if it so chooses, with the open policy it gave in the TWU case after the public complaints that elicited such a complete reversal.

The role of interveners is, at least partially, to bolster public faith in the legal system. One could argue that in this case, the Court took public perception into serious consideration and acted immediately to correct it. That may be beneficial to the Court's image. Eugene Meehan observes that, "having let every intervener in, the Court is now free to do whatever it wants, and no one can complain they were not heard."[958]

There were, no doubt, unambiguous lines of reasoning that went into Justice Wagner's first decision, as noted above. However, because the Court, as a general practice, does not give reasons for its decisions on interventions we are left in the dark as to what those deliberations were. This incident may give the Court some reason to pause about the effectiveness of its current policy in not providing reasons. Perhaps, given time and reflection, this policy may evolve to the point that a future Court will give reasons for its use of discretion in granting or not granting interventions.

However, for the purpose of this work, this series of events does suggest that the Court's hypersensitivity to the public perception of how it handled this case was a harbinger of the Court's final decisions to come: decisions that have confirmed the legal revolution against religion is at full throttle.

6.3.6.4 Decision: Law Society of British Columbia v. Trinity Western University[959]

The Supreme Court of Canada rejected the BCCA's decision and ruled against TWU in a notably fractured 7-2 decision, with a 5-justice majority, 2 concurring opinions, and a vigorous dissent. Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon formed the majority opinion while Chief Justice McLachlin and Justice Rowe each wrote their own concurring opinions. Justices Côté and Brown wrote a robust dissenting opinion.

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[957] Sean Fine, "Supreme Court justice offers explanation for LGBTQ decision," *Globe and Mail* (2 August 2017), online: <https://www.theglobeandmail.com/news/national/supreme-Court-justice-offers-explanation-for-lgbtq-decision/article35870614/>.

[958] Interview of Eugene Meehan by the author, 5 June, 2018.

[959] *LSBC v TWU* 2018, *supra* note 14.

6.3.6.4.1 Majority Decision

The majority ruled that the LSBC was entitled to consider TWU's admissions policies apart from the academic qualifications and competence of individual graduates. The Law Society benchers have an overarching objective of upholding and protecting the public interest in the administration of justice in reviewing admission requirements to the profession. The governing body of the legal profession, being a self-regulating profession, is to be given deference in carrying out the public interest.

The heart of the appeal, the Majority noted, was the Covenant's prohibition "on sexual intimacy that violates the sacredness of marriage between a man and a woman."[960] The Majority's decision paid careful attention to the negative response of the LSBC membership to TWU's application. They described the "considerable response"[961] from the LSBC membership when the LSBC April 11, 2014 meeting upheld approval for the school, forcing a Special General Meeting on June 10, 2014. That meeting had a vote of 3210 to 968 against TWU. Then the October 2014 referendum resulted in a 5951 to 2088 vote against TWU. The Majority's emphasis on the large numbers opposed to TWU is striking. While such opposition forms part of the facts, a case involving *Charter* rights is not a numbers game. *Charter* rights are meant to protect against the tyranny of the majority.[962]

The Majority saw the LSBC decision as not a rejection of TWU's graduates but a rejection of a law school with a mandatory covenant that violates the public interest.[963] The LSBC's statutory mandate as a "gatekeeper to the profession"[964] requires it to broadly uphold and protect the public interest.[965] How it carries out that mandate, as a self-regulating profession, is to be given deference.[966] Professional regulation through licensing "is directed toward the protection of vulnerable interests – those of clients and third parties."[967] The delegation of statutory power maintains the independence of the bar, is a hallmark of a free and democratic society,[968] and recognizes the institutional expertise to interpret public interest.[969]

The LSBC was entitled to be concerned about the Covenant that "effectively imposes inequitable barriers on entry to the school."[970] It risks decreasing the diversity of the bar and harming LGBTQ individuals.[971] Its decision to deny TWU accreditation was reasonable as TWU's denial of LGBTQ students who could not sign the Covenant limited access to the legal profession based on personal characteristics, not merit, which is "inherently inimical to the

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[960] *Ibid* at para 6.
[961] *Ibid* at para 17.
[962] Former Chief Justice Dickson noted, "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'." See *Big M Drug Mart, supra* note 4 at para 96.
[963] *LSBC v TWU* 2018, *supra* note 14 at para 27.
[964] *Ibid* at para 29.
[965] *Ibid* at para 32.
[966] *Ibid* at para 34.
[967] *Ibid* at para 36.
[968] *Ibid* at para 37.
[969] *Ibid* at para 38.
[970] *Ibid* at para 39.
[971] *Ibid* at para 39.

integrity of the legal profession."[972] As a public actor its overarching interest is to protect the "values of equality and human rights in carrying out its functions" in line with "*Charter* values."[973] *Charter* values are "[f]ar from controversial" but are "accepted principles of constitutional interpretation" and in administrative decision-making must be complied with.[974] The potential harm to the LGBTQ community is a factor for the LSBC to consider. [975] This does not amount to LSBC regulating law schools or being confused with a human rights tribunal.[976]

As to the referendum, the Majority were of the view that as a self-governing body it was consistent with its authority to receive "guidance or support of the membership as a whole."[977] Nor did it need to give formal reasons for its decision as the LSBC benchers are elected representatives and were alive to the issues of balancing the rights.[978] This is perhaps one of the most troubling aspects of the decision. Peter Gall, Q.C., Counsel for the LSBC, admitted to the SCC in oral testimony that he agreed with the BCCA's view the Law Society failed "to consider its statutory obligation to determine whether the special resolution was consistent with its statutory mandate."[979] In other words, the LSBC admitted it did not exercise its authority to ensure that there was a proportionate balance between the severe limits on TWU's *Charter* rights and the statutory objectives governing the LSBC. Despite that failure, the Society called upon the SCC to do it for them. Incredibly the SCC obliged rather than sending it back to the LSBC for its own determination. This fact suggests that the SCC's trust in state regulators to carry out a robust *Doré* and *Loyola* analysis is misplaced. And, as Côté and Brown observed, the Majority's assertion that the Benchers believed their decision "would benefit from the guidance or support of the membership as a whole" was "pure historical revisionism."[980] A very sad commentary indeed on the lengths to which the Majority (acting as legal revolutionaries against religious accommodation) was willing to go to ensure they were "on the right side of history."

The *Doré* and *Loyola* analysis of administrative decisions that engage the *Charter* "are binding precedents of this Court."[981] The first part of the analysis asks, is freedom of religion engaged? It is not necessary to decide if TWU, as an institution, has a religious freedom right.[982] The test is whether the claimant sincerely believes in a practice or belief that has a nexus with religion and if so, whether the state conduct interferes in more than a trivial or insubstantial manner with the claimant's ability to act in accordance with the belief and practice.[983] "It is clear from the record that evangelical members of TWU's community sincerely believe that studying in a community defined by religious beliefs … contributes to their spiritual development."[984] And this right was engaged by the LSBC decision.[985]

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[972] *Ibid* at para 40.
[973] *Ibid* at para 41.
[974] *Ibid*.
[975] *Ibid* at para 44.
[976] *Ibid* at para 45.
[977] *Ibid* at para 50.
[978] *Ibid* at paras 54-56.
[979] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 2, 1 December 2017, at 340).
[980] *LSBC v TWU* 2018, at para 298.
[981] *Ibid* at para 59.
[982] *Ibid* at para 62.
[983] *Ibid* at para 63.
[984] *Ibid* at para 70.
[985] *Ibid* at para 75.

Under the *Doré* and *Loyola* framework the administrative decision-maker is in the best position to weigh the *Charter* protections and strike the right balance with the statutory mandate.[986] This "is not a weak or watered-down version of proportionality – rather, it is a robust one."[987] The decision-maker does not need to choose the option that limits the *Charter* protection the least but the option can be within a range of reasonable outcomes.[988]

The LSBC limit on religious freedom is of minor[989] significance because the mandatory covenant is not absolutely required for the religious practice of studying law in a Christian learning environment.[990] The interference is limited because the belief is "preferred" "rather than necessary" for spiritual growth.[991] However, on the other side, the LSBC decision furthered the statutory objective of maintaining equal access and diversity of the profession.[992] The Covenant "effectively closed" LGBTQ students from the school and "may discourage qualified candidates from gaining entry to the legal profession."[993] They would have fewer opportunities relative to others.[994] "The public confidence in the administration of justice may be undermined if the LSBC is seen to approve a law school that effectively bars many LGBTQ people from attending."[995] TWU can determine the rules of conduct for its members but in balancing the rights the decision-maker can take into account that this was a case where TWU was enforcing its rules on others.[996] To be "required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful."[997]

In the end, the LSBC's decision is not a serious limitation on TWU's religious freedom as it "does not suppress TWU's religious difference".[998] It means that TWU is "not free to impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm." The decision ensures equal access to the profession and prevents the risk of significant harm to LGBTQ who feel they have no choice but to attend TWU's proposed law school," and maintains public confidence.[999]

The LSBC "decision amounted to a proportionate balancing and was reasonable."[1000]

6.3.6.4.2 Chief Justice Beverley McLachlin

In a concurring judgement with the majority, Chief Justice McLachlin agreed that discretionary administrative decisions that engage *Charter* rights are to be reviewed on the *Doré* and *Loyola* framework, which is less onerous than the *Oakes* test. However, she is

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[986] *Ibid* at para 79.
[987] *Ibid* at para 75.
[988] *Ibid* at para 81.
[989] The Majority's view is very similar to Robin Elliot & Michael Elliot, "Striking the Right Balance: Rethinking the Contest Between Freedom of Religion and Equality Rights in Trinity Western University v. The Law Society of British Columbia," (2017) 50:3 University of British Columbia Law Review.
[990] *LSBC v TWU* 2018, *supra* note 14 at para 87.
[991] *Ibid* at para 88.
[992] *Ibid* at para 92.
[993] *Ibid* at para 93.
[994] *Ibid* at para 95.
[995] *Ibid*.
[996] *Ibid* at para 99.
[997] *Ibid* at para 101.
[998] *Ibid* at para 102.
[999] *Ibid* at para 103.
[1000] *Ibid* at para 105.

concerned with the proportionality test, i.e. weighing the benefit that came as a result of infringing the right verses the negative impact on that right. If the benefit is greater than the infringement, then the government action is proportional and therefore the limit is reasonable. The proportionality test has three elements: first, the state objective must be rationally connected to the decision; second, the impairment must be minimal, that is, there was no alternative, less-infringing decision possible; and third, the impact assessment of the decision must determine whether the effects of the decision are proportionate to the state objective.

McLachlin raised four concerns:[1001] first, the initial focus must be on the rights, not on the *Charter* values. Second, the *Charter* right must be consistently interpreted regardless of the state actor. In other words, a state administrator is still a state actor just as much the executive government. Third, the onus is on the state actor to demonstrate that the limits on the rights are reasonable and demonstrably justified. Fourth, use of "deference" and "reasonableness" are not helpful. Where an administrative decision-maker's decision has unjustifiable and disproportionate impact on a *Charter* right it is always unreasonable.

McLachlin agreed that TWU's freedom of religion was infringed. She disagreed with the majority decision not to analyse TWU's claims of freedom of expression and association. Such freedoms, she maintained, are part of freedom of religion.[1002] She rejected TWU's equality claim on the basis that the Law Society's decision was not from religious prejudice but to ensure equal access to all prospective law students.[1003]

As to the negative impact of the denial of accreditation McLachlin felt the majority was wrong to hold it "of a minor significance" as it interfered with religious practice, freedom of expression and association. "These are not minor matters," McLachlin observed; "Canada has a tradition dating back at least four centuries of religious schools which are established to allow people to study at institutions that reflect their faith and their practices."[1004] The majority's view that the impact is only interfering with the "*optimal* religious learning environment … is to deny this lengthy and passionately held tradition."[1005] "We cannot, on the one hand, acknowledge the deep sincerity of the belief in a religious practice and then, on the other, doubt that sincerity by calling the practice relatively insignificant."[1006] Further, she noted that "the fact that some individuals may be prepared to give up the religious practice does not make it a minor infringement."[1007]

McLachlin rejected the majority's position that the mandatory Covenant be devalued because it compels non-believers to follow TWU's religious practices. "There is a deep tradition in religious schools of welcoming non-adherents as students, provided they agree to abide by the norms of the community," she observed.[1008] "Students who do not agree with the religious practices do not need to attend these schools. But if they want to attend, for whatever reason, and agree to the practices required of students, it is difficult to speak of compulsion."[1009]

For McLachlin, "the most compelling law society objective is the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation

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[1001] *Ibid* at paras 115-119.
[1002] *Ibid* at para 122.
[1003] *Ibid*.
[1004] *Ibid* at para 130.
[1005] *Ibid*, emphasis in the original.
[1006] *Ibid* at para 131.
[1007] *Ibid* at para 132.
[1008] *Ibid* at para 133.
[1009] *Ibid*.

to protect the public interest."[1010] Though the *Charter* does not apply to TWU, the mandatory covenant is discriminatory as it "imposes burdens on LGBTQ people on the sole basis of their sexual orientation."[1011] "[It] singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them."[1012] LGTBQ students have less access to law school and the practice of law than heterosexual students.[1013]

For McLachlin, the LSBC has a statutory duty to uphold the public interest to protect the rights and freedoms of everyone including LGBTQ people.[1014] This interest is broad and involves more than the competence of the law graduate.

The onus is on LSBC to show that the serious negative impacts on TWU are proportionate to the benefits of its decision. In the end, "[t]he LSBC cannot abide by its duty to combat discrimination and accredit TWU at the same time."[1015]

McLachlin, unlike the majority, did not ignore the *TWU* 2001 decision. That 2001 decision was distinguishable, in McLachlin's view, as it dealt with teachers and the possibility of TWU education graduates bringing discrimination into the classroom. But here the LSBC sought "to avoid condoning or even appearing to condone discrimination."[1016] For her "LSBC operates under a unique statutory mandate – a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination."[1017]

6.3.6.4.3 Justice Malcolm Rowe

Justice Rowe held that the question is whether the LSBC infringed the *Charter* by withdrawing the approval of TWU's proposed law school because of the effect of the Covenant on prospective students.[1018] He concluded it did not.

He agreed with the Majority that the LSBC's statutory mandate allowed it to consider the effect of the Covenant on prospective students.

He differed on the approach in assessing how the *Charter* rights were infringed. He agreed with the McLachlin, Côté and Brown that the *Doré* and *Loyola* analysis needs clarification. He agreed with TWU that the Doré framework leaves many unanswered questions.[1019] He proposed three clarifications.

First, *Charter* rights, not *Charter* values, are to be the focus of inquiry as the "reliance on values rather than rights has muddled the adjudication of *Charter* claims in the administrative context."[1020] The use of *Charter* values makes sense when the *Charter* is not directly implicated, as in developing principles of the common law, but where the *Charter* applies there is no need to have recourse to *Charter* values.[1021] The confusion comes, says Rowe, "when *Charter* values are used as a standalone basis for the adjudication of *Charter* claims." This is because the scope

[1010] *Ibid* at para 137.
[1011] *Ibid* at para 138.
[1012] *Ibid*.
[1013] *Ibid*.
[1014] *Ibid* at para 140.
[1015] *Ibid* at para 147.
[1016] *Ibid* at para 149.
[1017] *Ibid* at para 150.
[1018] *Ibid* at para 153.
[1019] *Ibid* at para 165.
[1020] *Ibid* at para 166.
[1021] *Ibid* at para 168.

of *Charter* values is undefined. In some cases, the value aligns with a right but in others it does not line up with *Charter* jurisprudence and that lack of clarity "heightens the potential for unpredictable reasoning."[1022]

Rowe held that the Majority's use of the language of *Charter* "protections" to mean both rights and values "does little to clarify the role of *Charter* values in the adjudication of *Charter* claims." By equating "rights and values" with "*Charter* protections," "the majority undermines the view that rights and values are distinct in scope and function."[1023] Rowe explains:

> In cases where *Charter* rights are plainly at stake, courts and other decision-makers have a constitutional obligation to address the rights claims as such and to do so explicitly. An analysis based on *Charter* values should not eclipse or supplant the analysis of whether *Charter* rights have been infringed. Where *Charter* rights have been infringed by administrative actors, reviewing courts must determine whether the state meets the burden of justifying the infringement according to s. 1. This is not a matter of doctrinal preference. It is a constitutional obligation imposed by the *Charter*.[1024]

Rowe noted that the initial burden is on the claimant to show that the state-actor's decision infringes his or her *Charter* rights.[1025] The court is to take a purposive approach to rights but not to give "undue attention to the historical meaning of rights and freedoms as understood when the *Charter* was enacted."[1026] This allows the *Charter* to keep pace with societal change. At the same time, the courts must not extend the meaning of the constitutional text beyond "'the limits of reason' so as not to 'overshoot the actual purpose of the right or freedom in question'"[1027] but "based on considerations that are intrinsic to the rights themselves."[1028]

Rowe raised concerns about the Court's approach in cases where it "avoids delineation and relies instead on s. 1 to ensure that rights are exercised within proper bounds."[1029] This approach allows claimants to quickly discharge their proof of infringement and shift the burden to government to justify its actions.[1030] But the problem with that is "[i]f infringements are too readily found on the basis of activities that fall outside of the protective scope of the rights then courts may well too readily find that the government has met the justificatory burden set out in *Oakes*."[1031] This "erodes the seriousness of finding *Charter* violations" and "increases the role of policy considerations," thereby distorting "the proper relationship between the branches of government by unduly expanding the policy making role of the judiciary."[1032] It means the entire adjudication of *Charter* claims are dealt with by balancing "whereby rights and justifications are considered in a type of blended analysis." This results in "an unstructured, somewhat conclusory exercise that ignores the framing of the *Charter* and departs fundamentally from the foundational *Charter* jurisprudence of this Court."[1033]

[1022] *Ibid* at para 171.
[1023] *Ibid* at para 173.
[1024] *Ibid* at para 175.
[1025] *Ibid* at para 176.
[1026] *Ibid* at para 179.
[1027] *Ibid* at para 182.
[1028] *Ibid* at para 185.
[1029] *Ibid* at para 186.
[1030] *Ibid* at para 188.
[1031] *Ibid* at para 191.
[1032] *Ibid* at para 192.
[1033] *Ibid* at para 193.

Justice Rowe was troubled by the fact that in the administrative law context the applicant is required to demonstrate that an impugned decision should be overturned.[1034] Thus the decision is deemed reasonable unless the claimant shows otherwise. "This would provide for less robust protection of *Charter* rights."[1035] Rowe maintains that "the justificatory burden must remain on the government once an infringement of rights is demonstrated."[1036] The Court's desire to streamline the review of administrative decisions must not have the "effect of diluting the protection afforded to *Charter* rights."[1037] Rowe agrees that *Doré* and *Loyola* are binding precedents but need to be clarified.[1038]

On the matter of religious freedom in s. 2(a) of the *Charter*, Rowe held that TWU's claim does not fall within the scope of freedom of religion. The scope of the right is that it is based on the exercise of free will,[1039] and defined by the absence of constraint.[1040] The focus is on the choice of the believer regardless of whether the belief or practice is recognized as part of an official religion.[1041] While there is also a communal aspect of religious freedom it "is premised on the personal volition of individual believers."[1042] Rowe declined to find that TWU, as an institution, has a right to religious freedom. Even if it did, he maintained, such rights "would not extend beyond those held by the individual members of the faith community."[1043]

The religious belief or practice at issue is the proscription of sexual intimacy outside heterosexual marriage and the imposition of this on all TWU students.[1044] Rowe questions the Majority's view that the claimants can have a preference for this belief as it is not required but is protected by the *Charter*; but since it is not required its infringement is of little consequence.[1045] This is an overbroad delineation of the right leading to the infringement being justified too readily.[1046] He prefers the view that the claimants did not advance a sincere belief or practice required by their religion[1047] but he will assume it to be satisfied.[1048]

As to whether the state interference is more than trivial or insubstantial Rowe held that TWU claims protection for their ability to study law in an academic environment that requires all students to abide by the Covenant.[1049] But the school is open to non-believers and its attempt to coerce religious practices on those outside of its community is not protected by the *Charter*.[1050] Since religious freedom is a function of personal autonomy and choice it does not allow individuals or communities to impose adherence on those who do not share that faith.[1051] Therefore, what the claimants seek falls outside the scope of freedom of religion.

[1034] *Ibid* at para 197.
[1035] *Ibid*.
[1036] *Ibid*.
[1037] *Ibid* at para 206.
[1038] *Ibid* at para 207.
[1039] *Ibid* at para 212.
[1040] *Ibid* at para 213.
[1041] *Ibid* at para 214.
[1042] *Ibid* at para 219.
[1043] *Ibid* at para 219.
[1044] *Ibid* at para 228.
[1045] *Ibid* at para 234.
[1046] *Ibid*.
[1047] *Ibid* at para 233.
[1048] *Ibid* at para 235.
[1049] *Ibid* at para 237.
[1050] *Ibid* at para 242.
[1051] *Ibid* at para 251.

The statutory authority of the *LPA* did not preclude the LSBC from holding a referendum and choosing to be bound by the results; nor was it unreasonable given the deference due to the LSBC to interpret its own statute.[1052] However, if there was a *Charter* infringement, "I do not see how it would be possible for the LSBC to proceed by way of a majority vote while upholding its responsibilities under the *Charter*."[1053]

The LSBC decision came within a range of reasonable outcomes, which is informed by the mandate to regulate the legal profession in the public interest, and the deference given to the LSBC. It was reasonable not to accredit TWU's law school because of the LSBC's mandate to promote equal access to the profession, support diversity, and prevent harm to LGBTQ law students.[1054]

6.3.6.4.4 Justice Suzanne Côté and Justice Russell Brown

Côté and Brown suggest the real question is who controls the door to the public square? The liberal state must foster pluralism by accommodating difference but where does public life begin? They held that it is the public regulator who controls the door and owes that obligation.[1055] A private denominational university, not subject to the *Charter* and exempt from human rights legislation, does not. By restricting access to the public square, as it has, the LSBC "profoundly interfered with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices."[1056] The denial of access based on religious grounds "merits judicial intervention, not affirmation."[1057]

TWU is not for everybody and LGBTQ students could only sign the Covenant at a considerable personal cost.[1058] At stake is also the personal self-identity of TWU community members. Courts must strive to see claims from the perspectives of all sides.[1059] Constitutionally protected rights, like religious freedom, exists "to *protect* right-holders from values which a state actor deems to be 'shared', not to give licence to courts to defer to or impose those values."[1060] A court of law ought not to be concerned, as was the Majority, with the "public perception" of what freedom of religion entails.[1061] Its responsibility is "not to produce social consensus, but to protect the democratic commitment to live together in peace."[1062]

The *Doré/Loyola* framework "betrays the promise of our Constitution that rights limitations must be demonstrably justified."[1063] The only proper purpose for the LSBC decision on TWU, as permitted by its governing statute, was to ensure TWU graduates met the minimum

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[1052] *Ibid* at para 255.
[1053] *Ibid* at para 256.
[1054] *Ibid* at para 258.
[1055] *Ibid* at para 261.
[1056] *Ibid*.
[1057] *Ibid*.
[1058] *Ibid* at para 262.
[1059] *Ibid* at para 264.
[1060] *Ibid* at para 265, emphasis in original.
[1061] *Ibid*.
[1062] *Ibid*, quoting M. A. Waldron et al., "Developments in law and secularism in Canada", in A. J. L. Menuge, ed, *Religious Liberty and the Law: Theistic and Non-Theistic Perspectives* (Routledge, 2018), 106 at 111.
[1063] *Ibid* at para 266.

competence and ethical conduct standards.[1064] Even if the statute's "public interest" mandate allowed for considerations other than fitness, the decision to deny TWU approval because of a Covenant restriction, which is protected by the provincial human rights legislation, "is a profound interference with religious freedom, and is contrary to the state's duty of religious neutrality."[1065] Even if "public interest" were to be understood broadly, the accreditation of TWU would not be inconsistent with the public interest as "[t]olerance and accommodation of difference serve the public interest and foster pluralism."[1066]

There is nothing in the governing statute that is ambiguous such that it was necessary to resort to "*Charter* values" to determine LSBC's public interest mandate.[1067] "Public interest" is itself "vague and difficult to characterize."[1068] The Majority's approach is "untethered from the express limits to the LSBC's statutory authority" which was to ensure licensing applicants are fit to practice law.[1069] There is no discretion for considerations that are improper or irrelevant.[1070] The scope of LSBC's mandate is "limited to regulating the legal profession, starting at (but not before) the licensing process."[1071] The Majority misconstrues the purpose underlying the LSBC's discretionary power to approve a law school.[1072] The purpose "does not rationally extend to guaranteeing equal access to law schools."[1073] Admissions criteria is left up to the law schools. The Majority's logic would mean the LSBC would be entitled to consider the inequitable barrier of tuition fees in accrediting law schools to promote competence of the bar.[1074] "The LSBC is not a roving free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate."[1075]

Côté and Brown disagreed with the Majority's approval of the LSBC Benchers' decision to be bound by the results of a referendum.[1076] "[T]he Benchers abdicated their duty as administrative decision-makers to properly balance the objectives of the LPA with the *Charter* rights implicated by their decision."[1077] The Majority was engaged in "pure historical revisionism to suggest that the Benchers believed their decision 'would benefit from the guidance or support of the membership as a whole.'"[1078] In short, "the LSBC's decision is completely devoid of any reasoning."[1079]

The Majority's justification for deferring to the LSBC despite the lack of reasons is "untenable" because it is never sufficient to consider the outcome alone.[1080] The majority replaces the non-reasons of the LSBC with its own and makes the outcome the sole

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[1064] *Ibid* at para 267.
[1065] *Ibid* at para 268.
[1066] *Ibid* at para 269.
[1067] *Ibid* at para 270.
[1068] *Ibid* at para 272.
[1069] *Ibid* at para 273.
[1070] *Ibid* at para 274.
[1071] *Ibid* at para 284.
[1072] *Ibid* at para 285.
[1073] *Ibid* at para 289.
[1074] *Ibid* at para 289.
[1075] *Ibid* at para 291.
[1076] *Ibid* at para 294.
[1077] *Ibid*.
[1078] *Ibid* at para 298.
[1079] *Ibid* at para 299.
[1080] *Ibid* at para 300.

consideration.[1081] Second, the Majority cannot point to any basis that the Benchers conducted any balancing after the referendum.[1082]

Côté and Brown find the lack of rationale for insisting on a distinct *Doré/Loyola* framework for administrative decisions troubling where the *Oakes* test is already context-specific,[1083] and has been applied to many administrative law decisions prior to *Doré*.[1084] The Majority said its *Doré* framework is a "robust" rather than a weak version of proportionality, but Côté and Brown note, "saying so does not make it so."[1085] As they note, it subverts our Constitution's promise to ensure that *Charter* rights are subject only to reasonable limits.[1086] The Majority has effectively said that under *Doré*, "*Charter* rights are guaranteed *only so far as they are consistent with the objectives of the enabling statute*."[1087] But the Constitution has it the other way around: rights trump statutory objectives.

Moreover, the Court's silence on who bears the onus in the administrative law context is "a conspicuous and serious lacuna in the *Doré/Loyola* framework."[1088] "[T]his hardly bolsters the credibility of the *Doré/Loyola* framework."[1089]

The Majority's reliance on "values" is troubling – "resorting to *Charter* values as a counterweight to constitutionalized and judicially defined Charter rights is a highly questionable practice."[1090] *Charter* values are "entirely the product of the idiosyncrasies of the judicial mind that pronounces them to be so."[1091] One judge's understanding of "equality" might be a "shared value" with all or even most Canadians but another judge's might not. Indeed, "One person's values may be another person's anathema."[1092] This is not problematic as long as each person agrees to the other's right to hold and act on those values in a manner that maintains civic order.[1093]

In Côté and Brown's view, "*Charter* 'values', as stated by the majority, are amorphous and, just as importantly, undefined."[1094] They lack doctrinal structure which the courts have crafted for over 35 years in giving substantive meaning to *Charter* rights. Instead, "*Charter* values like 'equality', 'justice', and 'dignity' become mere rhetorical devices by which courts can give priority to particular moral judgments, under the guise of undefined 'values', over other values and over *Charter* rights themselves."[1095] For instance, equality is too nebulous a notion to form the basis of concrete decision-making. The Majority cannot point to a specific legal rule or right to ground the application of the value of equality here. It is purely abstract and could mean virtually anything. After all, "equality in an absolute sense is also perfectly compatible with a totalitarian state, being easier to impose where freedom is limited."[1096]

[1081] *Ibid*.
[1082] *Ibid* at para 301.
[1083] *Ibid* at para 302.
[1084] *Ibid* at para 303.
[1085] *Ibid* at para 304.
[1086] *Ibid*.
[1087] *Ibid* at para 305.
[1088] *Ibid* at para 312.
[1089] *Ibid*.
[1090] *Ibid* at para 307.
[1091] *Ibid* at para 308.
[1092] *Ibid*.
[1093] *Ibid*.
[1094] *Ibid* at para 309.
[1095] *Ibid*.
[1096] *Ibid* at para 310.

Côté and Brown agree with the majority that the LSBC's decision infringes the religious freedom of members of the TWU community and also agree not to determine whether TWU, *qua* institution, has a right to religious freedom.[1097] They reject Justice Rowe's narrowing of the scope of activity protected by the right.[1098] Relying on *TWU* 2001, they note that the restriction on the freedom can be justified by evidence that there will be a detrimental impact on the statutory decision-maker's ability to carry out its mandate.[1099] That would mean in this case that the TWU graduates would be unfit to practice law. But there is no evidence here to justify the limit.

Côté and Brown held that the LSBC decision "undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community" – "it is substantially coercive in nature."[1100] The Covenant is protected by the BC Human Rights Code but the LSBC decision makes its approval contingent on TWU "manifesting its beliefs in a *particular* way."[1101] This demonstrates "highly intrusive conduct by a state actor into the religious practices of the TWU community."[1102]

The majority failed to appreciate that the unequal access that results from the Covenant "is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society."[1103] It is "the state and state actors – not private institutions like TWU – which are constitutionally bound to accommodate difference in order to foster pluralism in public life."[1104]

State neutrality requires the state to refrain from espousing "values" that undermine what is necessary for the participation of all. "[A]ccommodating diverse beliefs and values is a precondition to secularism and pluralism."[1105] The view of marriage espoused by TWU was recognized by Parliament in the *Civil Marriage Act*. Legislators recognized that the public interest is served by promoting the accommodation of difference. So "[t]he LSBC's decision repudiates this wisdom and is unworthy of this Court's affirmation."[1106]

Côté and Brown rejected the concept that the LSBC's approval of TWU would be condoning the Covenant or discrimination against LGBTQ persons. Law schools do not exercise a public function on behalf of LSBC. "Equating approval to condonation turns the protective shield of the *Charter* into a sword by effectively imposing *Charter* obligations on private actors,"[1107] thereby excluding religious communities from the public square because they exercise their *Charter*-protected religious beliefs.

Côté and Brown noted that both Parliament and British Columbia's legislature recognized the so-called "discriminatory" (McLachlin C.J.'s Reasons, at para 138) and "degrading and disrespectful" (Majority reasons, at para 101) practices of TWU's Covenant "as consistent with the public interest, legal and worthy of accommodation."[1108] These practices

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[1097] *Ibid* at para 315.
[1098] *Ibid* at para 317.
[1099] *Ibid* at para 321.
[1100] *Ibid* at para 324.
[1101] *Ibid*.
[1102] *Ibid*.
[1103] *Ibid* at para 327.
[1104] *Ibid* at para 330.
[1105] *Ibid* at para 334.
[1106] *Ibid* at para 337.
[1107] *Ibid* at para 338.
[1108] *Ibid* at para 340.

cannot then be cited as a reason justifying the exclusion of a religious community from public recognition. The approval of TWU would not be state preference for evangelical Christianity but a recognition of the state's duty "to accommodate diverse religious beliefs without scrutinizing their content."[1109] The only decision reflecting a proportionate balancing of the rights and state objectives would be to approve TWU's law school.

6.3.6.5 Decision: Trinity Western University v. The Law Society of Upper Canada[1110]

In a 7-2 decision the Court ruled that the LSUC's decision to deny accreditation to TWU was reasonable. Justices Abella, Moldaver, Karakatsanis, Wagner, and Gascon formed the majority opinion while Chief Justice McLachlin and Justice Rowe each wrote their own concurring opinions. Justices Côté and Brown wrote a robust dissenting opinion.

6.3.6.5.1 The Majority

The Majority noted that LSUC did not deny TWU law graduates but denied TWU accreditation with a mandatory covenant.[1111] The issues were whether the LSUC was entitled to review TWU's admissions policies; whether the decision limited a *Charter* protection; and if so, whether there was a proportionate balance of the *Charter* protections and the statutory objectives.[1112]

The LSUC's mandate from the Law Society's Act[1113] (LSA) was to provide an overarching objective of protecting the public interest in admission to the profession that included whether to accredit a law school.[1114] The LSA (s. 4.2) tasked the LSUC with advancing the cause of justice, the rule of law, access to justice, and protection of the public interest.[1115] The LSUC was entitled to be concerned about the inequitable barriers on entry to law schools as these impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar and causing harm to LGBTQ individuals.[1116] This is part of its duty to uphold the public interest in accreditation as well as a positive public perception of the legal profession.[1117] "[T]he LSUC has an overarching interest in protecting the vales of equality and human rights in carrying out its functions."[1118]

The Majority referenced its reasons in the LSBC case in noting that the LSUC did not need to give reasons, since "the Benchers were alive to the question of the balance to be struck between freedom of religion and their statutory duties."[1119]

In reviewing administrative decisions, the *Doré/Loyola* framework is used because it "is concerned with ensuring that *Charter* protections are upheld to the fullest extent possible given

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[1109] *Ibid*.
[1110] *TWU v LSUC* 2018, *supra* note 14.
[1111] *Ibid* at para 11.
[1112] *Ibid* at para 12.
[1113] *Law Society Act*, R.S.O. 1990, c. L.8.
[1114] *TWU v LSUC* 2018, *supra* note 14 at para 14.
[1115] *Ibid* at para 17.
[1116] *Ibid* at para 19.
[1117] *Ibid* at para 20.
[1118] *Ibid* at para 21.
[1119] *Ibid* at para 28.

the statutory objectives within a particular administrative context. In this way, *Charter* rights are no less robustly protected under an administrative law framework."[1120]

Freedom of religion is engaged for the same reasons as the LSBC case. The LSUC has interfered with the TWU religious community's beliefs and practices which are more than trivial or insubstantial.[1121] However, the LSUC's interpretation of the public interest precluded it from accrediting TWU as it would not have advanced the statutory objectives.[1122] Its decision "reasonably balanced the severity of the interference with the benefits to the statutory objectives" as the impact on religious freedom was minor "because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary," for TWU students.[1123] On the other side of the scale its decision significantly advanced statutory objectives of ensuring equal access and diversity in the profession and preventing harm to LGBTQ people. The Majority asserted, "[t]he reality is that most LGBTQ individuals will be deterred from attending TWU… and those who do attend will be at risk of significant harm."[1124]

Religious freedom can be limited when it interferes with the rights of others. Hence, "TWU's community members cannot impose those religious beliefs on fellow law students, since they have an inequitable impact and can cause significant harm." LSUC's decision "prevents *concrete*, not abstract harms to LGBTQ people and to the public in general."[1125] The decision gives effect as fully as possible to the Charter protections given the statutory mandate and was therefore reasonable.[1126]

6.3.6.5.2 Chief Justice Beverley McLachlin

The Chief Justice concurred with the Majority and adopted her reasons of the companion decision.

6.3.6.5.3 Justice Malcolm Rowe

Justice Rowe concurred with the Majority, noting that deference is required in reviewing the decisions of law societies as they self-regulate in the public interest.[1127] The LSUC did not err in denying accreditation because of the discriminatory barrier to legal education created by "effectively excluding LGBTQ students from studying law at TWU."[1128]

Justice Rowe adopted his reasons in the companion appeal, holding that there was no infringement of Charter rights.[1129] The decision fell within a range of possible acceptable outcomes, and there was no need for formal reasons as the Court can look to the record to

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[1120] *Ibid*.
[1121] *Ibid* at para 34.
[1122] *Ibid* at para 37.
[1123] *Ibid* at para 38.
[1124] *Ibid*.
[1125] *Ibid* at para 41.
[1126] *Ibid* at para 42.
[1127] *Ibid* at para 49.
[1128] *Ibid*.
[1129] *Ibid* at para 50.

assess the reasonableness of the decision which was evident.[1130] The LSUC decision was reasonable.

6.3.6.5.4 Justice Suzanne Côté and Justice Russell Brown

This appeal and its companion appeal entail who controls the door to the public square. "[W]ho owes an obligation to accommodate difference in public life? We say that this obligation lies with the public decision-maker."[1131] TWU, being a private denominational institution, not subject to the *Charter* or to judicial review, exempt from provincial human rights legislation, "owes no such obligation."[1132] The only purpose of the LSUC accreditation decision was to ensure the TWU graduates were fit for licensing. Not to accredit TWU was "a profound interference with the TWU community's freedom of religion."[1133] Even if the public interest were as broad as the majority said then it would not have been inconsistent with the statutory mandate to accredit TWU since "[i]n a liberal and pluralist society, the public interest is served, and not undermined, by the accommodation of difference."[1134]

Sections 4.1 and 4.2 of the LSA set out the LSUC's primary function and it is clear that "the setting of standards for the provision of legal services in Ontario is the LSUC's *primary* function."[1135] That regulation begins "at (but not before) the licensing process – that is, starting at the doorway to the profession."[1136] It "is *crystal clear* that the provisions in *By-Law 4* relating to the accreditation of law schools are meant *only* to ensure that individual applicants are fit for licensing" and it "is not for this Court to extend *By-Law 4*'s scope beyond the limits of the LSUC's mandate."[1137] Nor do the LSUC's arguments based on s.62(0.1)23 of the LSA extend authority over law schools – and even if it did, it would not apply to a school outside of Ontario.[1138]

Contrary to the majority position, "'upholding a positive public *perception* of the legal profession' … is not a valid basis for the LSUC's decision."[1139] The objective to ensure equal access to and diversity to the profession does not fall under LSUC's duty to ensure competence.[1140] If it were otherwise the LSUC would be obliged "to regulate law school tuition fees which, arguably, create inequitable barriers to the practice of law."[1141] The only defensible exercise of its statutory discretion for a proper purpose would have been to approve TWU.[1142]

The Ontario Court of Appeal Justice MacPherson's finding that TWU's admission policy discriminates against the LGBTQ community contrary to s. 15 of the *Charter* "reveals the fundamental and serious error in the Court of Appeal's understanding of [the] balancing exercise. TWU is a private institution. And, at the risk of stating trite law, private actors are not

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[1130] *Ibid* at para 51-54.
[1131] *Ibid* at para 56.
[1132] *Ibid*.
[1133] *Ibid* at para 57.
[1134] *Ibid*.
[1135] *Ibid* at para 60, emphasis in original.
[1136] *Ibid* at para 62.
[1137] *Ibid* at para 66, emphasis in original.
[1138] *Ibid* at para 73.
[1139] *Ibid* at para 75, emphasis in original.
[1140] *Ibid* at para 76.
[1141] *Ibid*.
[1142] *Ibid*.

subject to the *Charter*."[1143] "[T]he Court of Appeal's manifestly erroneous understanding of a basic premise, not only of our constitutional order but of the particular balancing the court was called upon to exercise in this case, taints its entire assessment of the matter."[1144]

The Majority errs in stating that limits on religious freedom are often unavoidable when the decision-maker pursues its statutory mandate in a multicultural and democratic society. Such a "categorical and unelaborated statement" is rooted in the:

> fundamental misconception: that, even where the rights of others are not actually infringed because private actors do not owe obligations to refrain from infringing them, a private actor's religious freedom will 'unavoidab[ly]' be limited solely on the basis that its exercise 'negatively impacts' the interests of others. But the point is this simple. The *Charter* binds state actors, like the LSUC, and *only* state actors. It does not bind private institutions, like TWU.[1145]

Côté and Brown, unlike the Majority, do not see the religious interference as minor. Rather, the LSUC decision "disrupts the core character of the TWU community by interfering with its ability to determine the biblically grounded code of conduct by which community members will abide."[1146] When the Majority said that the LSUC did not deny graduates but TWU's law school with a mandatory covenant, it is "a highly formalist description" that "belies the majority's claim … that it is applying '*substantive* equality'. In *substance*, TWU is seeking accreditation of its proposed law school for the benefit of its graduates."[1147]

Finally, the "unequal access resulting from the Covenant is a function not of condonation of discrimination, but of accommodating religious freedom, which freedom allows religious communities to flourish and thereby promotes diversity and pluralism in the public life of our communities."[1148]

In short, "[t]he appeal should be allowed. We therefore dissent."[1149]

6.3.7 Analysis of SCC's TWU Decisions

6.3.7.1 The Increasing Power of Identity Politics

From the moment TWU filed its application with the Federation, the political realities of the legal profession were exposed. As noted above, the CCLD and legal academics were adamant in their disdain for TWU's Community Covenant. "Religion" and "religious freedom" have evidently become, within the profession, regressive concepts that are associated with discrimination and inequality.

Justice Karakatsanis, during the *TWU* 2018 oral argument on November 30, 2017, complained that the BC Court of Appeal's decision, which favoured TWU, did not look at the controversy "from the perspective of *substantive equality*, they don't consider whether they have less opportunity than others for those seats."[1150] Justice Karakatsanis was willing to sacrifice the TWU law school because the LGBTQ population theoretically would not have the

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[1143] *Ibid* at para 78.
[1144] *Ibid*.
[1145] *Ibid* at para 79.
[1146] *Ibid* at para 80.
[1147] *Ibid*.
[1148] *Ibid* at para 81.
[1149] *Ibid* at para 82.
[1150] *TWU* 2018, *supra* note 14, (transcript of oral hearing, SCC vol 1, 30 November 2017, at 58).

exact same number of open seats as evangelical Christians. The Christian TWU school would be open to those Christians who could sign the Community Covenant but not to the LGBTQ students who could not or would not sign the Covenant. However, was the number of seats for entry to law school a proper comparator in determining equality in the circumstance? Professor Rex Ahdar points out, "We cannot know whether two things or two people are alike, and hence deserving of similar treatment, until we work out the criterion of likeness and like treatment."[1151] Neither Justice Karakatsanis nor the rest of the SCC majority established the criterion of likeness – for example, if the SCC is using evangelical Christians and LGBTQ people as the comparator groups, what might we consider like treatment? What about "substantive equality" among law clerks at the SCC? Or, as deans or faculty members of the law schools across Canada?

Professor Alexandra V. Orlova argues that the courts have a role "to engage in transformational legal strategies to work towards achieving substantive equality."[1152] Courts are to eradicate "systemic inequality" in order to assist in changing the landscape of social, economic and political conditions. This will involve shaping the public's "feelings and challenging existing norms" like the "hetero-normativity of the 'public good'" to reduce "law's violence." [1153] The courts then, as envisioned by Orlova, are agents of change. They are a "political organ" to implement the public interest.[1154] The public interest is fluid, in keeping with the changing norms, but also "firmly grounded in the principle of equality".[1155]

The views of Orlova and Karakatsanis regarding the TWU law school controversy are proof positive of my assertion that there is a paradigm shift underway in the profession against the legal accommodation of religious practice. The reliance upon political identity politics for constitutional adjudication is not to be applauded as much as it is to be feared. The rejection of the law of religious accommodation by the courts and academics in order to show solidarity with the hurt feelings of certain groups presumes that the emotional hurt is due to "social corruption" and that such corruption must be solved by "cultural restructuring." Warns Dr. Jordan Peterson, "[o]ur society faces the increasing call to deconstruct its stabilizing traditions to include smaller and smaller numbers of people who do not or will not fit into the categories upon which even our perceptions are based. That is not a good thing".[1156] Peterson argues, "Each person's private trouble cannot be solved by a social revolution, because revolutions are destabilizing and dangerous."[1157] However, the SCC has steered the law unequivocally into the murky and dangerous waters of revolutionary identity politics.

And all political shifts can shift back given the right circumstances. Until the SCC's TWU decisions, the law has, by and large,[1158] been generous in its accommodation of religious

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[1151] Rex Ahdar, "The Empty Idea of Equality Meets the Unbearable Fullness of Religion" (2016) 4 Journal of Law, Religion and State, 146-178, at 148.

[1152] Alexandra V. Orlova, "Public Interest, Judicial Reasoning and Violence of the Law: Constructing Boundaries of the Morally Acceptable," (2017) 9 Contemp. Readings L. & Soc. Just. 51 at 71.

[1153] *Ibid* at 72.

[1154] *Ibid* at 59.

[1155] *Ibid* at 63.

[1156] J. Peterson, *supra* note 265 at 118.

[1157] *Ibid.*

[1158] The notable exception is the SCC's very troubling decision in *Hutterian Brethren, supra* note 5, where the SCC ruled that the Hutterite colony's objection to their photograph being taken for the Alberta drivers' license could not be accommodated, despite the Alberta government's accommodation of that very thing for over 29 years. That decision was referred to by the Majority to justify its positions in the TWU law school cases.

practices.[1159] That is no longer the case. The growing consensus within the legal profession is that there can be no tolerance for religious views or practices that offend sexual equality claims. The Ontario Court of Appeal's declaration that the TWU Covenant "hurts"[1160] suggests that emotive language has supplanted legal principles. There no longer appears to be, in the legal profession, any recognition of the historical, philosophical, or practical imperatives for accommodating religious difference within a liberal democratic society.[1161] A private religious community is the sole arbiter of who can and cannot be a member of its community.[1162] The fact that non-members are required to abide by religious rules when seeking to be part of that community should not alter that principle.[1163] Indeed, one has to question why the law societies are owed deference because of their mandate to self-define in the interests of the legal profession, but religious groups are clearly not permitted the same latitude to self-define according to their religious beliefs? Guests on private property do not get to change the lawful rules of the owner.

However, politics – sexual identity politics – has moved the conversation to mean just that: non-members are demanding the privilege of entering a private religious community, receiving all benefits, such as a university education (despite rejecting the community's principles) and nullifying those beliefs and practices they find offensive. The advocates are adamant that the law destroy offensive difference. Entities that refuse to acquiesce to political demands are deemed discriminatory and are not permitted to operate in the public square. In short, opponents of religious accommodation require nothing less than total compliance with their social values. The BCCA declared, "there is no *Charter* or other legal right to be free from views that offend and contradict an individual's strongly held beliefs."[1164] That may change.

Intentional or not, the political movement sweeping the legal community may make the currently non-existent *Charter* right "not to be offended" into a reality by virtue of "*Charter* values". The fact the *Charter* does not have such language is immaterial in this new era. Politics makes all things possible just by "the vibe of the thing."[1165] The SCC has now shown itself sympathetic to sexual identity politics and creative in reaching what it deems the public

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[1159] In *Same-Sex Marriage*, *supra* note 178, para 53, the SCC stated, "The protection of freedom of religion afforded by s. 2(a) of the Charter is broad and jealously guarded in our Charter jurisprudence." In that case the SCC held that clergy could not be compelled to perform marriages that violated their faith – even though they were state actors. Nor were church buildings required to be used for celebration of marriages that violated the beliefs of the religious community.

[1160] *TWU* ONCA 2016, *supra* note 701 at para 119.

[1161] Further, it must be pointed out that to suggest that the law societies have a duty to protect "the values of equality and human rights" which precludes them from accrediting TWU is to imply that religious beliefs are not compatible with equality or human rights/dignity. That view is distorted, and hurtful to religious adherents. It also dismisses the profound contributions of religious principles and practices to law, democracy, and civil rights. As was observed by the BCCA, "the language of 'offense and hurt' is not helpful in balancing competing rights"; see *TWU* BCCA 2016, *supra* note 478, at para 189.

[1162] It is ironic that only a few weeks before, the SCC released a decision supporting the principle that religious communities are free to decide who can and cannot be a member: *Wall, supra* note 368.

[1163] This is a function of freedom of association. See Derek Ross, "Trinity Western and the Endangerment of Religious Pluralism in Canada" (22 July 2018) online: *The Witherspoon Institute* <thepublicdiscourse.com/2018/07/22222/>.

[1164] *TWU* ONCA 2016, *supra* note 701 at para 188.

[1165] Bruce Pardy, "The Supreme Court's TWU ruling is a cruel joke played on all Canadians," *The National Post* (29 June 2018), online <https://nationalpost.com/opinion/bruce-pardy-the-supreme-courts-twu-ruling-is-a-cruel-joke-played-on-all-canadians>/

desires.[1166] Recently, Chief Justice Richard Wagner referred to the long-held principle that the Canadian Constitution is "like a living tree, it evolves, so that we don't necessarily keep to the strict definition of a word when it was drafted 150 years ago. We look at it against the backdrop of an evolving society with the perspectives, outlooks, moral values of that society, and the context in which the issue comes up at the time the Court is making its decision."[1167]

I suggest, as is evident by *TWU* 2018, that it is not so much Canadian society that has changed,[1168] but the legal community which has changed in its views toward the law's accommodation of religion. Consider, for example, Joseph Arvay's comments, noted above, that as Benchers they were the law.[1169] The SCC agreed with Arvay.

The most obvious problem with identity politics being the basis of law is that politics change. The future is unknown: what is considered to be on the "right side of history" today may not be so tomorrow. Should a new ideology take control, different from the current sexual identity power dynamic, then the law will be forced to follow its new political masters. Liberal democratic pluralism was meant to be a check against the dramatic swings of politics by accommodating, as much as possible, the religious (and other) differences of its citizens. William Galston writes, "liberal democracies rely on cultural and moral conditions that cannot be taken for granted. To remain 'liberal,' however, these regimes must safeguard a sphere in which individuals and groups can act, without state interference, in ways that reflect their understanding of what gives meaning and value to their lives."[1170] The SCC has chosen politics and exclusion rather than jealously guarding a place for difference.

6.3.7.2 The Diminishing Power of Law

Law matters. For peace, order, and good government, it must matter. But it no longer appears to matter as much as the politics of the law. The rule of law has been a bedrock principle of liberal democratic countries.[1171] However, if a court is more concerned with political popularity than the rule of law, then the net effect is that established law will be sacrificed on the altar of political correctness. Hence, in *TWU* 2018 the majority did not allow any legal rule to impede its progress towards the "right" decision of denying TWU a law school.

[1166] Professor Bezanson states "the social and political climate favours extending aspects of the dissenting arguments of Justice L'Heureux-Dubé in that [*TWU* 2001] case in favour of equality [in the *TWU* 2018 case]." See Kate Bezanson, "Reconciling Rights in Tension: Freedom of Religion and Equality in Trinity Western University," online: <https://www.academia.edu/36173486/Reconciling_Rights_in_Tension_Freedom_of_Religion_and_Equality_in_Trinity_Western_University>.

[1167] Wagner, "First News Conference," *supra* note 38.

[1168] Obviously, Canadian society has been leaving Christianity in droves as noted by Clarke & Macdonald, *supra* note 31. My point is that it is the legal community, not simply society at large, whose views have evolved. And when I consider the opposition to TWU's law school bid I observe that it was lawyers and legal academics who were vocal – not the average Canadian.

[1169] LSBC Bencher Transcript, *supra* note 853 at 46.

[1170] William Galston, "Expressive Liberty, Moral Pluralism, Political Pluralism: Three Sources of Liberal Theory," 40 Wm and Mary L. Rev. 869, 907.

[1171] Tom Bingham, *The Rule of Law* (London: Penguin, 2011). The Canadian *Charter* specifically refers to it in the Preamble: "Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law."

6.3.7.3 Stare Decisis

We have come a long way from what one keen observer, in the 1950s, noted was the SCC's penchant to be "bound by its own previous decisions, subject to the meaningless 'exceptional circumstances' qualification."[1172] In other words, it was once rare for the SCC to oppose its previous decision(s). In recent years, the concept has met with criticism and a call to the SCC to loosen *stare decisis's* grip.[1173] The SCC responded with a new test.[1174] Yet, in *TWU* 2018, not only did the SCC feel it was not bound by its *TWU* 2001 decision, it virtually ignored it. The majority did not even bother to take the time to distinguish it or apply its *Bedford* test.

It is ironic, therefore, that after ignoring *TWU* 2001, (not to mention other occasions in the recent past where it overturned its own decisions[1175]) the SCC felt it necessary to repeatedly emphasize that the administrative law analyses in *Doré* and *Loyola* are binding precedents.[1176] Justices Côté and Brown appeared taken aback by the majority's insistence on that point; they observed that the majority could not even change those precedents to clarify who (the decision-maker or the claimant) had burden of proof in the analysis.[1177] It seems that some cases are more binding than others. We are left not knowing why *TWU* 2001 was ignored by the majority in *TWU* 2018.[1178]

6.3.7.4 Constitutional Protection Nullified by Charter Values

TWU is not a state actor – it is a private religious university. TWU is to be protected from state actors' decisions by *Charter* guarantees. Further, it is exempt from the scrutiny of human rights legislation in BC as was noted by *TWU* 2001, not to mention that the rights of religious communities with these beliefs and practices are referenced in the *Civil Marriage Act,*[1179] and are protected from having their charitable status removed in the *Income Tax*

[1172] Andrew Joanes, "Stare Decisis in the Supreme Court of Canada" (1958) 36 Can. B. Rev. 175, 189.
[1173] Neil Guthrie, "Stare Decisis Revisited" (2006) 31 Advoc. Q. 448.
[1174] *Canada (Attorney General) v. Bedford*, [2013] S.C.J. No. 72, 2013 SCC 72, [2013] 3 S.C.R. 1101, at para 42, *per* McLachlin C.J.: "In my view, a trial judge can consider and decide arguments based on *Charter* provisions that were not raised in the earlier case; this constitutes a new legal issue. Similarly, the matter may be revisited if new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate."
[1175] For example, *Carter, supra* note 777, overturned the decision of *Rodriguez v. British Columbia (Attorney General),* 1993 CanLII 75 (SCC), [1993] 3 S.C.R. 519.
[1176] *LSBC v TWU* 2018, *supra* note 14 paras 58, 59, 207.
[1177] *Ibid* at para 313: "the majority's invocation of stare decisis ("*Doré* and *Loyola* are binding precedents") is no answer to good faith attempts in concurring and dissenting judgments to clarify precedent. A precedent of this Court should be strong enough to withstand clarification of who carries the burden of proof."
[1178] CJ McLachlin did briefly reference *TWU* 2001. In *LSBC v TWU* 2018, *supra* note 14, para 122 she recognized parallels between the two cases (referencing freedom of association and freedom of expression) and in paras 149-50 she distinguished *TWU* 2001 from *TWU* 2018.
[1179] *Civil Marriage Act,* SC 2005, c 33, assented to 20 July 2005. See the Preamble where it states unequivocally:

> "WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;
> WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage…"

Act.[1180] Finally, these same views were protected in the SCC's own *Same-sex Marriage Reference*.[1181] The non-discussion of these points by the majority is telling.

So is the Majority's refusal to address the incomprehensible Ontario Court of Appeal decision that TWU's Covenant violated s. 15 of the *Charter*.[1182] As Côté and Brown JJ observed, it is trite law that a private actor cannot violate the *Charter*.[1183] Yet, the majority let the Ontario decision stand without a whisper of contradiction. The majority stated that the use of "*Charter* values" in constitutional interpretation is "[f]ar from controversial."[1184] However, the concurring and dissenting opinions belie that assertion.[1185] If anything, the use of "*Charter* values" is more controversial than ever as a result of *TWU* 2018. Côté and Brown's robust dissent criticized the doctrine which elevates "the idiosyncrasies of the judicial mind" to such an extent that these judicially-imposed "values" limit a constitutionally protected right.[1186] A cursory look at the legal literature makes it indisputable that "*Charter* values" are controversial.[1187] Even the Ontario Court of Appeal has recognized that "*Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application."[1188] This "is particularly acute when *Charter* values are understood as competing with *Charter* rights."[1189]

For all of the reasons that the concurring judgements and the dissent raise, the emphasis on "*Charter* values" is misplaced and worrisome especially for Christian institutions that hold to the same theological beliefs and practices as TWU.

> And s. 3.1 of the Act: "3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom."

[1180] *Income Tax Act* RSC, 1985, c 1 (5th Supp) (6.21): "For greater certainty, subject to subsections (6.1) and (6.2), a registered charity with stated purposes that include the advancement of religion shall not have its registration revoked or be subject to any other penalty under Part V solely because it or any of its members, officials, supporters or adherents exercises, in relation to marriage between persons of the same sex, the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms*."

[1181] See *Same-Sex Marriage*, *supra* note 178, paras 58-59.

[1182] *TWU* ONCA 2016, *supra* note 701, para 115.

[1183] *TWU v LSUC* 2018, *supra* note 14, para 78.

[1184] *LSBC v TWU* 2018, *supra* note 14, para 41.

[1185] *Ibid*, Chief Justice McLachlin, para 115; Justice Rowe, paras 166-175; dissent of Justices Côté and Brown, paras 307-311.

[1186] *Ibid*, para 308.

[1187] For example, see: Audrey Macklin, "Charter Right or Charter-Lite? Administrative Discretion and the Charter", in J. Cameron, B. Berger and S. Lawrence, eds, (2014) 67 S.C.L.R. (2d), 561; Mark S. Harding and Rainer Knopff, "Constitutionalizing Everything: The Role of 'Charter Values'" (2013) 18 Rev. Const. Stud. 141; Iain T. Benson, "Do 'values' mean anything at all? Implications for law, education and society" (2008) Journal for Juridical Science 33 (1): 1-22; Matthew Horner, "Charter Values: The Uncanny Valley of Canadian Constitutionalism" (2014) The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference, 67 at 361.

[1188] *Gehl v. Canada (Attorney General)*, [2017] O.J. No. 1943, 2017 ONCA 319, para 79.

[1189] *Ibid*.

6.3.8 Eureka Moment

As we saw in Kuhn's analysis of scientific revolutions, there comes a point during the crisis stage that there is a "light bulb" moment or an epiphany. Some scientists say their "Ah ha!" moment came while taking a shower – a flash of insight when the scientist connects the dots of the issues at stake. That moment is a recognition that the paradigm itself must be replaced with a new understanding. The old paradigm is obsolete. A new paradigm comes to take its place.

The Supreme Court of Canada's decision on the TWU law school case is the enforcement of the "Eureka Moment" in the legal revolution against the special status of religion in Canadian law that has been brewing for some time. Indeed, one could argue that the Court's two decisions have carried the law well beyond its flash of enlightenment, from speculation to reality: across the Rubicon of religious freedom into a new territory of secular uniformity.

The SCC Majority had a no-holds-barred approach in its pursuit of sexual equality. The Majority did not let any legal rule – including centuries of religious accommodation – stop it in its path to arrive at the "right" decision. There simply was no way it was going to allow a Christian law school with the traditional teaching and practice of marriage to be accredited – to be a legitimate member of the legal fraternity. In time we may expect a further "Eureka Moment" when there will be a widespread recognition of just how disastrous this decision was. Consider the following.

There are a number of obvious and daring omissions in the *TWU* 2018 decisions. First is the SCC's absolute disregard for basic constitutional principles, as highlighted above, as well as its inconsistent application of *stare decisis*. Second, there was no appreciation whatsoever for religious difference on fundamental human life issues as being necessary in a liberal, democratic society.

It seems clear that the SCC was anxious to reach its desired conclusion without the bother of legal impediments. It is my position that this lack of respect for the current law was founded on and facilitated by the Court's recognition that a preponderance of legal academics, practitioners, and law societies had reached a Eureka Moment: religious accommodation in Canada, as it was understood prior to June 15, 2018, was no longer morally acceptable. The Majority concurred.

I will now proceed to explain, based on my research, how this SCC decision was made possible within the framework of the legal revolution against the place of religion. First, the secularization theory that religion would decline with the advancement of education has not materialized, except for the societal elites. Second, the legal profession and the legal academia have shown that there is no room for accommodation of religious practice as the law once stood. Third, the SCC's decisions have confirmed what had been fermenting within the profession for a while – the belief that religion should no longer to be treated as special. The argument will consider the SCC's decision as it relates to public perception, public interest, and the accentuation of harm on the LGBTQ community versus the diminishment of effects on TWU within a framework that favours "*Charter* values" over "*Charter* rights".

6.3.8.1 The Legal Elite In the Secularization Theory

If religion has shown anything over the millennia of human existence, it is that it has staying power. So much so that many have come to recognize that the secularization thesis is no longer persuasive. That theory suggested religion would fade as societies became more

educated – "where secularism gradually displaces religiosity in much the same way that adulthood displaces childhood."[1190] However, that thesis has failed to materialize.

Sociologists such as Peter Berger not only recognized that the secularization theory does not stand up to current reality, but that despite the secularization of society, there are many vibrant religious communities that have successfully resisted secular influence. Indeed, TWU's continued insistence on maintaining its religious identity is a testament to religion's resistance. However, this fact has not yet been picked up by certain segments of society. Berger writes:

> There exists an international subculture composed of people with western-type higher education, especially in the humanity and social sciences that is indeed secularized. This subculture is the principle 'carrier' of progressive, enlightened beliefs and values. While its members are relatively thin on the ground, they are very influential, as they control the institutions that provide the 'official' definitions of reality, notably the educational system, the media of mass communication and the higher reaches of the legal system.[1191]

"What this means," suggests legal scholar Iain T. Benson, "is that when we are dealing with the law and the media we must recognize that these sectors are heavily over-represented by those, such as many Western journalists, judges and lawyers, who have little time for religion at best and actively wish to attack it at worst."[1192]

Lawyer Philip R. Wood argues that as the priest falls in esteem in the West the lawyer rises.[1193] Wood recognizes the foundational role of religion in organizing life on the planet,[1194] but feels its retreat from a public role to a more private character in the West has left a gap. That gap, says Wood, will be best filled by law and lawyers. "The law is the one universal secular religion which practically everybody believes in," he maintains.[1195] It has "no burdensome rituals" like religion. There is no sacrifice; no prostrating before the law or uttering words of devotion or singing of hymns. Further, law has the advantage of changing when necessary and its content, "[i]n ideal conditions", is derived from the "consensus and will of the people."[1196] While law may not offer the consolations of religion it does empower:

> and liberates us and makes it possible for us to do things in peace which otherwise we would never be able to do. It enables us to pursue happiness. It gives us the order and freedom to pursue a greater goal. We control it. The law is our servant not our master. The law at its best is the most important ideology we have.[1197]

[1190] Andrea Paras & Janice Gross Stein, "Bridging the Sacred and the Profane in Humanitarian Life," in Michael Barnett and Janice Gross Stein, eds, *Sacred Aid: Faith and Humanitarianism* (Oxford: Oxford University Press, 2012), 212

[1191] Peter L. Berger, *The De-Secularization of the World* (Grand Rapids; Eerdmans, 1999), 34.

[1192] Benson, "Attack on Western Religions" *supra* note 468 at 11.

[1193] Wood, *supra* note 182.

[1194] "Religions," said Wood, "provided an explanation of the universe and the meaning of life" by answering the question of creation and providing purpose to our lives, a rationale for morality, and codes for "peace with ourselves and with others," *supra* note 182 at 1-2.

[1195] *Ibid* at 3.

[1196] *Ibid* at 4.

[1197] *Ibid*.

6.3.8.2 No Room For Religion in the Legal Inn

During the TWU law school crisis a number individuals from the ranks of practicing lawyers;[1198] the Benchers and staff of the law societies; the law school faculty members; and law students came to a "eureka moment." They have decided that the law's accommodation of religion as currently understood and practiced no longer fits their understanding of how the law ought to operate when traditional religious norms conflict with the new sexual norms. University of Calgary professor Alice Woolley, clearly troubled by the debate, recognized the pros and cons of both sides but decided against religious accommodation, confessing:

> From my own perspective the proposed TWU law school defies satisfactory resolution. I reject the perspective that religious belief obviously justifies this sort of discriminatory practice. At the same time, constraining expressions of human sexuality to monogamous heterosexual marriage is a mainstream religious belief. I see some weight to the argument that freedom of religion protects even bad religious practices. If forced to choose I would pick equality over religious freedom, but in doing so I would recognize the sacrifice of the freedom at the right's expense, and would feel the weight of that loss.[1199]

In short, the law of religious accommodation must be replaced. It is wrong. As LSBC bencher Joe Arvay stated, "I don't recognize that law." The Supreme Court of Canada has now solidified the consensus in the legal profession against religion.

Perhaps the most comprehensive description of the Eureka Moment is contained in the comments of Heather Burchill, Deputy Judge Advocate for the Canadian Forces. In her letter of opposition against TWU to the Nova Scotia Barristers' Society she argued that the legal profession is "the guardian of the law in Canada. … We are bound by the rule of law…. Should we, as a profession, set ourselves above the law, we lose the moral authority to champion for it."[1200]

She contends that TWU's Code "condemns an entire population as 'lesser', as unholy…. Trinity's narrow interpretation of marriage is not shared by many Christians. More to the point, Trinity's narrow definition of marriage is not shared by the highest Court in Canada, nor by our own Provincial Legislature."[1201]

This is fascinating in light of the fact that Parliament, when it passed the *Civil Marriage Act*, went to great lengths to point out that religious groups were entitled to have a different opinion on marriage. And, further the SCC in its Marriage Reference decision was unequivocal in its protection of religious communities that did not agree with same-sex marriage.[1202] Yet Burchill insists:

[1198] Elliot & Elliot, *supra* note 989.

[1199] Alice Woolley, "Equality Rights, Freedom of Religion and the Training of Canadian Lawyers" (2014) 17:3 Legal Ethics, 437-441.

[1200] Email from Heather Burchill to René Gallant (21 January 2014) in Nova Scotia Barristers' Society, "Trinity Western University Submissions" (2014) at 13, online (pdf): <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-10_ExecPkg_TWU_Submissions.pdf> [NSBS Submissions].

[1201] *Ibid*.

[1202] In *Same-Sex Marriage*, *supra* note 178 at paras 58-59, the Court stated:

> It therefore seems clear that state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s.

> Let us not ignore that religion offers one of the few remaining pulpits from which Canadian community leaders can communicate and promote anti-LBGT messages without retribution. Thankfully, there is a separation of church and state in Canada. For this reason, it is contrary to the Charter to harness the resources and influence of our public institutions to impose exclusionary and discriminatory views upon others, to deprive a minority of their rights and privileges – hard earned and for too many, still out of grasp.[1203]

Burchill has confused the legal concept of state neutrality with the American separation of church and state. And she clearly makes the assertion that to accredit an institution is to expend public resources and thereby somehow make the *Charter* applicable to a private organization. This is a dramatical reversal of how our law has worked until now. However, it is this revolutionary thinking that was ultimately accepted by the SCC. Her prescience of the SCC's thinking is noteworthy. She continues:

> Surely the connection between religious intolerance and homophobia is not lost on our profession. The history of exclusion and persecution of sexual minorities is inextricably tied to religious expression. Let me be clear, within the confines the church, and outside a public institution, the faculty are entitled to express their beliefs and practice their religion. However, once they act for the state, or their degree program is accredited by it, the expression of their religious rights cannot be allowed to perpetuate stereotypes and discrimination. … Trinity's application, if accepted by the Federation, would condone religious-based intolerance and discrimination by an accredited law school. This cannot be countenanced. … If they want to be a member of our club, *they will need to play by our rules* – and these include the *Charter of Rights and Freedoms*. I belive [sic] that accepting Trinity's application would strike a blow to the heart of our profession.[1204]

Burchill's presentation reads like a manifesto for those favouring the revolutionary position against the law's historic accommodation of religious practice. By addressing Burchill's outline of grievances with religion and its legal protection I will outline what the opposition to TWU is advocating. It will be shown that their position is not only aggressive, it repudiates the law's accommodation of religion. This repudiation was, as we now know, accepted by the SCC in its TWU decisions. It is remarkable that Kuhn's theory – applied to the legal system on the place of the law's treatment of religion and the revolution that has occurred within the legal community – fits so very well.

2(a) of the Charter. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.

The question we are asked to answer is confined to the performance of same-sex marriages by religious officials. However, concerns were raised about the compulsory use of sacred places for the celebration of such marriages and about being compelled to otherwise assist in the celebration of same-sex marriages. The reasoning that leads us to conclude that the guarantee of freedom of religion protects against the compulsory celebration of same-sex marriages, suggests that the same would hold for these concerns.

[1203] Burchill, *supra* note 1200 at 14.

[1204] *Ibid* at 14-15, emphasis added.

6.3.8.2.1 The Elitism of Law

The familiar line from Shakespeare, "The first thing we do, let's kill all the lawyers,"[1205] has been the inspiration of many jokes. However, contained within that slogan is a deep meaning about the order of society. Dick the Butcher was the wisecracking henchman who spoke this line in favour of Jack Cade who wanted to be king. The point was that if you want to radically change the present order of things you must first deal with the law that keeps all in order. The "guardian" of the law, as Burchill and Shakespeare noted, is the legal profession. Lawyers, while not held in high esteem in some sectors, are necessary. That has given the profession a sense of self-importance.

As Peter Berger noted above, the secularization theory has a strong hold on the legal profession. While Berger notes the secularization theory has proven false, that is not how the legal profession sees it. For them, as is evidenced by their anti-religious attitude toward TWU, religion is a relic of the past and has no place in university campuses – even private religious campuses.[1206] The emotive nature of the arguments against TWU is significant.[1207] Revulsion and ridicule left little room for the rule of law. The legal profession was determined to ensure that no discrimination, as they described it, would be permitted in a law school. To the extent that the law differed, it would have to be changed. The law could never sanction such a law school.

The legal profession was remarkably docile some twenty years ago when the British Columbia College of Teachers locked horns with Trinity Western University over its education degree. There were a few voices of opposition against TWU among the legal academics[1208] but that was it. Perhaps that is not surprising given that the profession was not directly involved – it was an education degree that was contested, not a law degree. However, it does seem peculiar that the legal profession came out so forcefully against TWU's law school proposal when there already existed a 2001 SCC decision on very similar facts. The difference between then and now appears to be, as suggested by the BC and Ontario benchers above, the acceptance of non-traditional sexual norms as evidenced by same-sex marriage.

The 2001 decision was not popular in the legal profession and there was a sense that the SCC ought to revisit it. For instance, Lisa Teryl, legal counsel to the Nova Scotia Human Rights Commission, called on the Nova Scotia Barristers' Society not to approve TWU's law

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[1205] William Shakespeare, *Henry VI*, Part II, Act IV, Scene II, Line 73.

[1206] For instance, Patricia McFadgen of the Nova Scotia Department of Justice described TWU's law school as "institutionalized humiliation of LGBT persons" and expressed her hope that "the lens of time" would show Trinity's religious beliefs to be one of the "absurd relics of history" (email, 5 February 2014 in NSBS Submissions, *supra* note 1200 at 168). Similarly, lawyer Susan McGrath characterized Trinity's admission's policy as "personally abhorrent to most of us in this day and age," in LSUC Convocation, *supra* note 487 at 108.

[1207] As only one of many expressions of horror against TWU, take George Gregory's confession that "I do not know whether to feel disgusted or disheartened when I think that the Law Society of British Columbia may permit TWU to train future lawyers while blatantly indulging its homophobic intolerance," email to LSBC, February 11, 2014, in "LSBC Submissions to the Law Society" at 487.

[1208] Richard Moon, "Sexual Orientation Equality and Religious Freedom in the Public Schools: A Comment on Trinity Western University v. B.C. College of Teachers and Chamberlain v. Surrey School Board" (2003) 8 Rev. Const. Stud. 228 ["A Comment"]; Macdougall, "Separation of Church and Date," *supra* note 214.

school in order to "trigger" TWU's judicial review of the decision leading to a Supreme Court review of its 2001 decision.[1209]

The concept of a Christian law school that maintains a traditional definition of marriage evidently kindled a primordial fear in large sectors of the profession. The spectre of Christian lawyers entering the profession was a clear threat to the present hegemony. As Burchill noted, "If they want to be a member of our club, they will need to play by our rules." This is not unlike the BCCT opposition. Intriguingly, if "our rules" mean the laws of the country, then TWU was in full compliance with the requisite rules. TWU followed the law in this respect: it was entitled to discriminate based on religious practices since it is exempt from BC human rights legislation and further, it is not subject to the *Charter*.[1210] It applied for accreditation to the Federation of the Law Societies of Canada, and despite the opposition it was found not to violate the "public interest."[1211]

However, if "our rules" encompass the profession's ideological leanings, then that is a different matter. Given that Burchill mentions one such "rule" being that "the *Charter of Rights and Freedoms*" is applicable to TWU, even though the 2001 Supreme Court of Canada clearly said it was not – then the professional "club" was outside of the very law it claimed to embody. Therefore, it would be more accurate to conclude that the expectation was not for TWU to follow the rules, meaning the law, but for TWU to accept what many in the legal profession *wanted* the law to be. That interpretation was not consistent with the Supreme Court of Canada in the 2001 case, nor with at least 12 of the 18 superior court judges who heard the TWU law school case.[1212]

With the backing of the Supreme Court firmly in hand, this model of "pushing" or "nudging" the law has now become an acceptable means of "advancing the law." However, the danger of this approach is that it ignores the current status of the law in order to forge ahead with a political (as opposed to a legal) interpretation of the law. The problem, as noted previously, is that politics can change very quickly. And if one political movement can alter the law to suit its agenda, without regard for precedent, there is little to deter another political movement from repeating the process. After all, the last time the SCC dealt with TWU was only 17 years ago – anything is possible 17 years hence given the right machinations. The legal profession may consider itself unique; however, politics, as Dick the Butcher declared, can change all things. The legal profession is an elite profession with the ability to make laws that affects society at large. Unlike educators, the subject of the 2001 case, law graduates may become judges. Judges not only interpret the law, they make law.[1213]

And this legal elitism made it clear that a tiny Christian university was going to have no place in a society that had evolved. In the words of former president of the Federation of Law Societies, John Campion, "It is astonishing to see, when I think of where I was when I went

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[1209] "The Nova Scotia Barristers' leadership may also have the additional benefit of triggering a judicial review by TWU. A judicial review would open up the possibility of the Supreme Court of Canada revisiting its reasoning. The High Court could consider the issues reframed in terms of the preservation of democratic state values of maintaining a separation of church and state for secular activities that conflict with discriminatory religious beliefs." See letter from Lisa Teryl, Legal Counsel, Nova Scotia Human Rights Commission, to Executive Committee and Council Members, in NSBS Submissions, *supra* note 1200.

[1210] *TWU* 2001, *supra* note 26 at para 25.

[1211] "Special Advisory Committee Report," supra note 837 at 19, para 66.

[1212] Being the judges in BC and Nova Scotia.

[1213] See Chief Justice Wagner's assertion that the constitution evolves as society evolves, in "First News Conference," *supra* note 38, also quoted in Chapter 6.

downtown with my father in 1950 compared to today. There is no comparison in terms of the issues of tolerance and diversity, and I don't think we should take even a millimetre step backwards. We can't do it."[1214] The law had to change.

6.3.8.2.2 Legal Academy

A primary source of opposition to TWU's law school proposal was the legal academy.[1215] It was the law deans who first voiced opposition to the Federation and every common law faculty in the country passed resolutions condemning TWU.[1216] One of the key academic voices against TWU has been Professor Elaine Craig of Dalhousie University (in Halifax, N.S.) who wrote two influential papers on the subject.[1217] Her writing is worth focusing on for a number of reasons. First, she is an articulate and influential advocate who exhibits a passionate

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[1214] John Campion, in Transcript, Convocation of the Law Society of Upper Canada, Public Session (24 April 2014), at 70, online (pdf): <https://lawsocietyontario.azureedge.net/media/lso/media/legacy/pdf/c/convocationtranscriptapr242014twu.pdf>.

[1215] Those critical of TWU include: Elaine Craig, "Rejecting Trinity" and "A Reply," *supra* note 793; Dianne Pothier, "An Argument against Accreditation of Trinity Western University's Proposed Law School" (2014) 23 Const. F. 1, 1-8; Sheila Tucker & Emily Snow, "Public Interest and the Trinity Western Law School Trilogy" (2016) 74 Advocate (Vancouver) 539-550; Feinstein & Hamill, "Silencing of Queer Voices," *supra* note 942; Elliot & Elliot, *supra* note 989.

Those sympathetic to TWU include: Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const. Forum 1-14 ["Argument for a Christian Law School"]; Thomas M. J. Bateman, "Trinity Western University's Law School and the Associational Dimension of Religious Freedom: Toward Comprehensive Liberalism" (2015) 66 U.N.B.L.J. 78-116; Mark A. Witten, "Tracking Secularism," *supra* note 566; Diana Ginn & Kevin Kindred, "Pluralism, Autonomy and Resistance: A Canadian Perspective on Resolving Conflicts between Freedom of Religion and LGBTQ Rights" (2017) 12 Religion & Hum. Rts. 1-37; Blair Major, "Translating the Conflict over Trinity Western University's Proposed Law School" (2017-18) 43 Queen's L.J. 175-21; Blair A. Major, "Trinity Western University Law: The Boundary and Ethos of the Legal Community" (2017-18) 55 Alta. L. Rev. 167-198.

[1216] For a sampling of the statements against TWU from the law faculties, see:

Dalhousie University: Letter from Vaughan Black, Chair of Faculty Council, Schulich School of Law, to René Gallant (13 January 2014), online (pdf): http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-24_FacultyCouncil_TWU.pdf [Schulich Faculty Letter];

University of British Columbia: "Motion addressed to Law Society of BC as passed" (January 2014), online (pdf): <http://news.ubc.ca/wp-content/uploads/2014/01/Motion-addressed-to-Law-Society-of-BC-as-passed1.pdf> and Simmi Puri, "BC Law asks B.C.'s Law Society to consider impact of Trinity Western's 'covenant' on LGBT community" (28 January 2014), online: *UBC News* <http://news.ubc.ca/2014/01/28/ubc-law-asks-b-c-s-law-society-to-consider-impact-of-trinity-westerns-covenant-on-lgbt-community/>;

University of Manitoba: Nick Martin, "U of M Faculty Joins Fight Against Christian Law School: Pledge required of students is discriminatory: dean," *Winnipeg Free Press* (25 April 2014), online: <http://www.winnipegfreepress.com/local/u-of-m-faculty-joins-fight-against-christian-law-school-256651921.html>, and Zachary Pedersen, "Manitoba Law School Calls for Action on TWU Covenant," *Canadian Lawyer Magazine* (15 April 2014), online: <https://www.canadianlawyermag.com/legalfeeds/author/na/manitoba-law-school-calls-for-action-on-twu-covenant-5688/>.

[1217] Craig, "Rejecting Trinity" and "A Reply," *supra* note 793. Her work was referenced by a number of groups and individuals against TWU including the BC Humanist Association in its letter to the FLSC (14 August 2013), online (pdf): <http://www.docs.flsc.ca/_documents/TWUBCHumanistAssnAug142013.pdf>; and the CBA letter, *supra* note 832 at 2.

argument; second, her writing covers fairly well the expanse of the positions taken by opponents of TWU; third, her writing was quoted and referred to extensively by a number of anti-TWU individuals and groups. Indeed, many of her arguments resurfaced in submissions to the law societies and then later in court documents. Her later writing was also quoted with approval in the Ontario Court of Appeal decision (one of only two court decisions, prior to the SCC, that decided against TWU).[1218] And, though her writing was not directly referenced by the SCC, the gist of her arguments was ultimately accepted by Canada's highest court.

Craig argued that the Federation should not approve programs that have discriminatory admissions policies "that are antithetical to fundamental legal values." Such institutions "are not competent providers of legal education."[1219]

The Federation took the position that it did not have the authority to review a proposed law school's hiring and admissions policies but only whether the law program was compliant with the national requirement. Craig said that was "insufficient".[1220] If the Federation failed in its duty by "not exercising its delegated authority in a manner that protects the public interest and reflects the academic requirements the law societies have agreed upon," said Craig, "then its authority to approve new programs should be withdrawn."[1221] Otherwise, a law society would be found endorsing a discriminatory law school.[1222] Thus, was outlined a plan of action. If the Federation "failed" by approving TWU then it was up to the individual law societies to conduct their own investigations.

As it turned out, the Federation ultimately did "fail," in the minds of many academics, including Craig, by approving TWU. For Professor Craig, that decision was "disappointing".[1223] The Federations' "recommendation represents a refusal to act in the interests of equality and justice. As lawyers, we lack the courage of the B.C. College of Teachers more than 10 years ago." [1224] Noting the "important moment in Canadian legal history and for the pursuit of justice" she queried whether the law societies would "embrace their commitment to the principles of equality, as did the B.C. College of Teachers" when they decided against TWU in the late 1990s in the *TWU* 2001 case. [1225] This clarion call was heeded by three law societies, The Law Society of Upper Canada (Ontario); The Nova Scotia Barristers' Society, and The Law Society of British Columbia.

Professor Craig argued that TWU's policies "would certainly violate human rights law protections" but for its exemption from such legislation as a religious institution.[1226] She also suggested that it might be unlawful in other jurisdictions, saying this was something that law societies should keep in mind – they could be found to be in violation of their home human rights legislation by approving a discriminatory law school.[1227] Craig's argument was forcefully made by the law societies, including the Nova Scotia Barristers' Society before Justice Jamie S. Campbell.

[1218] *TWU* ONCA 2016, *supra* note 701 at para 134.
[1219] Craig, "Rejecting Trinity," *supra* note 793 at 152.
[1220] *Ibid* at 154-155.
[1221] *Ibid* at 154.
[1222] *Ibid*.
[1223] Craig, "More Courage," *supra* note 852.
[1224] *Ibid*
[1225] *Ibid.*
[1226] Craig, "Rejecting Trinity," *supra* note 793 at 156.
[1227] *Ibid* at 157.

Justice Campbell held that it simply made no sense for the Law Society in Nova Scotia to be concerned about whether a law school in BC would be in violation of human rights legislation in Nova Scotia. "The legal authority of the NSBS cannot extended to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it," said Justice Campbell. He continued, "[t]he extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university."[1228] Campbell's arguments were rejected by the SCC, who declared that the LSUC is "entitled to consider whether accrediting law schools with inequitable admissions policies promotes the competence of the bar as a whole."[1229]

Professor Craig also used the case of Bob Jones University[1230] (BJU) as a comparator to TWU. BJU had a policy that prohibited interracial dating among its students based on its religious beliefs. In 1983, the US Supreme Court refused to recognize a religious exemption for BJU from the Internal Revenue Service's policy that had denied charitable status to BJU because of its discriminatory policy. Professor Craig, and subsequently a number of interveners and academics, claimed that "A religiously based anti-miscegenation policy is analogous to TWU's anti-gay policy."[1231] The Ontario Court of Appeal agreed that BJU was a comparable situation. "TWU, like Bob Jones University," said the court, "is seeking access to a public benefit – the accreditation of its law school. The LSUC, in determining whether to confer that public benefit, must consider whether doing so would meet its statutory mandate to act in the public interest. And like in Bob Jones University, the LSUC's decision not to accredit TWU does not prevent the practice of a religious belief itself; rather it denies a public benefit because of the impact of that religious belief on others – members of the LGBTQ community."[1232]

However, the British Columbia Court of Appeal firmly rejected the BJU comparison. "TWU is not seeking a financial public benefit [like the tax break sought in BJU] from this state actor," said the court.[1233] Instead, "Accreditation is not a 'benefit' granted in the exercise of the largesse of the state; it is a regulatory requirement to conduct a lawful 'business' which TWU would otherwise be free to conduct in the absence of regulation."[1234] There is a practical benefit to TWU from regulatory approval but that is not a funding benefit. The BC court observed, "the reliance on the comments of a single concurring justice in the Bob Jones case is misplaced." Finally, the court did not see the BJU case "as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants."[1235]

The SCC's decision did not directly address the BJU case, though it was raised by the LSBC in its factum[1236] and during oral argument by Justice Gascon[1237] on the first day; and by legal counsel Susan Ursel, representing the Canadian Bar Association, during the hearing on the

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[1228] *TWU* NSSC 2015, *supra* note 775 at para 8.
[1229] *TWU v LSUC* 2018, *supra* note 14 at para 22.
[1230] *Bob Jones University, supra* note 877.
[1231] Craig "Rejecting Trinity," *supra* note 793 at 159.
[1232] *TWU* ONCA 2016, *supra* note 701 at para 138.
[1233] *TWU* BCCA 2016, *supra* note 478 at para 182.
[1234] *Ibid.*
[1235] *Ibid.*
[1236] *Law Society of British Columbia v. Trinity Western University*, 2018 SCC 32 (Factum of the Appellant, SCC No. 37318, at para 199, online (pdf): https://www.lawsociety.bc.ca/Website/media/Shared/docs/newsroom/TWU-factum-appellant-SCC.pdf).
[1237] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 1, 30 November 2017, at 47).

second day.[1238] Although the SCC did not explicitly mention the BJU case, it did frame TWU's policy as being on par with racism, suggesting that "The Covenant singles out LGBTQ people as less worthy of respect and dignity than heterosexual people, and reinforces negative stereotypes against them."[1239] Noticeably, there was no evidence given for those assertions by the Court – nevertheless, the BJU analogy did appear to influence the SCC.[1240]

Professor Craig also argued that the legal context has changed since 2001 as a result of the SCC's decision in *Doré v. Barreau du Québec*.[1241] In *Doré*, the SCC held that administrative tribunals are not to be held to a standard of "correctness" but of "reasonableness" when making decisions in their area of expertise. This means, says Craig, that the 2001 TWU case would be decided differently today; if the SCC had used the reasonable standard test it would have supported the BCCT's decision to deny TWU's teacher training program. Thus, she argues, the Federation could reasonably deny TWU's law school application because of its concerns with TWU's discrimination. Craig points out that "as societal values change, what constitutes a reasonable balance between protecting freedom of religion and protecting against discrimination on the basis of sexual orientation also changes."[1242] Craig believes that today's decision makers are expected to be much more protective of gay and lesbian equality than the decision makers of the past.[1243]

According to Craig, "Freedom of religion would not trump these equality interests as easily as it did when the College of Teachers case was decided." [1244] In other words, the appropriate balance now, as opposed to twenty years ago, would be for religious freedom to yield to the overriding right of equality as defined by the rights advocates. When a religious entity ventures outside its walls of worship and runs institutions like universities that require public accreditation, it must surrender its religious beliefs and practices. There is no private sphere immune from public scrutiny. Craig was prescient: this analysis did persuade the SCC.

In short, Craig argued that the evolution of societal values have reached the point where a religious organization has absolutely no jurisdiction to define for itself what is or is not acceptable behaviour on fundamental human life issues such as marriage. It is curious that the only issue at stake for the critics of TWU was that the school allegedly discriminates against those who engage in sexual activity outside of the traditional one man–one woman marriage. Underlying this criticism is an inability to appreciate what constitutes a diverse society that allows for differences of opinion (and belief) concerning acceptable sexual behaviour. Unlike Professor Robert Wintemute's assertion, as noted below, that in time there will be no need for religious accommodation as religious institutions will "voluntarily" change their views, Craig speaks for those advocates who would see the use of the state as the means to ensure the "appropriate balance". The SCC agreed.

The legal opinion of constitutional lawyer John B. Laskin, commissioned by the Federation, disputed Craig's assertion. Laskin held to the notion that the Supreme Court of Canada continued to apply the same balancing approach of competing rights that it took back

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[1238] *TWU* 2018, *supra* note 14 (Transcript of oral hearing, SCC vol 2, 1 December 2017, at 282).
[1239] *LSBC v TWU* 2018, *supra* note 14 at para 138.
[1240] For a rebuttal of the BJU analogy see: Mary Anne Waldron, "Analogy and Neutrality: Thinking about Freedom of Religion," in Dwight Newman, ed, *Religious Freedom and Communities* (Toronto: LexisNexis, 2016), at 252.
[1241] *Doré, supra* note 833.
[1242] Craig, "Rejecting Trinity," *supra* note 793 at 168.
[1243] *Ibid*.
[1244] Craig, "More Courage," *supra* note 852.

in the *TWU* 2001 case.[1245] The BC Court of Appeal adopted Laskin's opinion on that point as their own when they balanced the two rights and found in TWU's favour.[1246] In a robust manner, Justice Campbell of the Nova Scotia Supreme Court likewise noted that although there has been widespread public acceptance of gay and lesbian rights over the last few decades, that did not render the 2001 case out of step with current legal thought and social values. The case involved not only LGBTQ rights, but also freedom of religion and conscience. Therefore, he concluded:

> The conversation between equality and freedom of conscience has not become old fashioned or irrelevant over the last 14 years, and the Supreme Court's treatment of it can hardly now be seen as archaic or anachronistic. Equality rights have not jumped the queue to now trump religious freedom. That delineation of rights is still a relevant concept. Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus.[1247]

In a review of the case law since 2001, Justice Campbell concluded that "Religious rights have not been marginalized or in any way required to give way to a presumption that equality rights will always prevail."[1248] There remains in the law significant room for religious freedom and religious expression, even if or where that offends secular concerns and equality rights.

However, with the SCC's decision, we now know that indeed religious freedom has been relegated to a mere judicial nod, since religious practices that are deemed offensive are no longer to be tolerated. The law as understood by the Courts in BC and NS and by constitutional expert Laskin has been dramatically altered – just as the legal academics have been demanding.

Finally, Craig asserted that TWU's Community Covenant would not allow the law program to teach the skill of critical thinking, since "Academic staff are required to teach students that the Bible is the ultimate, final, and authoritative guide by which all ethical decisions must be made."[1249] Craig maintains, "To teach that ethical issues must be perceived of, assessed with, and resolved by a pre-ordained, prescribed, and singularly authoritative religious doctrine is not to teach the skill of critical thinking about these issues."[1250]

Dwight Newman, a law professor in Saskatchewan, points out that Craig's argument falls short on three accounts. First, there is scholarly literature examining the development of critical thinking skills among those educated in evangelical Christian environments. Newman observes:

> Some evidence points toward an equal or possibly even greater acquisition of critical thinking skills than in secular environments. Admittedly, sometimes the focus on critical thinking skills in Christian education is to help in the defence of claims against non-Christian challenges, but there are also strong human developmental reasons within Christian traditions for a commitment to critical thinking.[1251]

Second, there are ongoing scholarly conversations within the Christian community about the place of law in private and public life. Third, evangelical scholarly work is entirely

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[1245] Laskin Memo, *supra* note 905 at 8.
[1246] *TWU* BCCA 2016, *supra* note 478 at para 159.
[1247] *TWU* NSSC 2015, *supra* note 775 at para 196.
[1248] *Ibid* at para 200.
[1249] Letter from Elaine Craig to Rene Gallant (5 February 2014) at 11, in NSBS Submissions, *supra* note 1200 at 65.
[1250] *Ibid*.
[1251] Dwight Newman, "Argument for a Christian Law School," *supra* note 1215 at 4.

consistent with the possibility of engaging with the Bible in a variety of ways within a faith tradition. Newman points out:

> The fact that somebody commences with faith of some sort should not be a basis for excluding that individual from the realm of critical thinking—especially with all the disturbing parallels that this argument has to techniques of dehumanization used in the past with other marginalized groups to legitimate discrimination against them.[1252]

Craig's argument, notes Newman, displays a lack of engagement with the Christian scholarly environment. Further, other scholars suggest that there is, in fact, a lack of critical thinking at secular law schools.[1253]

Newman succinctly describes the robust tradition of critical thinking and animated debate within the Christian tradition and its institutions regarding biblical interpretation and the applicability of faith to current moral and legal issues. This reality weakens the suggestion that TWU, being an inheritor of that tradition, is a place where rigid, "pre-ordained, prescribed, and singularly authoritative religious doctrine" is emphasized at the expense of critical thinking. Nothing could be further from the truth.

Professor Craig later retracted the impact of her suggestion by clarifying that she was not saying that all Christian institutions are incapable of providing legal education nor that the Christian worldview is antithetical to critical thinking. Rather, the "specific institutional policies" of TWU, as stated in the Community Covenant and the Statement of Faith, are inconsistent with the ethical duty not to discriminate and with critical thought.[1254] She argued that there is a distinction between other Christian universities, such as the University of Notre Dame in the United States, and TWU. "The distinction, and it is an important one," according to Craig, "is that these institutions do not impose policies that discriminate on the basis of sexual orientation or mandate a statement of faith that is inconsistent with creating an institutional environment consistent with some aspects of the requirements that the law societies have arrived at in accrediting Canadian common law degrees."[1255] This distinction was accepted by the Ontario Court of Appeal.[1256] Given the SCC's emphasis on "TWU's proposed law school *with a mandatory covenant,*"[1257] it would appear that it too sympathized with Craig's position.

What is striking about the academic arguments leading up to the Supreme Court of Canada's decision is their absolute confidence that the law's accommodation of religion as outlined in the *TWU* 2001 case and onward, including the *Reference Re Same-Sex Marriage*, was fundamentally wrong. Those with a different view, including the courts, were not on the right side of history.[1258]

[1252] *Ibid.*

[1253] Carissima Mathen & Michael Plaxton, "Legal Education, TWU, and the Looking Glass" (2016) 75 Supreme Court Law Review (2d) 223. In the abstract it states, "We argue that many of the early criticisms directed at TWU's proposed law school would apply, in some measure, to many or all of its secular counterparts, and that it is inappropriate for critics to hold TWU to a standard to which they are unwilling to hold themselves. Furthermore, there is no reason to think that law graduates would fail to appreciate the force and authority of positive legal norms and doctrines, merely because they were studied from a religious point of view."

[1254] Letter from Elaine Craig to Timothy McGee, Q.C. (1 March 2014), at 12.

[1255] *Ibid* at 13.

[1256] *TWU* ONCA 2016, *supra* note 701 at para 134.

[1257] *LSBC v TWU* 2018, *supra* note 14 at para 27, emphasis added.

[1258] This continues to be the ubiquitous rallying call of those advancing sexual equality. For example, Bramadat, *supra* note 792, at 61, 68 (quoting Frances Mahon, a lawyer for Out On Bay Street, an LGBTQ advocacy group, who supported the Law Society of Upper Canada's decision against TWU: "[The decision] suggests to me [the Law Society of Upper Canada] chose to be on the right side of history"); Elaine Craig,

The academics assumed that discrimination, *ab initio*, is wrong, even in the realm of a private religious university and even if it is lawful. This view was echoed in the Ontario Divisional Court when it proclaimed, "discrimination is still discrimination, regardless of whether it is unlawful."[1259] Remaking the law in the image of radical equality removes space for institutional religious freedom. That is an aggressive stance which met considerable headwind in the Nova Scotia and British Columbia courts but was embraced by the Ontario Courts and the Supreme Court of Canada.

What can be gleaned from this case is that the legal academic world plays a very important role in matters of public policy. Canadian legal scholars have been outspoken and in many respects antagonistic toward TWU. The antagonism was evident in the SCC's decisions.[1260] Additionally, these scholars have had a major influence upon all the decision bodies that addressed TWU's law school proposal. Consider that but for the academic opposition, led by the law deans, the Federation would have dealt with the TWU application as it had done with the previous law school proposals. It would have considered the academic plan in light of the National Requirement[1261] and passed the proposal without controversy. However, the anti-TWU opposition caused the Federation to set up a special committee to deal with the concerns raised about TWU's discriminatory admissions policy. That delayed the accreditation process by a number of months at additional cost.

Yet, it did not stop there. Once the Federation approved TWU the academics called on the law societies to have the "courage" to disregard the Federation's decision and to independently review the proposal. So convinced were they in their cause that they made the bold claim that the accommodation of religion in this case was unjust and that the law societies must lead society by example to change the law. Three law societies accepted that challenge. The taxation on the skills, time and effort of the bureaucratic apparatus of each society had to be immense. It is one thing for larger societies such as Ontario and British Columbia to engage in litigation but for the smaller Nova Scotia Barristers' Society it was obviously too much. The NSBS did not appeal its loss at the Nova Scotia Court of Appeal, perhaps because the cost of such an appeal was prohibitive.[1262]

The common law faculties across Canada joined the chorus and publicly denounced TWU. Reading through their statements, it is evident that the current equality rights paradigm on the campuses of the law schools cannot comprehend a religious university legitimately operating a law school while holding to the traditional view of marriage as part of its admissions criteria. The very concept of such a school goes against everything they stand for, even though their conviction is in direct opposition to the law's accommodation of religion. The Faculty Council of Dalhousie University called on the NSBS to "properly apply a human rights

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"Rejecting Trinity," *supra* note 793 at 170 ("In deciding whether to approve a law degree from TWU, the Federation and its member law societies will need to choose on which side of legal history they wish to stand."). Similarly, Martha McCarthy reminisced that, during her fight to redefine marriage, "[t]here were low moments," but what kept her going was the "knowledge that we were on the side of the angels", in Ellen Vanstone, "Redefining the Family" (2005) Canadian Law. Mag. at 22.

[1259] *TWU* ONSC 2015, *supra* note 776 at para 108.

[1260] Calling the Community Covenant "degrading and disrespectful" was an unfortunate use of terms by the SCC and clearly expressed its uninformed view of what the Covenant was about.

[1261] "National Requirement" (last accessed October 2018), online (pdf): *Federation of Law Societies of Canada* <http://docs.flsc.ca/National-Requirement-ENG.pdf>.

[1262] Nova Scotia Barristers' Society, "Update on the Trinity Western University matter" (15 August 2016), online: *NSBC* <http://nsbs.org/news/2016/08/update-trinity-western-university-matter>.

lens" to refuse TWU approval. They insisted that the religious freedom issues "are outweighed by equality concerns regarding sexual orientation."[1263]

The equality norm has become so comprehensive in legal analysis at Canada's law schools that it allows little room for religious practise. The advancement of equality rights under the Charter in recent years appeared to confirm their presupposition that religion must inevitably fade into the background. However, the TWU law school proposal totally upset the academic worldview. As one "disturbed" and "stunned" professor at the Schulich School of Law wrote, "I … was absolutely blind-sided when the [TWU] report was released."[1264] Not accustomed to the world of private religious universities, the academics assumed that, "Yes, such universities may exist, but they are really anachronisms of a bygone era. We have nothing to fear: they will never reach our level of expertise." Suddenly TWU shows up and presents not only a law school proposal but one that is unique. A proposal that challenges the myopic, theoretically-focused establishment with a curriculum concentrated on practical, legal competence so that its graduates are ready to begin work at a law firm immediately upon graduation. It promises to fill an important gap in legal education – challenging the current law school hegemony.

Though TWU is but a very small institution, its legitimate proposal for a law school, within the context of a Christian environment, was seen as a threat. A threat to the one worldview of equality rights. A worldview that has made no place for serious religious organizations that actually mean what they say. The academic world was quiet while TWU churned out nurses, history teachers and business graduates. However, to produce law graduates who might someday sit on the judicial bench or be eligible for high public offices in government bureaucracy – that was apparently a totally different matter. Religion, that nemesis of equality,[1265] was about to stride in on the legal fraternity. That was a scary proposition for those who see equality as the highest human right. Hence, Claire L'Heureux-Dubé's view that a fundamental right can't be reasonable if it's not compatible equality.[1266] The trump of sexual equality rights at the expense of religious freedom seems just about assured.

6.3.8.3 The Redefinition of Marriage Changes Everything

There is now evidence that part of the "Eureka Moment" for many is the idea that the redefinition of marriage has changed the dynamic so drastically that the law can no longer grant religious accommodation as it once did. This was evident in the oral arguments before the British Columbia Court of Appeal,[1267] where counsel for the LGBTQ Coalition said that if the Law Society of British Columbia accredited TWU it would be complicit in TWU's emphasis on traditional marriage which is "an unconstitutional definition of marriage."[1268] To suggest that heterosexual marriage is unconstitutional is curious to say the least, especially given the

[1263] Schulich Faculty Letter, *supra* note 1216.
[1264] Email from Constance MacIntosh to René Gallant (28 December 2013) in NSBS Submissions, *supra* note 1200 at 153.
[1265] Baines, *supra* note 19.
[1266] Siddiqui, *supra* note 20.
[1267] *TWU* BCCA 2016, *supra* note 478.
[1268] My personal notes at the time of the hearing.

history of marriage in the West.[1269] However, it clearly expresses the extent to which advocates understand what has taken place in the law on marriage.

Gavin MacKenzie, a Bencher with the Law Society of Upper Canada, explained it well when he said:

> I do think that it bears mention that there is probably no issue on which public attitudes have changed more in the last fifteen years or so than the question of public attitudes towards discrimination based on sexual discrimination [sic], and there have been intervening events that may well lead to a different legal conclusion today than was formed by Supreme Court of Canada in the BCCT case when it was decided. Perhaps, most importantly, the enactment in 2005 of the *Civil Marriage Act*, which recognizes the legitimacy of same sex marriage throughout Canada.[1270]

In the minds of those opposed to TWU, the redefinition of marriage was a watershed moment that required the re-evaluation of religious communities that did not accept the new public norm. As Professor Moon insists, public commitment to sexual orientation equality (in public schools) "will involve nothing less than a repudiation of the religious view that homosexuality is sinful."[1271]

6.3.8.4 Is the Enemy the Christian Religion?

To reiterate, the so-called "elephant in the room" in this discussion about religion is the Christian definition of marriage. Christian marriage, as noted in *Hyde* above, is characterised by monogomy and opposite-sex partners. The *TWU* 2018 cases centred around the issue of the heterosexual requirement of TWU's policy. However, the arguments of the anti-TWU groups could as easily been applied to the other Christian requirement of marriage – monogamy. Since marriage was redefined in Canada, the conversation has shifted. What ought to be done to those religious entities which still insist on maintaining the traditional heterosexual definition? Again, as Burchill's manifesto proclaims:

> Trinity's narrow interpretation of marriage is not shared by many Christians. More to the point, Trinity's narrow definition of marriage is not shared by the highest Court in Canada, nor by our own Provincial Legislature.[1272]

However, such a position suggests that there is only one accepted framework through which to view sexual norms: the public (i.e. government-approved) framework. Religion, the academics and legal professionals maintain, must not differ from the "sexular" public. That, of course, means there can be no real religious freedom. One may believe something different only as long as those beliefs are kept "within the confines of the church" and not acted upon.

Religion is viewed, by some TWU opponents, as being "one of the few remaining pulpits" left from which leaders can communicate and promote anti-LGBT messages. Hence, it must be dealt with, especially given the redefinition of marriage. What is particularly problematic for those who hold this position is not so much that religious organizations believe

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[1269] John Witte, Jr., *From Sacrament to Contract: Marriage, Religion and Law in the Western Tradition*, 2nd edition (Louisville, KY: Westminster John Knox Press, 2012).
[1270] Gavin MacKenzie, LSUC Convocation, *supra* note 487 at 27.
[1271] Richard Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation in the Public Schools," in David Rayside & Clyde Wilcox, eds, *Faith, Politics, and Sexual Diversity in Canada and the United States* (Vancouver: UBC Press, 2011), 321 ["Religion and Sexual Orientation in the Public Schools"].
[1272] Burchill, *supra* note 1200 at 13.

in traditional marriage, but that such organizations refuse, within their communities, to accommodate same-sex relationships.[1273] It hardly seems right, according to this perspective, that the public must accommodate religion, but religion does not have to accommodate the public and its norms.

That sentiment was expressed by Peter Rogers, counsel for NSBS. He argued that part of the rationale for the NS Barristers' Society not to accept TWU law graduates was that such refusal would hopefully compel TWU to change its admissions policies. During oral argument he suggested:

> It may induce TWU to make what the Society submits is a very small adjustment to its process that would remove the situation where we now have a new law school coming in that is reserving places, in effect, for heterosexual students and increasing the disadvantages experienced by LGB students.[1274]

The point of refusing TWU's accreditation was to force the university to wake up to modern reality. We now live in a brave new world where anachronistic religious views on sexuality are to be eradicated. As BC Law Society Bencher David Mossop argued, while TWU has a legal right to maintain its community covenant, "it doesn't mean you should do it."[1275] "The present trend in Christian churches is to accept gay marriage," Mossop continued, "it's happened in the Anglican Church." By implication, his message is that TWU will follow suit, given enough time and pressure.

Peter Rogers' view was that TWU only needed to make "a very small adjustment to its process" to fall in line with the public's expectations: simply make the Community Covenant voluntary. However, what appeared to be very small in the eyes of the public was a very big deal to TWU in that it was willing to fight all the way to the Supreme Court of Canada. The Law Society of BC asked TWU whether there could be an amendment to the Community Covenant to bring it more in line with the public norms. TWU responded, "TWU cannot simply disavow those beliefs in the hope or expectation of a positive result from the Benchers and should not be asked to do so."[1276] The Covenant, said TWU:

> is an expression of the religious beliefs of TWU and its community that is necessary for TWU to live out its purposes as a Christian university. It is critical for TWU, as a private religious educational community, to be able to define its important religious values consistent with its biblical beliefs.[1277]

TWU's response was perceived by the anti-TWU group as unreasonable stubbornness, a recalcitrance that should not be accommodated. What is missing from their analysis is the reality that just because marriage was redefined, that did not mean that religious communities

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[1273] As Justice Rowe argued, "the decision of the LSBC does not interfere with the claimants' freedom to believe [in heterosexual marriage]. The claimants remain free to hold this belief;" however, they are *not* free to "impose adherence to their religious beliefs or practices on others who do not share their underlying faith" (*TWU* 2018, at paras 226, 251).

[1274] Peter Rogers, counsel for NSBS, in *TWU* NSSC 2015, transcript *supra* note 477 (Oral argument, 18 December 2014).

[1275] LSBC Bencher Transcript, *supra* note 853 at 21.

[1276] *TWU* BCCA 2016, *supra* note 478 at para 19.

[1277] *Ibid.* It is worth noting that, even though TWU has made the covenant voluntary for students as of August 2018, it is still mandatory for faculty and staff, and the beliefs expressed in the covenant have not been altered. The university remains "a Biblically-based, mission-focused, academically excellent university, fully committed to our foundational evangelical Christian principles." See Robert G. Kuhn, "TWU Reviews Community Covenant" (14 August 2018), online: *Trinity Western University* <https://www.twu.ca/twu-reviews-community-covenant>.

or organizations were required to give up their traditional views and practices on marriage. As noted earlier, this is evident in both the Supreme Court of Canada's decision in the *Same-Sex Reference*[1278] and the *Civil Marriage Act*.[1279]

If the redefinition of marriage meant that religious communities would have to change their beliefs and practices on marriage, then the SCC itself was wrong when it stated:

> state compulsion on religious officials to perform same-sex marriages contrary to their religious beliefs would violate the guarantee of freedom of religion under s. 2(a) of the *Charter*. It also seems apparent that, absent exceptional circumstances which we cannot at present foresee, such a violation could not be justified under s. 1 of the *Charter*.[1280]

Further, the SCC noted that conferring an equality right on one does not take away religious freedom rights from another.[1281]

6.3.8.5 TWU is a State Actor

There is a settled opinion among those against TWU that TWU is a state actor and therefore subject to the state. As Burchill argued:

> Let me be clear, within the confines the church, and outside a public institution, the faculty are entitled to express their beliefs and practice their religion. However, once they act for the state, or their degree program is accredited by it, the expression of their religious rights cannot be allowed to perpetuate stereotypes and discrimination.[1282]

The "elephant in the room," so to speak, with the TWU case is the propriety of a religious community maintaining a traditional sexual norm in its operation of a "public" institution. While there have been other cases that dealt with the right of a religious charity to enforce a lifestyle and faith commitment on its employees, such as Christian Horizons,[1283] the TWU case has gone beyond that. TWU requires not only its employees but also its students—in other words, its "clientele"—to adhere to its strict moral view on sexuality.

This is not unusual. It has been the practice of many religious universities since their inception.[1284] In 2001, the SCC recognized this practice as a part of religious freedom. The SCC

[1278] *Same-Sex Marriage*, *supra* note 178 at para 56.

[1279] *Civil Marriage Act,* SC 2005, c 33, assented to 20 July 200, Preamble, ss 3 & 3.1.

[1280] *Same-Sex Marriage*, *supra* note 178 at para 58.

[1281] *Ibid* at para 46, "The mere recognition of the equality rights of one group cannot, in itself, constitute a violation of the rights of another."

[1282] Burchill, *supra* note 1200 at 14.

[1283] *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105, 102 O.R. 3d 267 [*Christian Horizons*].

[1284] Religious universities do not see themselves as simply peddling knowledge for knowledge's sake but are concerned with educating the individual "for the purpose of illuminating the Divine," Emily Longshore, *Student Conduct Codes at Religious Affiliated Institutions: Fostering Growth* (Master of Education Thesis, University of South Carolina, 2015, UMI 1589324). This is evident in many university codes such as Baylor University's sexual conduct policy, BU-PP 031, wherein it is stated, "Baylor will be guided by the biblical understanding that human sexuality is a gift from God and that physical sexual intimacy is to be expressed in the context of marital fidelity," online: *Baylor University* <https://www.baylor.edu/content/services/document.php?id=39247>. See also Brigham Young University's Honor Code where students are expected to "Live a chaste and virtuous life," where it states: "the Honor Code requires all members of the university community to manifest a strict commitment to the law of chastity. Homosexual behavior is inappropriate and violates the Honor Code. Homosexual behavior includes not only

was able to justify TWU's religious freedom to mean "that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost" because "TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions."[1285]

As a private institution, TWU is exempted, in part, "from the British Columbia human rights legislation and … the *Charter* does not apply."[1286] It was therefore inconceivable, at least within the established legal paradigm, for the SCC to require a section 15 equality rights analysis on the voluntary adoption of a code of conduct in a private institution. Such a position "would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."[1287] In other words, it would be against the legal paradigm of religious freedom to deny TWU its accreditation based on its code of conduct.

Canadian jurisprudence once acted as a jealous mistress, ensuring that religion and religious freedom maintained special status. This was evident in the pre-*Charter* jurisprudence[1288] and was greatly enhanced during the early years of the *Charter* with the elimination of state-imposed religious holy days[1289] and with the accommodation of religious practice in a number of areas including the workplace,[1290] the school,[1291] and condominiums.[1292] The religious paradigm worked well with the *Charter*. However, the paradigm became strained in trying to reconcile religious freedom and human sexuality interests.

When the SCC recognized the constitutional protection of "sexual orientation" as an analogous ground[1293] in section 15 of the *Charter*, although a welcome relief for the LGBTQ community, it resulted in friction between sexual orientation and religion. The drafters of the *Charter* were aware of the anticipated, widespread challenges that the addition of "sexual orientation" as a protected ground from discrimination was going to have. They decided not to include sexual orientation but drafted the language so that the courts would deal with it in due course.[1294]

Over the ensuing years, the SCC has been navigating uncharted waters by trying to juggle three major constitutional principles: protection of religion, protection of sexual orientation, and the constitutional doctrine that there is no hierarchy of rights.[1295] The growing consensus among legal scholars is that the SCC's attempt to balance these interests to date has

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sexual relations between members of the same sex, but all forms of physical intimacy that give expression to homosexual feelings." Online: *BYU University Policies* <https://honorcode.byu.edu/>.

[1285] *TWU* 2001, *supra* note 26 at para 25.

[1286] *Ibid*.

[1287] *Ibid*.

[1288] *Saumur, supra* note 6 at 329 (emphasis added).

[1289] *Big M Drug Mart*, *supra* note 4.

[1290] *Simpson-Sears*, *supra* note 8.

[1291] *Multani*, *supra* note 9.

[1292] *Amselem, supra* note 7.

[1293] *Egan v. Canada*, [1995] 2 S.C.R. 513.

[1294] Barry L. Strayer was Assistant Deputy Minister of Justice under the Pierre E. Trudeau government that brought in the *Charter*. Strayer was instrumental in the design of the *Charter*. He writes, "The addition of the words "in particular" [of s.15] was thought to make the grounds of discrimination open-ended: it left open the possibility that non-enumerated grounds could also be found by the courts in the future, such as sexual orientation and matters on which there was no consensus in 1981." See Barry L. Strayer, *Canada's Constitutional Revolution* (Edmonton: U of Alberta Press, 2013), 265.

[1295] *Dagenais v. Canadian. Broadcasting Corp*., [1994] 3 S.C.R. 835, at 877.

been the equivalent of trying to "square the circle."[1296] This reconciliation attempt has been difficult, and it would appear that the future will not be any easier. The inconsistencies of affirming sexual equality while at the same time respecting religious pluralism without passing judgment on the religious norms of sexuality appear to have come to a head in the TWU law school case.

The SCC was faced with a crucial decision: whether to reject its long-held no-hierarchy principle and allow either equality or religion to trump the other, or to maintain the status quo by protecting both religious freedom and equality rights while recognizing that there will be, by necessity, a palpable dissonance on the views and practices of human sexuality, and that such differences must be respected in a plural and liberal democratic society. This book argues that it is the latter position that makes the most sense going forward.[1297] However, in the end, the SCC decided otherwise by limiting the promise of religious freedom and siding with the equality claim.

[1296] Richard Moon, "Comment," *supra* note 1208 at 283.

[1297] This is precisely the view expressed by the British Columbia Court of Appeal in *TWU* BCCA 2016, *supra* note 478 at para 193: "A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal."