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### '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*'

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**“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*.”**

**Robin Elliot and Michael Elliot\***

**Introduction**

In this paper, we examine the British Columbia Court of Appeal’s holding in *Trinity Western University v The Law Society of British Columbia*<sup>1</sup> (“TWU”) that freedom of religion obliged the Law Society of British Columbia (“Law Society”) to approve<sup>2</sup> Trinity Western University (“TWU”)’s proposed new law school. Our basic thesis is that that holding was wrong, and on many levels. It was wrong in its characterization of the freedom of religion interest invoked by TWU; it was wrong in its assessment of the seriousness of the infringement on freedom of religion resulting from the Law Society’s refusal to approve TWU’s new law school; it was wrong in its characterization of the equality interest of members of the LGBTQ community invoked by the Law Society; it was wrong in its assessment of the importance of that equality interest; and it was wrong in concluding that the balance of the competing interests of freedom of religion and equality in the context in question fell in favour of the former.<sup>3</sup>

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<sup>1</sup> 2016 BCCA 423. The Court of Appeal sat as a panel of five, comprised of Chief Justice Bauman and Justices Newbury, Groberman, Willcock and Fenlon, and the reasons for judgment were authored by “the Court.” Leave to appeal the Court of Appeal’s decision to the Supreme Court of Canada was granted to the Law Society on February 23, 2017. On that same day, the Supreme Court granted leave to TWU to appeal the decision of the Ontario Court of Appeal in the Ontario counterpart to *TWU, Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518, and the two appeals will be heard together.

<sup>2</sup> We use the terms “approve,” “approved” and “approval” to describe the decision-making role of the Law Society rather than “accredit,” “accredited” and “accreditation” because those are the terms used in Rule 2-27(4.) (now Rule 2-54(3)) under the *Legal Profession Act*, S.B.C. 1998, c. 9.

<sup>3</sup> We should note that TWU advanced arguments in this case under s. 2(b) (freedom of expression), s. 2(d) (freedom of association) and s. 15 (right to equality) in addition to its argument under s. 2(a). We will not be dealing with any of these other arguments in this paper. The first two add nothing to the argument under s. 2(a), and the third is clearly without merit. The Court of Appeal referred to “associative rights” on one occasion in its reasons (para. 190), but otherwise limited its analysis to s. 2(a). We should also note that, in addition to TWU, there was an individual

The holding that the Law Society is constitutionally required to approve TWU’s proposed new law school was not, of course, the only holding that the Court of Appeal made. The Court of Appeal made a number of other findings as well. It found that the Law Society has authority under the “public interest” language in the governing provision in its enabling statute, the *Legal Profession Act*,<sup>4</sup> to refuse to approve TWU’s proposed new law school on the basis of the latter’s admissions policy;<sup>5</sup> that the Law Society abdicated its statutory responsibility to base its decision as to whether or not to grant approval on its own balancing of the competing freedom of religion and equality interests by agreeing to be bound by the results of a referendum of its members;<sup>6</sup> that the process that the Law Society followed in making its decision not to approve TWU’s law school did not violate TWU’s right to procedural fairness;<sup>7</sup> that, in accordance with the regime established in *Doré v. Barreau de Quebec (“Doré”)*,<sup>8</sup> the appropriate standard of review for the courts to apply to the Law Society’s decision was reasonableness;<sup>9</sup> that the decision of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers (“TWU #1”)*<sup>10</sup> was not dispositive of the current case;<sup>11</sup> and that the provision of the Covenant

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claimant. However, his claim did not add anything substantive to TWU’s arguments and was not addressed by the Court of Appeal in its *Charter* analysis.

<sup>4</sup> *Supra*, note 2, s. 3 provides as follows:

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

- (a) preserving and protecting the rights and freedoms of all persons,
- (b) ensuring the independence, integrity, honour and competence of all lawyers,
- (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

The Law Society’s power over admission to the profession is found in s. 21(1)(b):

21(1) The benchers may make rules to do any of the following:

....  
 (b) establish requirements, including academic requirements, and procedures for call to the bar of British Columbia and admission as a solicitor of the Supreme Court;

....  
<sup>5</sup> *Supra*, note 1 at paras. 52-59.

<sup>6</sup> *Ibid*, at paras. 60-91.

<sup>7</sup> *Ibid*, at paras. 92-97

<sup>8</sup> [2012] 1 SCR 395, 2012 SCC 12.

<sup>9</sup> *Ibid*, at paras. 117-134. The Court noted, however, at the conclusion of its balancing exercise that, in the context of this particular case, there was only one result capable of satisfying the reasonableness standard (that being, of course, the one arrived at by the Court of Appeal).

<sup>10</sup> [2001] 1 SCR. 2001 SCC 31. The Supreme Court held in that case, in which TWU also relied on s. 2(a) of the *Charter*, that the British Columbia College of Teachers was wrong to have refused to approve the fifth and final year of TWU’s teacher training program. The Court of Appeal’s holding in relation to that case was as follows:

prohibiting members of the TWU community, including students, from engaging in acts of sexual intimacy outside marriage between a man and a woman (sometimes referred to hereafter as the “Prohibition”) discriminates against members of the LGBTQ community. The last of these holdings provides the basis for our examination of the equality interest, and will therefore be the subject of extensive comment. We will not be commenting on any of the other holdings, however, other than to say that we agree with the Court of Appeal that the Law Society has authority under the *Legal Profession Act* to refuse to approve TWU’s proposed new law school on the basis of the latter’s admission policy and that *TWU #1* did not resolve the issue before the Court of Appeal in this case.

Our paper unfolds as follows. First, we examine the freedom of religion claim being advanced by TWU, with a particular focus on the manner in which the interest that TWU is seeking to vindicate in this case under s. 2(a) should be characterized. We devote a good deal of attention to that issue because, in our view, the proper characterization of both that interest and the equality interest of the LGBTQ community being invoked by the Law Society is essential to a fair and proper balancing of those interests. Second, we explain why we say the Court overstated the seriousness of the infringement on freedom of religion that results from the Law Society’s decision. That explanation draws heavily on the characterization of TWU’s religious interest at which we arrive in the first part, but also brings into play a decision of the Supreme Court of Canada that sets out some important guidelines for assessing the seriousness of an infringement on freedom of religion and that the Court of Appeal ignored. Third, we argue that the Court’s analysis of the equality interest not only mischaracterized the nature of that interest but also understated its importance. We conclude by arguing that the appropriate balance to be struck between the freedom of religion and equality interests in this case is one that favours the latter rather than the former.<sup>12</sup>

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“That case concerned the ‘downstream’ effect of the Covenant on students in public school classrooms, particularly whether TWU’s Community Covenant and learning environment might foster intolerant attitudes on the part of its graduate teachers. The issue of access by LGBTQ individuals to the faculty of education was not raised directly” (para. 149).

<sup>11</sup> *Supra*, note 1, at paras. 148-162

<sup>12</sup> There is a voluminous body of commentary on the question of whether or not TWU’s proposed new law school should receive the approval of the law societies in Canada, much of it in the form of submissions to those law societies. Readers interested in following up with some or all of that literature should have recourse to Craig, Elaine, “TWU Law: A Reply to Proponents of Approval, (2014), 37 Dal. L.J. 621, in which cites to much of that literature can be found (see, in particular, footnote 20); another useful source is (2015), 40:2 *Law Matters: The Trinity*

Before undertaking our analysis, we wish to make a few brief preliminary points. The first is that we do not deal in any detail in this paper with the question of whether TWU as a distinct legal entity ought to be permitted to claim a right to religious freedom for itself, or, putting it more broadly, whether freedom of religion extends to claims by institutions. That question has yet to be finally resolved by the Supreme Court of Canada, but it is fair to say, particularly given the recent decision of the three minority judges in *Loyola High School v. Quebec*,<sup>13</sup> (“*Loyola*”), that momentum seems to be building in favour of recognizing an institutional dimension to freedom of religion.<sup>14</sup> We do not deal with the question here because, while it was raised by the Court of Appeal,<sup>15</sup> the Court chose not to decide it, and we therefore have no reasoning on which to comment (although we do note that the Court’s analysis at times did appear to assume such a right,<sup>16</sup> and for that reason ours may at points appear to do the same). Moreover, even if TWU were to be granted an independent right under s. 2(a), it is our view that that would not have any bearing on the result, since the religious interest at stake would be the same. We will simply say here that we are strongly of the view that institutions should *not* be recognized as independent right-holders under s. 2(a).<sup>17</sup>

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*Western University Debate* 40, a special edition of a regular publication of the Alberta Branch of the Canadian Bar Association that contains a broad range of positions on the question.

<sup>13</sup> 2015 SCC 12, at para. 100 (per Chief Justice McLachlin and Justice Moldaver, with Justice Rothstein concurring, holding that an institutional dimension to s. 2(a) should be recognized). The majority judges in that case, writing through Justice Abella, expressly left the question open (at para. 33). It should be noted that the minority judges were partially in agreement with the majority judges in the result.

<sup>14</sup> We note in this regard that, to the best of our knowledge, no member of the Supreme Court of Canada has yet argued that an institutional dimension to s. 2(a) should not be recognized.

<sup>15</sup> *Supra*, note 1, at para. 107.

<sup>16</sup> See in particular para. 168, where the Court of Appeal holds that “TWU’s religious freedom rights as an institution are also significantly impacted by the decision,” a holding it makes despite its earlier statement that TWU only “perhaps” possesses such rights (*supra*, note 1, at para. 107).

<sup>17</sup> Providing a complete explanation of our opposition to recognizing institutions as separate right-holders under s. 2(a) is beyond the scope of this paper. However, we note here that our reasons include concern regarding the powers that an institutional right to freedom of religion would afford to entities which themselves may wield significant authority over individuals, with the result that, far from advancing the cause of individual freedom, such a right may in some cases hinder it. They also include the difficulty of squaring with an institutional right a body of jurisprudence that has interpreted religious freedom on the basis of “a conception of religious belief or commitment as deeply rooted, as an element of the individual’s identity”, a conception which in turn enables an understanding of the harm that it protects against as being the denial of an individual’s “equal worth” (see, in particular, *Loyola*, *supra* at para. 44, quoting Professor Moon’s article “Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality” (2012), 45 U.B.C. L. Rev. 497, at pp. 498-99). Efforts to square such an individualistic understanding of freedom of religion with an institutional right would require conceptual distortions that in our view ought to be avoided in the interpretation of fundamental rights. These distortions are not, we note, limited to those engaged in by the minority in *Loyola* in attempting to set out factors by which to assess an institution’s “sincerity of belief” for the

Secondly, for the purposes of this paper, we use the term “LGBTQ” to refer to those individuals whose equality rights are at issue in the *TWU* case. As others have noted, that term does not capture all individuals who could fall under that rubric. For example, as Saul Templeton has written, it does not account for the impact of approval on the equality rights of intersex individuals.<sup>18</sup> We have confined ourselves to the term “LGBTQ” not because we consider it correct to ignore the rights of such individuals – we do not – but because it appears that the case was argued on the basis of those who fall within the scope of that term, and we recognize that courts are constrained by the argument and evidence put before them.

Finally, we have proceeded on the assumption that our readers will be familiar, at least in a general way, both with the factual origins of the dispute that led to this case and with the litigation to which this dispute has given rise in other provinces, with the result that we have not provided summaries of either here. Readers who lack that familiarity can find detailed summaries of both in the reasons for judgment of the Court of Appeal.<sup>19</sup>

## I. The Freedom of Religion Claim

The Supreme Court of Canada has established a two-part test to determine whether freedom of religion or conscience has been infringed: in the words of Justice Iacobucci in *Syndicat*

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purposes of the first step of s. 2(a)’s analysis (see paras. 136-140). Amongst other things, such distortions run the risk of devaluing the freedom by extending it to institutions for which religious belief cannot be said to form an element of their “individual identity”, and for which being denied the right to act in accordance with that belief cannot be said to impose the sort of personal cost that accompanies the denial of an individual’s “equal worth”. Aspects of these problems were already evident, in our view, in the minority judgment in *Loyola*. In particular, in attempting to overcome the difficulty of determining whether an institution can have “sincere beliefs”, the minority found that the “beliefs and practices of an organization may also reasonably be expected to be more static and less fluid than those of an individual. Therefore, inquiry into past practices and consistency of position would be more relevant than in the context of a claimant who is a natural person” (at para. 140). The notion that individuals’ beliefs are more fluid than those of institutions – if such a comparison is possible – would seem directly contrary to the notion that religious beliefs are “an element of the individual’s identity”, which is premised on the idea that, as Professor Moon writes, it lies “at the core of the individual’s worldview” and is not “simply a choice or judgment she or he has made”. None of this is to say that institutional interests may not further individuals’ interests, or that the exercise of religious freedom does not in many circumstances include a communal element. However, we have not yet encountered a convincing argument as to why the communal element, or the institutional function, cannot be protected through recognition of its importance to the individual interests that they further (a significant amount of relevant scholarship on this topic is referred to in Victor M. Muñoz-Fraticelli and Lawrence David, “Religious Institutionalism in a Canadian Context”, (2015) 52:3 *Osgoode Law Journal* 1049).

<sup>18</sup> Saul Templeton, “Re-Framing the Trinity Western University Debate: Tax, Trans and Intersex Individuals”, (2015) 40:2 *Law Matters: The Trinity Western University Debate* 40, *supra*, note 12.

<sup>19</sup> *Supra*, note 1, at paras. 5 – 47.

*Northcrest v. Amselem*,<sup>20</sup> the case in which that test was first articulated, “the first step ... is for a claimant to demonstrate that he or she sincerely believes in a practice or belief that has a nexus with religion...[and] the second step is to then demonstrate that the impugned conduct ... interferes with the individual’s ability to act in accordance with that practice or belief in a manner that is non-trivial.”<sup>21</sup> The Court of Appeal acknowledged that this test governed the question of whether or not the Law Society’s refusal to approve TWU’s new law school infringed on the freedom of religion of the evangelical Christians who work and study at TWU,<sup>22</sup> but chose, for unexplained reasons,<sup>23</sup> not to apply either branch of it in a manner that reflected the actual language the Supreme Court used in formulating it. While that failure on the Court’s part means that we have had to do some extrapolating in order to fit the Court’s handling of the infringement issue into the language of the test, those extrapolations have not been difficult ones.

We proceed now to examine each branch in turn, starting with the reasoning the Court of Appeal relied upon in reaching the conclusions it did and then explaining why we find that reasoning to be problematic.

### **A. The religious interest at stake**

We begin our look at the Court of Appeal’s reasoning in relation to the first of the two branches with some general comments about the importance in *Charter* cases of ensuring that the interest that underlies a *Charter* challenge – here the religious interest - is accurately characterized. If the characterization of that interest is not accurate, the court will misapply whatever test governs the decision as to whether the impugned governmental action infringes on the right that is said to protect that interest. It will also run the risk of skewing the balancing exercise called for in the

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<sup>20</sup> [2004] 2 SCR 551, 2004 SCC 47.

<sup>21</sup> *Ibid*, at para. 65. We should note here that TWU advanced a separate argument under s. 2(a) based on the principle of state neutrality in matters of religion (see Respondent’s Factum at paras. 144-147). The Court of Appeal chose not to deal with that line of argument, but did not explain why. In our view, the argument is clearly without merit. For example, TWU’s contention that “The Law Society is not being ‘neutral’, but penalizing the TWU community for retaining its religious character” (at para. 147) ignores the fact that the Law Society’s decision relates to an attempt by TWU to *extend* its religious character, not simply to retain it. That decision leaves intact TWU’s existing operations.

<sup>22</sup> *Supra*, note 1, at para. 101. The Court of Appeal used slightly different language in articulating this test (and chose to cite in support of it *S.L. v. Commission scolaire des Chenes*, 2012 SCC 7 and *Hutterian Brethren of the Wilson Colony v. Alberta*, 2009 SCC 37 instead of *Amselem*), but the substance of the test is the same under both formulations.

<sup>23</sup> It is possible that the Court of Appeal was of the view that the more flexible *Charter* review regime established in *Doré*, *supra*, note 8, released it from the obligation to apply the test according to its terms.

event that the court finds that that right has been infringed. For example, in a case involving s. 2(a), if the religious interest is defined more broadly than it should be, there is a real risk that it will be given more weight than it warrants, particularly if the interest on the other side is defined narrowly.

Ensuring that the characterization process results in an accurate definition of the interest at stake requires that it be conducted in a manner that reflects the particular factual context out of which the *Charter* challenge has arisen. The Supreme Court of Canada has made that kind of contextualization an integral feature of its application of the *Oakes* test under s. 1 of the *Charter* when it is assessing the merits of challenges to legislation,<sup>24</sup> and there is no reason to believe that it should not play an equally important role in the kind of proportionality balancing exercise in which courts now engage in the judicial review of administrative decisions that adversely affect a *Charter* right. In fact, one could argue that contextualization should be an even more important feature of challenges to administrative decisions because, at least as a general rule, such decisions are much more likely to be grounded in a very particular, if not unique, set of factual circumstances and relate solely to the reasonability of those decisions within that set of circumstances.<sup>25</sup> For the purposes of the balancing exercise in the *TWU* case, this need for contextualization means that both the freedom of religion interest invoked by TWU and the equality interest invoked by the Law Society need to be defined in a manner that accurately captures the specific context out of which the contest between them arose.

The Court of Appeal's reasoning in relation to the first branch of the test was exceedingly brief. It consisted primarily of short quotations from, and summaries of, evidence that TWU had provided, either to the Law Society or in support of its judicial review application, on the basis of which the Court concluded that “[t]here is little doubt that the freedom of religion ... of at least

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<sup>24</sup> The case in which the call for this kind of contextualization was first made was *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, per Wilson, J. at pp. 1352-1356. See also *Thomson Newspapers Co. v. Canada*, [1998] 1 SCR 877, per Bastarache, J. at para. 87. The need for proper contextualization has been affirmed in a recent freedom of religion case: see *S.L. v. Commission scolaire des Chenes*, *supra*, note 22, at para. 25.

<sup>25</sup> See, for example, *Doré*, *supra*, note 6, in which the Court stated that, “When Charter values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts” (at para. 36); and that “[e]ven where Charter values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant Charter values *on the specific facts of the case*” (at para. 54, emphasis in original).



TWU's faculty and students was implicated by the Law Society's decision not to approve its Faculty of Law."<sup>26</sup> The evidence relied upon by the Court of Appeal in this regard included the following:

"...the Covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians."<sup>27</sup>

"...the Covenant reflects the core teachings of evangelical Christian theology; nothing in it is marginal to evangelical moral concerns: 'It attempts to do nothing more than organize the Bible's directions about how to live as a Christian with regard to many aspects of daily life as individuals and members of a shared community'."<sup>28</sup>

"Codes of conduct are commonly established by evangelical Christians as distinctive moral codes that 'strengthen commitment to the [evangelical Christian] subculture and thus strengthen the subculture'."<sup>29</sup>

"...codes of conduct ... can foster spiritual growth, encourage students toward a life of wisdom and foster an atmosphere that is conducive to the integration of faith and learning."<sup>30</sup>

If one were to convert the essential message conveyed by these passages into "a belief or practice that has a nexus with a religion" in which the Court of Appeal accepted that evangelical Christian members of the TWU community "sincerely believe" – which, for simplicity's sake, we will refer to as the religious interest at stake - one might reasonably formulate that "belief or practice" in something along the following terms: *relying on a biblically grounded Covenant to assist TWU in creating and strengthening a religious community for the evangelical Christians who work and study there that fosters their moral and spiritual growth in an academic setting.*

We believe that such a characterization of the religious interest – or any other characterization that is consistent with the above-quoted passages - is seriously flawed. We say that for a number

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<sup>26</sup> *Supra*, note 1, at para. 102. The Court added that the Law Society had not argued otherwise. We understand that the Law Society had argued before the court below that there was no nexus with religion (see paragraph 138 of the Supreme Court of British Columbia decision, indexed at *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326). It appears, however, to have abandoned that argument before the Court of Appeal.

<sup>27</sup> *Ibid*, para. 103.

<sup>28</sup> *Ibid*.

<sup>29</sup> *Ibid*, para. 104.

<sup>30</sup> *Ibid*, para. 105.

of reasons: (1) it refers to the Covenant as a whole rather than to the single part of it that gave rise to the Law Society's refusal to grant TWU approval; (2) it fails to acknowledge that the Law Society's refusal to approve TWU's new law school would have no impact on the right that evangelical Christians working and studying at that law school would have under s. 2(a) to believe that the Bible considers sinful sexual intimacy outside marriage between a man and a woman, the right that they have to live in accordance with that belief, or the right that they have under s. 2(a) to advocate in support of that belief in their personal dealings with other members of the TWU community – those rights would all remain intact; (3) it fails to acknowledge that TWU's existing admissions policy does not currently limit admission to evangelical Christians, and there is nothing to indicate that it will change that aspect of its admissions policy for its proposed new law school; and (4) it fails to acknowledge that the Law Society's decision relates solely to the proposed new law school and has no effect on the status and role of the Covenant, including the Prohibition, insofar as TWU's current operations are concerned.<sup>31</sup> The theme running through all of these problematic features is the Court of Appeal's failure to ensure that the religious interest was properly contextualized.

### 1. The Covenant

Before we expand upon these problematic features, it is important to examine in some detail the contents of the Covenant itself. That Covenant lies at the heart of the dispute between TWU and the Law Society, and, as such, its provisions and the way in which they operate are integral to the context within which that dispute arose. While the Court of Appeal quoted several passages from the Covenant early on in its reasons for judgment, including parts of the section containing the Prohibition, it made no reference to any of its provisions when it addressed the question of whether or not the Law Society's decision had an adverse effect on freedom of religion. Nor,

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<sup>31</sup> In its factum, TWU argued that the Law Society's decision "could put all of TWU's programs and degrees in jeopardy" (para. 184 of the Respondent's Factum). We do not agree that the Law Society's decision could have such an impact, however. We accept, of course, that if the Supreme Court of Canada rules against TWU on the balancing of interests issue, that ruling might have negative implications for some of TWU's current operations. But any such implications would flow from the reasoning used in the Supreme Court's decision, not from the Law Society's refusal to approve TWU, and it is the latter that is the subject of TWU's judicial review application. That decision concerned only TWU's application for approval of a new law school to an organ of state operating under its own specific statute and mandate and in the particular factual context before it. Moreover, it seems very unlikely that any such implications would extend beyond requiring TWU to remove the language that limits permissible sexual intimacy to opposite-sex couples.

therefore, did it provide any meaningful scrutiny of those provisions. For example, the judgment provided very little if any meaningful information on the scope of the Covenant’s application, the other categories of conduct that it prohibits, or the consequences of breaching those prohibitions.<sup>32</sup> Nor did it compare the Covenant at issue in this case with either the Covenant that was before the courts in *TWU #1* or the codes of conduct at any other Canadian universities. In our respectful view, the Court of Appeal’s failure to incorporate into its analysis of the religious interest at stake in this case such comparisons or a careful reading of the Covenant constitutes a serious shortcoming.

A careful reading of the Covenant reveals the following: the Covenant is comprised of five parts.<sup>33</sup> The first two parts are descriptive in nature. Part I explains the nature of the Covenant, linking it to TWU’s mission as an evangelical Christian institution. It provides that TWU “is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that strives to live according to biblical precepts, believing that this will optimize the University’s capacity to fulfil its mission and

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<sup>32</sup> In fact, the only reference to the consequences of breaching the code of conduct was to a submission by TWU to the Benchers in which it advised that “sexual misconduct” had to this point not resulted in expulsion but had resulted in withdrawal, probation and “occasional” suspension (*supra* note 1 at para. 18). Besides the fact that “sexual misconduct” could refer to any number of ostensible transgressions, the Court of Appeal’s failure to examine either that claim or the powers that TWU reserved for itself in enforcing the Covenant is particularly disappointing when one considers that it clearly premised part of its judgment on the assumption that prospective students will examine the Covenant and its individual terms carefully. After all, the Court found that the discrimination of the Covenant lies in the fact that the “vast majority” of LGBTQ students could not embrace the Covenant’s Community values (at para. 171). The Court evidently expected that those students would be making that decision, not on the basis of abstract references to biblical directions or a community based on shared values, but on what the actual consequences of committing to the Covenant’s terms would be. If those students are expected to read the Covenant carefully to understand the impact of it upon their studies and experience as members of TWU’s community, and the powers that they are ceding to TWU by signing it, there is reason to think that the Court should do the same when assessing the rights of those students in being put to the choice of doing so.

This is especially true because, as we develop later in this paper, the Court of Appeal seems to understand the discrimination at issue only in the indirect sense of dissuading LGBTQ individuals from attending TWU. However, as recent press reports have made clear, LGBTQ students do attend TWU and have faced direct and damaging discrimination as a result (see, in particular, the accounts of the negative experiences of LGBTQ students from TWU on this website: [www.marshillonline.com/featured-articles/breaking-the-silence-together-twu-alumni-on-the-lgbtqi-experience](http://www.marshillonline.com/featured-articles/breaking-the-silence-together-twu-alumni-on-the-lgbtqi-experience), and the recent newspaper article by Bethany Lindsay, “A university’s queer covenant: Is TWU controlling a culture of shame?”, *The National Post*, November 28, 2016, available at <http://www.nationalpost.com/m/wp/news/university+queer+covenant+controlling+culture+shame/12441997/story.html>). The Court of Appeal does not appear to acknowledge this possibility, which is in our view an omission that is difficult to understand, and might have been prevented had it turned its mind to, amongst other things, what the Covenant actually provides for when its code of conduct is breached.

<sup>33</sup> The text of the Covenant is available on TWU’s website at <http://wwwprod.twu.ca/sites/default/files/twu-community-covenant-agreement.pdf>.

achieve its aspirations” and defines the Covenant as “a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond.”

Part II of the Covenant speaks to the importance of TWU’s biblical foundations to the educational community that it is seeking to create. It provides that TWU’s acceptance of the Bible “as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God’s purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled”, and that “TWU envisions itself to be a community where members demonstrate concern for the well-being of others, where rigorous intellectual learning occurs in the context of whole person development, where members give priority to spiritual formation, and where service-oriented citizenship is modeled”.<sup>34</sup>

Part III, which is essentially divided into two sections, is prescriptive. The first section sets out a series of what it describes as Christian values, such as love and modesty, to which members of the TWU community are to commit. Among these commitments is one to “reserve sexual expressions of intimacy for marriage”, but there is no qualifier here that marriage must be between a man and woman. On the face of it, these commitments appear to be enforceable, but the fact that much of the language is of a highly general nature would make enforcement of them very difficult, if not impossible. It is far from clear, for example, how TWU would be able to enforce commitments to “live exemplary lives characterized by honesty, civility, truthfulness, generosity and integrity,” “communicate in ways that build others up, according to their needs, for the benefit of all,” and “exercise careful judgment in all lifestyle choices, and take responsibility for personal choices and their impact on others.” This view is supported by the decision of TWU to include the Prohibition in the second section of Part III; if the first section was intended to be enforceable, providing there that students commit to “reserve sexual expressions of intimacy for marriage” would make the inclusion of the Prohibition in the next section redundant.

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<sup>34</sup> *Ibid.*

The prescriptions set forth in the second section of Part III, however, are clearly intended to be enforceable and form what we understand to be the Covenant’s “code of conduct.” These prescriptions relate to eight categories of conduct that signatories agree not to engage in, such as stealing, use of illegal drugs and the provision at issue here: “sexual intimacy that violates the sacredness of marriage between a man and a woman”. Of the eight categories, three, one of which is the Prohibition, are supported by footnoted references to passages from the Bible; the other five are not. Some of the prohibitions, such as the consumption of alcohol, are limited to conduct that occurs on campus; others, including sexual intimacy outside of marriage between a man and woman, are not.

It is important to note that this code of conduct differs significantly from the code of conduct that was at issue in *TWU #1*. That code of conduct was comprehensive, in the sense that it obliged members of TWU’s community to refrain from *all* practices that are biblically condemned, not simply a few specific ones.<sup>35</sup> The particular practices to which it referred were, by their terms, designed to serve merely as examples, rather than to be exhaustive, and included practices that the current version does not prohibit, such as abortion<sup>36</sup> and involvement in the occult. Notably,

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<sup>35</sup> The relevant passage, as quoted by the Supreme Court of Canada in *TWU #1*, *supra*, note 10, at para. 4, read:

“REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED. *These include but are not limited to* drunkenness (Eph. 5:18), swearing or use of profane language (Eph. 4:29, 5:4; Jas 3:1-12), harassment (Jn 13:34-35; Rom. 12:9-21; Eph. 4:31), all forms of dishonesty including cheating and stealing (Prov. 12:22; Col. 3:9; Eph. 4:28), abortion (Ex. 20:13; Ps. 139:13-16), involvement in the occult (Acts 19:19; Gal. 5:19), and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography (I Cor. 6:12-20; Eph. 4:17-24; I Thess. 4:3-8; Rom. 2:26-27; I Tim. 1:9-10). Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.” (emphasis added)

<sup>36</sup> The commitments in the first section of Part III include one to “treat all persons with respect and dignity, and uphold their God-given worth from conception to death.” However, abortion is not included in the list of prohibited acts. The Law Society and the intervener West Coast LEAF argued in their respective facta that that commitment infringed women’s right to equality. In its reply factum, TWU did not state that this commitment was enforceable; instead, it stated that “[t]here is no evidence as to how TWU interprets or applies the provision of the Covenant that community members ‘treat all persons with respect ... from conception to death,’ other than as a general requirement to ‘treat all persons with dignity, respect and equality, regardless of personal differences.’ Nor is there any evidence that, within the TWU community, this has ever been applied to reproductive choices. West Coast LEAF is speculating and stereotyping evangelical Christians.” (para. 67 of the Respondent’s Reply Factum). We have to say that we find TWU’s response to this argument very curious. TWU’s argument in favour of maintaining the Covenant is that it intends the provisions of the Covenant to govern the conduct of its members. That argument is plausible only insofar as its members, prospective and current, understand how TWU interprets and applies those provisions. To place the onus on an intervener to adduce evidence as to TWU’s interpretation of its own Covenant –

it also banned “homosexual behaviour”, which potentially encompasses a great deal more conduct than “sexual intimacy” outside of marriage between a man and woman. We do not know why TWU made these changes to the more expansive and biblically grounded 2001 version of the Covenant,<sup>37</sup> which amounted to abandoning a significant amount of conduct that TWU presumably still considers to be contrary to biblical teachings. But we have to assume, given the evidence that it adduced in the current case, that the inclusion of the comprehensive range of prohibited forms of conduct is no longer seen by TWU to be necessary to its ability to establish the kind of community it wishes to establish; TWU can establish such a community even if it accepts a variety of conduct that it would consider to be contrary to biblical teachings. Although the lower court quoted from the 2001 version, the Court of Appeal made no reference to the differences between the two iterations of the Covenant. In fact, on the only occasion on which it mentioned the two together, it said – mistakenly, in our view - that the new Covenant was “effectively the same covenant” as the old one.<sup>38</sup>

One of the striking features of this list of prohibitions is that, with the exception of the Prohibition, the categories of prohibited behaviour map closely onto those which one would expect to find in the code of conduct of any modern university, religious or secular. This can be

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a question on which TWU would be the authority and the answer to which TWU would presumably wish to share in order for the Covenant to perform the role that TWU claims for it – seems unhelpful to say the least, particularly when it pertains to a matter as important as abortion. Nevertheless, trusting that TWU would have made it clear if it did intend to prohibit abortion, we have taken TWU’s position on this provision at face value and accepted that TWU does not prohibit, and would not punish, abortion. That is consistent as well with our understanding of TWU’s decision to remove reference to abortion from the list of prohibitions in the second section of Part III; it is also consistent with what appears to have been the Court of Appeal’s understanding of this question, as the Court did not address the arguments related to the impact on women’s equality rights, focusing solely on the equality rights of LGBTQ individuals.

<sup>37</sup> The TWU website includes a document headed “Community Covenant Agreement: Frequently Asked Questions” that contains information about the triggering event that led to the overhaul of the earlier Covenant (a decision of the President of TWU in 2008); the process that was followed in redesigning its contents (the establishment of a joint student, faculty, and staff committee that conducted extensive research and consulted with a range of internal and external stakeholders and then drafted a new version that was eventually approved by the University Policy Council); the main differences between the two documents (although only in the most general terms); the rationale for replacing the complete prohibition against the use of alcohol and tobacco with two new prohibitions, one against “the use or possession of alcohol on campus or at any TWU sponsored event” and the other against drunkenness anywhere (which includes reference to the fact that 70% of TWU’s student body expressed the desire to have this change made); and the possibility of future changes being made to it (clearly anticipated, given that the Covenant was to be reviewed after one year following implementation and every 3 years thereafter). But it does not explain why the list of prohibited forms of conduct was cut back so dramatically, apart from an acknowledgement that “TWU today exists in a different world from 1962 or even 1985 when TWU became a full-fledged university.” (The text of this document is available on TWU’s website at <https://www.twu.ca/office-president/twu-community-covenant-agreement>.)

<sup>38</sup> *Supra.*, note 1, at para. 148.

seen when TWU's list is set against that found in the student code of conduct that the University of British Columbia ("UBC") currently uses (which we have done in Appendix A to this paper).<sup>39</sup> For example, TWU's prohibition against "harassment or any form of verbal or physical intimidation, including hazing," is matched by UBC's prohibition against "physically aggressive behavior, assault, harassment, intimidation, threats or coercion." And TWU's prohibition against "stealing, misusing or destroying property belonging to others," is matched by UBC's prohibition against "taking without authorization, or misusing, destroying, defacing, or damaging University property or property that is not their own, or information or intellectual property owned by the University or by any of its members." To a very significant extent, therefore, the exclusively religious nature of TWU's code of conduct can be said to lie in a very small number of its provisions, the Prohibition prominent amongst them.

Part IV of the Covenant highlights areas, such as "self-care" and the use of drugs, tobacco and alcohol, which it says require "careful discernment and sensitivity," but beyond that general injunction does not impose specific obligations upon students. Finally, Part V provides that the Covenant applies to administrators, faculty, staff and students; that these individuals may be held accountable for its breach through disciplinary action by the university; and that, "[u]nless specifically stated otherwise, the Covenant and its prohibitions apply "both on and off TWU's campus and extension sites". Crucially, as indicated above, Part V also provides that "TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity".

By virtue of Part V, the Prohibition's placement in the second section of Part III of the Covenant means that TWU has the right to impose discipline for its breach. The Covenant itself, however, does not provide any details on what such discipline might entail. That information is found in the university's "Student Accountability Policy".<sup>40</sup> Like the Covenant, this policy is composed of multiple parts. Some of those parts explicitly reflect the evangelical Christian mission of the university. For example, the introductory section explains that "the goal of the accountability

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<sup>39</sup> The UBC student code of conduct is available on UBC's website at <http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,54,750,0>.

<sup>40</sup> The text of the "Student Accountability Policy" is available on TWU's website at <https://www.twu.ca/student-handbook/university-policies/student-accountability-policy>.

process is to contribute to both the student’s personal and spiritual growth,” in part through “prayerfully and objectively assess[ing] what has occurred and indicat[ing] to the student what violation(s) has (have) been committed.” And the section entitled “Accountability Procedures” begins with the words “[i]n Christian love, respect and responsibility, students are encouraged to seek resolution when tension, misunderstanding, conflict, failure or disagreements have fractured a relationship”. However, in the section entitled “Possible Accountability Actions” the Christian emphasis is less apparent. Although the less severe forms of punishment, such as “Miscellaneous Consequences” and “Conduct Accountability,” could conceivably be tailored to the evangelical Christian values of TWU, the more serious forms, such as probation, suspension and expulsion, are the same as those employed by secular universities and would have a similar impact on students’ studies and future regardless of whether the motivation underlying their imposition is a Christian one.<sup>41</sup>

The Accountability Policy also provides the probable level of discipline for particular categories of wrongdoing. In the case of “sexual misconduct”, which would include breach of the Prohibition, the policy indicates that a first time offence is likely to be subject to short-term suspension, the second harshest category of discipline, which the policy states will prevent students from attending classes or university events, and impact matters such as financial aid and participation on athletic and drama teams. According to the policy, long-term suspension and expulsion are also possible, and in the case of repeat breaches, likely.

## 2. Problematic features of the Court of Appeal’s understanding of the religious interest

We turn now to expand upon each of the four problematic features of the Court of Appeal’s understanding of the religious interest at stake outlined above. Permitting TWU to rely on the Covenant as a whole in the Court’s characterization of that religious interest was clearly a mistake. The Law Society’s objection to the Covenant was not to the Covenant as a whole; it was limited to the discriminatory provision that prohibits “sexual intimacy” outside “marriage between one man and one woman.” The Law Society took no issue with the rest of the Covenant, and there is every reason to believe that it would have approved TWU’s new law school if the

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<sup>41</sup> See, for example, section 5 of UBC’s Student Code of Conduct, *supra*, note 39.



Covenant had omitted that one provision.<sup>42</sup> If the definition of TWU’s religious interest for the purposes of this case is going to accurately reflect what was actually at issue, as it should, it must reflect this critically important aspect of the Law Society’s decision. It is not the religious value of the entire Covenant to the evangelical Christians at TWU’s law school that is at issue; it is the religious value of retaining within the Covenant the prohibition against sexual intimacy outside marriage between a man and a woman.<sup>43</sup>

It is also important for the purpose of understanding the religious interest at stake to acknowledge that the Law Society’s refusal to approve TWU’s new law school leaves untouched the rights that evangelical Christians working and studying at the law school would have under s. 2(a) to believe that sexual intimacy outside a marriage between a man and a woman is sinful, to conduct themselves in a manner that is faithful to that belief, and to express support for that belief in their personal dealings with others, including non-evangelical Christians. It is only the power that the Covenant gives TWU to discipline members of the law school community who engage in acts of sexual intimacy outside such a relationship that would be adversely affected.

Thirdly, the Covenant itself makes clear that admission to TWU as a student is not limited to evangelical Christians. It also says nothing to suggest that evangelical Christian students will even be preferred. The relevant passage (found in Part V) provides that “TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University’s Christian identity.” Individuals of other faiths and of no faith are therefore free to apply and will be admitted without reference to their faith or the absence thereof. We are not aware of any evidence as to the percentage of TWU’s students that fall into this category, but it is not unreasonable to assume that it is more than *de minimis*; while there are no doubt many prospective students who are not evangelical Christians who would not feel comfortable in a university that takes an avowedly evangelical Christian approach to teaching, there are no doubt others who would find aspects of the kind of student life that TWU promotes

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<sup>42</sup> See *supra*, note 1 at para. 176, where the Court of Appeal states that “the Law Society was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from ‘sexual intimacy that violates the sacredness of marriage between a man and a woman’.”

<sup>43</sup> We note in this regard that at no point did the Court of Appeal suggest that removal of the Prohibition would alter the essential nature of the Covenant. Given the substantial changes that had been made to the original version of the Covenant, noted above, it is difficult to see how an argument that it would do so could be sustained.

on its website, as well as some of its programs, to be sufficiently appealing to overcome whatever reservations they might have about the teaching. That is much more likely to be true of prospective students who do not see themselves as being the target of the Prohibition than of those who do, but it is at least possible that some LGBTQ individuals, whether by choice<sup>44</sup> or because of external pressures, will agree either to expose themselves to the powers of correction that the Covenant provides to TWU, and the stigma that surely follows from their application, or to keep that part of their identity hidden from view. Regardless of the precise percentage, the presence within the Covenant of this “welcome to non-evangelical Christians” clause means that the TWU community cannot be described as a community of evangelical Christians, or, as the Court of Appeal referred to it towards the end of its reasons, a community of “like-minded persons bound together by their religious principles”.<sup>45</sup> It is more accurately described as a community established by and comprised predominantly of evangelical Christians but intended to include many other people as well, some of them non-religious, some of them adherents to other religions.

It is worth noting in this regard that the executive director for TWU’s proposed school of law, Earl Phillips, has acknowledged in a recent article that the Covenant “is not a statement of faith. It does not require Christian faith or any religious faith; it deals with conduct. Nor is the Community Covenant an affirmation of belief in the Biblical ideals, principles and standards on which the Covenant is based.”<sup>46</sup> The terms of the Covenant itself suggest that TWU is just as content to admit, and form a community with, those who do not adhere to a system of beliefs that teaches that homosexual conduct is wrong, as it is to admit students who do adhere to that system.

Finally, the definition of the religious interest at stake in this case should also take into account the fact that the impugned decision of the Law Society relates solely to the interest that TWU has in extending the reach of the Prohibition in the Covenant into a new educational program that TWU would like to establish. That decision has no bearing on the maintenance and continuing

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<sup>44</sup> We note in this regard that TWU put before the Benchers affidavits from three LGBTQ former students who attested to a positive experience (see para. 125 of Respondent’s Factum).

<sup>45</sup> *Ibid*, at para. 178.

<sup>46</sup> Earl Phillips, “Trinity Western University’s Community Covenant” (2015) 40:2 *Law Matters: The Trinity Western University Debate*, *supra*, note 12, at p. 14.

enforceability of that provision within TWU's existing programs. It is therefore wrong to define the religious interest at stake in terms of the value of the Prohibition within the university's entire operations. It is only the value of that provision within a proposed new law program that is relevant.

We come now to our own formulation of the religious interest that is at stake in this litigation. Taking into account the contextual factors just canvassed, we suggest that that interest should be defined in something along the following lines: *the interest in being able to establish a law school at TWU in which the evangelical Christians who teach, provide staff support and enroll as students there will receive support for their belief that the Bible treats as sinful sexual intimacy outside marriage between a man and a woman, with that support coming from a prohibition against sexual intimacy outside such a relationship that is enforced by the threat of disciplinary measures.*

Replacing the Court of Appeal's understanding of the religious interest at stake in this case<sup>47</sup> with this narrower one does not render suspect the Court of Appeal's conclusion that the Law Society's decision not to approve TWU's new law school engages with the freedom of religion of its faculty, staff and students. Even with a narrower formulation, the conclusion remains intact: the claimants would succeed in having shown that they sincerely believe in a practice or belief that has a nexus with religion. The impact of the change will be felt, as we will see, when we consider the seriousness of the infringement on freedom of religion that results from the Law Society's decision, to which we now turn.

## **B. The Seriousness of the Infringement on Freedom of Religion**

As noted above, the second part of the test established by the Supreme Court of Canada for determining whether or not the state has infringed on freedom of religion requires the claimant to show that "the impugned measure interferes with the claimant's ability to act in accordance with his or her religious beliefs in a manner that is more than trivial or insubstantial." While the Court of Appeal quoted both parts of the test and appeared to acknowledge that it was required to apply

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<sup>47</sup> That formulation can be found in the text following footnote 30, *supra*.

both, it chose not to address the question of whether or not TWU had met that obligation after it held that the Law Society's decision implicated the freedom of religion of TWU's faculty and students. It decided instead to leave the question of the seriousness of "[the interference] with [their] ability to act in accordance with [their] religious beliefs" until it embarked upon the balancing exercise in which it engaged in accordance with the proportionality analysis called for by the Supreme Court of Canada's decision in *Doré*.

It is clear, however, from the approach that the Court of Appeal took to that balancing exercise that it would have concluded very quickly that TWU had met that obligation, because it found that the interference with religious freedom caused by the Law Society's refusal to approve its proposed new law school was "severe".<sup>48</sup> The reasoning relied upon in support of that conclusion was again exceedingly brief. It consisted essentially of the suggestion that the decision of the Supreme Court of Canada in *Loyola High School v. Quebec (A.G.)*<sup>49</sup> offered significant guidance in relation to this inquiry, coupled with the assertion that "[t]he legal education of TWU graduates would not be recognized by the Law Society and they could not apply to practice law in this province".<sup>50</sup> The Court rejected the contention that TWU might still operate a law school even without accreditation because that contention "fails to recognize that the main function of a faculty of law is to train lawyers".<sup>51</sup>

We contend that the Court of Appeal made a serious error in characterizing the interference on freedom of religion as "severe." In our view, that interference should be characterized as minimal, and perhaps even sufficiently minimal to qualify for the label trivial or insubstantial.<sup>52</sup> We say that for a broad range of reasons, which we set out in some detail below. As might be expected, those reasons frequently make use of the narrower formulation of the religious interest at stake for which we have argued above. It is important to note, however, that many of the reasons upon which we rely could also be used to support that same conclusion even if the Court of Appeal's understanding of the religious interest were the correct one.

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<sup>48</sup> *Supra*, note 1, at para. 168.

<sup>49</sup> 2015 SCC 12, [2015] 1 SCR 613. The Court of Appeal referred to *Loyola High School* as "highly relevant to the case before this Court" (para. 122) and as "chart[ing] the course for the Law Society" (para. 134).

<sup>50</sup> *Supra*, note 1, at para. 168.

<sup>51</sup> *Ibid*, at para. 169.

<sup>52</sup> Were it to be held to qualify for this label, TWU's freedom of religion claim would fail without any need to balance that claim against the equality interest of the LGBTQ community.

Our response to the Court of Appeal’s handling of this issue draws on the majority reasons for judgment of Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*,<sup>53</sup> to which, surprisingly, the Court of Appeal made no reference in this part of its reasons.<sup>54</sup> At issue in that case was a challenge to the validity of regulations enacted by the Government of Alberta that imposed on everyone seeking a driver’s licence in that province the obligation to include as part of the licence a photograph of the licence-holder. The challenge was based on the belief by Hutterites that the Second Commandment in the Old Testament prohibits having a photograph taken of oneself. Given that belief, the full Court accepted that the obligation infringed on the freedom of religion of Hutterites. The Court divided, however, on the question of whether or not that infringement could be saved under s. 1, with the majority, writing through Chief Justice McLachlin, holding that it could be.

We draw on the reasons for judgment of Chief Justice McLachlin in that case because they contain a lengthy discussion of the approach that courts should take in assessing the seriousness of an infringement on freedom of religion.<sup>55</sup> That discussion includes both a number of general pronouncements about the manner in which such assessments should be made as well as several passages that in our view have direct relevance to the task of measuring the seriousness of the infringement on the freedom of religion interest invoked by TWU. The statements made by the Chief Justice in those latter passages support, if not require, a finding that that infringement falls on the minimally serious side of the ledger, and nowhere close to being “severe.”

We begin by taking note of some of the general propositions advanced by Chief Justice McLachlin. One is her concession that “[t]here is no magic barometer to measure the seriousness of a particular limit on a religious practice”;<sup>56</sup> another is her assertion that, while it is important

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<sup>53</sup> *Supra*, note 22.

<sup>54</sup> The Court of Appeal did refer to the *Hutterian Brethren* decision (along with the *S.L.* decision) when it set out the two-step framework of analysis for a s. 2(a) claim (*supra*, note 1, at para. 101). The Court’s failure to engage with the *Hutterian Brethren* decision beyond that single citation is all the more strange given that TWU relied on it in support of its s. 2(a) claim (paras. 11 and 20 of the Respondent’s Reply Factum).

<sup>55</sup> *Ibid*, at paras.86-98. We should note that, while we rely on the majority reasons of Chief Justice McLachlin in this case, we do so at the level of principle; we both have reservations at the level of application about the majority’s minimizing of the impact on the communal dimension of the Hutterites’ religious beliefs and practices of requiring them to hire third parties to transport goods and people from the Colony to and from nearby towns.

<sup>56</sup> *Ibid*, at para. 89.

for courts to be attentive when making that measurement to “the perspective of the religious or conscientious claimant, ... that perspective must be considered in the context of a multicultural, multi-religious society where the duty of state authorities to legislate for the general good inevitably produces conflicts with individual beliefs.”<sup>57</sup> Finally, she says that it is incumbent on courts to “evaluate the degree to which the limit actually impacts on the adherent,”<sup>58</sup> which is followed by the statement that “the seriousness of a particular limit must be judged on a case-by-case basis.”<sup>59</sup>

Chief Justice McLachlin does not provide any general categories under which the “actual impact” of the impugned measure can or should be assessed. But given the criteria that she identifies in the passages on which we rely below, we think it helpful to think in terms of two broad categories of factors: one is the nature of the infringing measure, the other the nature of the religious interest at stake. Our reasons for objecting to the Court of Appeal’s conclusion that the infringement on freedom of religion in the *TWU* case was “severe” have been grouped under these two headings. After setting out these reasons, we explain why we disagree with the Court of Appeal’s view that the decision in *Loyola High School* provided support for that conclusion.

### 1. The Nature of the Infringing Measure

The first set of passages in Chief Justice McLachlin’s reasons for judgment in *Hutterian Brethren* on which we rely draws a distinction that has direct relevance to assessing the seriousness of the infringement of freedom of religion in the *TWU* case. That distinction is between state action that either directly compels or prohibits a religious practice and state action that negatively impacts a religious practice by denying a benefit. The passages are these:

“Cases of direct compulsion are straightforward. However, it may be more difficult to measure the seriousness of a limit on freedom of religion where the limit arises not from a direct assault on the right to choose, but as the result of incidental and unintended effects of the law.”<sup>60</sup>

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<sup>57</sup> *Ibid*, at para. 90.

<sup>58</sup> *Ibid*.

<sup>59</sup> *Ibid*, at para. 91.

<sup>60</sup> *Ibid*, at para. 94..

“The *Charter* guarantees freedom of religion, but does not indemnify practitioners against all costs incident to the practice of religion. Many religious practices entail costs which society reasonably expects the adherents to bear. The inability to access conditional benefits or privileges conferred by law may be among such costs.”<sup>61</sup>

“The law does not compel the taking of a photo. It merely provides that a person who wishes to obtain a driver’s licence must permit a photo to be taken for the identification data bank. Driving automobiles on highways is not a right, but a privilege.”<sup>62</sup>

As will quickly be appreciated, the first two passages amount to general propositions, while the third applies those propositions to the particular circumstances of that case.

It seems clear from these passages, particularly when they are read in the context of the entire discussion of how courts should assess the seriousness of an infringement of freedom of religion and its application to the facts of that case, that the majority in *Hutterian Brethren* considered it relevant to ask whether the infringement is of a coercive nature, in which case it will very likely be adjudged more serious, or, by contrast, of a denial-of-benefit nature, in which case it will very likely be adjudged less serious.<sup>63</sup>

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<sup>61</sup> *Ibid*, at para. 95. The next sentence in this passage reads: “A limit on the right that exacts a cost but nevertheless leaves the adherent with a meaningful choice about the religious practice at issue will be less serious than a limit that effectively deprives the adherent of such a choice” (*ibid*). In our view, the proposition articulated in this sentence was premised on the assumption that the religious practice at issue was viewed by the adherent as an obligatory one (a valid assumption in *Hutterian Brethren*, where the practice was not having one’s photograph taken): the question in such a case is whether or not there is a reasonable way in which the adherent can achieve his/her secular objective without having to violate that obligation. If there is, then the infringement on freedom of religion will be viewed as less serious than if there is not. In that case, the majority held that a reasonable alternative to people within the community obtaining their own licences in order to transport goods and people from the Colony to nearby towns and back did exist: the community, it said, could “hire people with driver’s licences for this purpose, or ... arrange third party transport.” (para. 97). In cases in which the religious practice is not obligatory – like the *TWU* case, as we argue below – either the proposition has no application, or, if it does, the answer will always be that there is a “meaningful choice” for the adherent: he/she can simply decline to engage in that religious practice.

<sup>62</sup> *Ibid*, at para. 98.

<sup>63</sup> It is true that, in the first of the above passages, Chief Justice McLachlin included in her description of an indirect infringement a reference to “incidental and unintended effects of the law.” It would be wrong, however, to attach too much significance to that descriptor. The infringement with which she was concerned in that case did not have “incidental and unintended effects” on the freedom of religion of the claimants. On the contrary, the government of Alberta knew very well when the impugned regulations under that province’s *Traffic Safety Act* were enacted that they would adversely affect the freedom of religion of Hutterites because those regulations replaced a previous one that had enabled the Hutterites to obtain an exemption from the photo-taking obligation; in other words, the purpose of the impugned regulations was to eliminate the possibility of Hutterites and other Albertans obtaining an exemption. And that knowledge on the part of the government did not prevent the majority from treating that infringement as less serious in nature.

What does this mean for the *TWU* case? In our view, the Law Society’s refusal to approve TWU’s proposed new law school should be assigned to the denial-of-benefit side of the analytical ledger, and the infringement of freedom resulting from that decision should therefore be held to fall on the less serious end of the spectrum. To paraphrase the last of the above passages: *The Law Society is not compelling TWU to operate a law school that permits students to engage in acts of sexual intimacy outside a marriage between one man and one woman. It is merely telling TWU that if it wishes to operate an approved law school, it must respect the right of members of the LGBTQ community to be free from discrimination. Like a driver’s licence, operating an approved law school “is not a right, but a privilege.”*<sup>64</sup>

While, as we have noted, the Court of Appeal made no reference in assessing the seriousness of the infringement on freedom of religion to the reasons for judgment of Chief Justice McLachlin in *Hutterian Brethren*, it did consider the question of whether or not Law Society approval should be considered a benefit. It did so – in its words - “parenthetically”<sup>65</sup> in response to an argument that the Court should be guided in its thinking about the appropriate balance to be struck between the competing freedom of religion and the equality interests it had before it by the judgment of the United States Supreme Court in the case of *Bob Jones University v. United States*.<sup>66</sup> Because we find that response to be unsatisfactory, we think it important to comment on it here.

The *Bob Jones* case had been relied upon by the Ontario Court of Appeal in support of its holding that the decision of the Law Society of Upper Canada not to accredit TWU was a reasonable one. That reliance was grounded in the Ontario Court of Appeal’s adoption of what it saw as a helpful distinction “between state action that interferes with religious belief itself and state action that denies a benefit because of the impact of that religious belief on others.”<sup>67</sup> The benefit being denied in the *Bob Jones* case was the university’s tax-exempt status, and it was

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<sup>64</sup> It is worth noting that TWU at least tacitly accepted that Law Society accreditation amounts to a “benefit” in one of its submissions to the Federation of Law Societies: “The denial of approval of TWU’s School of Law application because of the Covenant would unquestionably *deny access to an opportunity or benefit* available to students at public institutions based on the religious beliefs of the TWU community.” (p. 13 of May 17, 2013 letter from Kevin G. Sawatsky, Vice-Provost and University Legal Counsel, to the Federation of Law Societies).

<sup>65</sup> *Supra*, note 1, at para. 182.

<sup>66</sup> 461 U.S. 574 (1983)

<sup>67</sup> *Supra*, note 1, at para. 136.



denied “because of [the university’s] discriminatory admissions policy.”<sup>68</sup> The discrimination lay in admitting black students only if they were married,<sup>69</sup> a practice based on the university’s belief that the Bible “forbids interracial dating and marriage.”<sup>70</sup> The IRS had a policy of denying tax-exempt status to educational institutions with discriminatory admissions policies, and the university claimed that application of that policy to it violated the university’s freedom of religion.<sup>71</sup> Chief Justice Burger, speaking for eight members of the United States Supreme Court, acknowledged that, while “[d]enial of tax benefits will inevitably have a substantial impact on the operation of private religious schools,...the Government has a fundamental, overriding interest in eradicating racial discrimination in education...That governmental interest substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”<sup>72</sup>

According to MacPherson J.A., who wrote for the panel of three judges who sat on that Ontario case, the *TWU* case bore a close resemblance to the *Bob Jones* case:

“TWU, like Bob Jones University, 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

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<sup>68</sup> *Ibid.*

<sup>69</sup> The evolution of the university’s policy over time was described by Burger CJ, *supra*, note 63 at p. 580 as follows:

“The sponsors of the University genuinely believe that the Bible forbids interracial dating and marriage. To effectuate these views, Negroes were completely excluded until 1971. From 1971 to May, 1975, the University accepted no applications from unmarried Negroes, but did accept applications from Negroes married within their race.

Following the decision of the United States Court of Appeals for the Fourth Circuit in *McCrary v. Runyon*, 515 F.2d 1082 (1975), *aff’d*, 427 U.S. 160 (1976), prohibiting racial exclusion from private schools, the University revised its policy. Since May 29, 1975, the University has permitted unmarried Negroes to enroll; but a disciplinary rule prohibits interracial dating and marriage” (footnotes omitted).

<sup>70</sup> *Ibid.*

<sup>71</sup> The argument based on freedom of religion was not the primary argument advanced by Bob Jones University (and by a private secondary school that had joined the action started by the university). That primary argument, which consumed most of the Court’s judgment and which was also unsuccessful, was that the IRS had exceeded the authority granted to it under the *Internal Revenue Code* of 1954 in establishing the policy in question. Given that the Court of Appeal found that the Law Society has authority under the “public interest” language of the *Legal Profession Act* to refuse to approve TWU, it is worth noting for our purposes that, in the course of rejecting that primary argument, Chief Justice Burger, speaking for a majority of seven, held that “racial discrimination in education is contrary to public policy” (at p. 595). Freedom of religion is protected by the First Amendment to the U.S. Constitution, the relevant part of which reads: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof...” It was the free exercise clause that the university relied upon in support of its claim.

<sup>72</sup> *Supra*, note 66, at pp. 603-4.

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.”<sup>73</sup>

Unlike the Ontario Court of Appeal, the British Columbia Court of Appeal was not prepared to see approval by the Law Society of British Columbia as a benefit of the kind at issue in the *Bob Jones* case. Its reasoning in this regard, which, we should note, is found not in its assessment of the seriousness of the infringement on freedom of religion, but in its response to the Law Society's argument that approval would have a significant negative impact on the equality rights of members of the LGBTQ community, proceeded as follows:

“We note parenthetically that TWU is not seeking a financial public benefit from this state actor. This is not the tax break sought in *Bob Jones University v. United States*, 461 U.S. 574 (1983), a monetary benefit to which Bob Jones University was not otherwise entitled. 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. While there is a practical benefit to TWU flowing from the regulatory approval, it is not a funding benefit .... Nor do we see *Bob Jones University* as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants.”<sup>74</sup>

We have a number of concerns about this reasoning.<sup>75</sup> The first is that, while it may be true that approval does not in and of itself amount to the granting of a financial public benefit by the Law Society, there can be little doubt that it would have significant financial implications for TWU.<sup>76</sup> And those implications would almost certainly be positive ones, since approval would open the door to the establishment of a new law school in a country in which demand for law school

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<sup>73</sup> *Ibid*, at para. 138.

<sup>74</sup> *Supra*, note 1, at para. 182.

<sup>75</sup> In addition to the concerns mentioned in the following paragraphs, we think it worth noting that, while the Court of Appeal acknowledged early in its reasons for judgment that the Ontario Court of Appeal had found that approval amounted to a “public benefit” (para. 47), it made no reference at any point in its disposition of this issue to that court's treatment of the relevance of the *Bob Jones* case to TWU's circumstances. While the Court of Appeal was obviously not bound by the Ontario Court of Appeal's decision on this point, or by the reasoning used to support it, one would have expected, given the respect customarily shown by the provincial and territorial courts of appeal for each other's decisions, that the Court of Appeal would have engaged with that decision in an open, direct and considered manner.

<sup>76</sup> The force of our argument here is strengthened if TWU decided not to proceed with its plan to establish a law school in the absence of Law Society approval, and there is good reason to believe that that would be its decision (see the following assertion in TWU's Reply Factum at para. 27: “Unless TWU amends or abandons its Covenant, there will be no law school for students to attend....”). TWU took the same position before the Ontario Court of Appeal (see text accompanying footnote 105, *infra*). The argument would still have merit, however, if TWU were to decide to go ahead without that approval, since it is likely that TWU would charge a lower level of tuition then.

places has been sufficiently high in recent years<sup>77</sup> to lead universities in Australia and the United Kingdom to establish special law programs for Canadian students, and expensive ones at that.<sup>78</sup> The likelihood is, in fact, that an approved law school would generate significant revenues for TWU.<sup>79</sup> It is true that the financial benefits that would accrue to TWU if it receives approval would come from the marketplace rather than from the state, but those benefits would still be the product of the action of the Law Society. The distinction that the Court of Appeal seeks to draw between the *Bob Jones* case and *TWU* is far less telling than the Court of Appeal suggests.<sup>80</sup>

We are also troubled by the Court of Appeal's description of approval as "a regulatory requirement to conduct a 'business' which TWU would otherwise be free to conduct in the absence of regulation."<sup>81</sup> It is surely misleading to suggest, as the Court of Appeal's language does, that approval is a pre-requisite to providing legal education at the university level. TWU does not require the approval of the Law Society to establish an educational program that provides instruction in a broad range of areas of the law. Carleton University has not been

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<sup>77</sup> According to evidence cited by the Nova Scotia Supreme Court in its decision on TWU's challenge to the Nova Scotia Barristers' Society decision not to approve TWU's law school, indexed as *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, at para. 80:

"The total number of applications to the 16 schools [of the 18 total common law schools in Canada] was 29,375 in 2011, 28,966 in 2012, and 27,583 in 2013. Most applicants apply to more than one law school and on average, each applicant applies to three. To fill first year law classes, the schools made 6508 offers to candidates in 2011, 6292 in 2012 and 6557 in 2013. The actual number of students enrolled in first year classes at the 16 common law schools in 2011 was 2715, 2720 in 2012 and 2782 in 2013."

<sup>79</sup> Bond University in Australia has two law programs open to Canadian students, the LLB and the JD. Both of those programs are taken over 2 years of continuous study. According to the office for Student Recruitment, in 2017 the tuition fees for the LLB program work out to approximately \$68,300 per year and for the JD program they work out to approximately \$54,000 per year. Leicester University in the United Kingdom offers a 2-year accelerated LLB Senior Status programme (which, according to their office for Student Recruitment and Communications, is the most popular programme for Canadian students) for which the tuition fees work out to approximately \$22,000 per year for students starting in September 2017. (These amounts in Canadian dollars reflect the relevant exchange rates in early March of 2017.)

<sup>79</sup> We note in this regard that TWU's website currently estimates annual tuition and fees for its undergraduate programs to be \$22,800. It seems highly unlikely that the corresponding amount for its law school would be any lower than that; on the contrary, one would expect it to be higher, possibly much higher.

<sup>80</sup> It is worth adding that Bob Jones University did not have to give up money from the state as a result of the outcome of its case; it simply had to pay more money to the state.

<sup>81</sup> The Court of Appeal's use of the term "business" to describe the educational initiative that TWU is seeking to further seems highly inapt, given that TWU is characterizing the impetus behind that initiative very much in religious and educational rather than economic terms. It is also a very odd term for the Court of Appeal to use, given that an important feature of its rejection of the *Bob Jones* case as a helpful authority in this context is its own reluctance to see TWU's initiative in economic terms.

prevented by the absence of professional accreditation from the Law Society of Upper Canada from including a law department within its Faculty of Arts. TWU might complain that such a description of their initiative is inaccurate precisely because it fails to include the element of professional approval that it is seeking. But the addition of that element would have the effect of rendering the Court of Appeal's characterization of approval inapplicable to TWU's circumstances, because TWU would clearly **not** be "free" to establish and run an approved law school in the absence of government regulation; to be an accredited law school *requires* regulation, not "the absence of regulation." It is worth remembering that university-based law schools only came into being in this country after the law societies agreed to accept their graduates on an equal footing with candidates who followed the traditional articling path. In other words, there were no "pre-regulatory" law schools.<sup>82</sup>

The purpose underlying the Court of Appeal's use of this description of approval by the Law Society was presumably to explain why it considered the distinction between a financial benefit and what it terms the "practical benefit" that TWU would receive from approval to be an important one in this context. The fact that we find that description to be problematic, for the reasons just given, means that we also find that explanation to be unsatisfactory. But there is a more telling objection to that explanation, which is that it missed the point of the Ontario Court of Appeal's use of the *Bob Jones* case. The Ontario Court of Appeal did not invoke the *Bob Jones* case to support the narrow proposition that courts should look more favourably on the denial by the state of a *financial* benefit to a person or entity on the ground that a religious practice in which the entity engages causes harm to other members of society than they do on

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<sup>82</sup> See the Final Report of the Task Force on the Canadian Common Law Degree established by the Federation of Law Societies of Canada (October 2009), at pp. 15-16:

"The concept of an approved Canadian law degree developed in large part as a result of the debate in Ontario in the 1940's and 1950's over control of legal education. In 1957 the benchers of the Law Society of Upper Canada agreed that graduates 'from an approved law course in an approved university in Ontario' would meet the academic requirements for entry to the bar admission course. This resulted in the relatively quick development of law schools at Queen's, Western, Ottawa and Windsor, the further development of the law faculty at the University of Toronto, and ultimately the relocation of the original Osgoode Hall Law School to a university setting at York University in 1969."

See also, Pue, W. Wesley, "Law School: The Story of Legal Education in British Columbia" (University of British Columbia Faculty of Law: 1995). As Professor Pue notes, some of the law societies established their own law schools; Osgoode Hall in Ontario is the best known of these. In British Columbia, both Vancouver and Victoria (the latter only briefly) had their own Law Society "law schools" in the early part of the 20<sup>th</sup> century. (at pp. xxvi-xxvii and 44-62).

“state action that interferes with religious belief itself.” It invoked that case to support the broader proposition articulated by Chief Justice McLachlin in *Hutterian Brethren* - that courts should look more favourably on the denial by the state of *any* benefit on that ground than they do on “state action that interferes with religious belief itself.” The B.C. Court of Appeal never addressed the merits of the latter distinction.

The last of our concerns about the Court of Appeal’s handling of this issue relates to the concluding sentence of the above-quoted paragraph, in which it said, “Nor do we see *Bob Jones University* as supporting a general principle that discretionary decision-makers should deny public benefits to private applicants.” We would simply say in respect of that statement that there is nothing in either the *Bob Jones* case or the Ontario Court of Appeal’s reliance on it that could be said to support such a general principle. By the same token, a decision by the Law Society to refuse approval to TWU’s new law school would not support such a principle either.

The fact that the Law Society’s refusal to accredit TWU amounts to the denial of a benefit has to be seen as an important reason for assessing the seriousness of the infringement on freedom of religion at the low end of the spectrum. We say that not only because of *Hutterian Brethren*, but also because it links directly to the fact that the Law Society’s decision had no impact on TWU’s ability to maintain the Covenant for all of its existing programs<sup>83</sup> or on the right of its faculty, staff and students under s. 2(a) to believe that sexual intimacy between homosexuals is sinful, to espouse that belief in their personal dealings with others, and to act themselves in accordance with that belief. Neither TWU nor the evangelical Christians who form part of its community lost any of the rights they currently have as a result of that decision. All of those rights remain intact.<sup>84</sup>

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<sup>83</sup> Subject to the rider noted in footnote 31, *supra*.

<sup>84</sup> The decision of the Saskatchewan Court of Appeal in *Marriage Commissioners Appointed under the Marriage Act (Re)*, 2011 SKCA 3 provides some helpful guidance here. At issue in that reference was the validity of possible amendments to the *Saskatchewan Marriage Act*, S.S. 1995, c. M-4.1, as amended, that would have allowed marriage commissioners in that province to refuse to perform marriages not in accordance with their religious beliefs. Richards, J.A., on behalf of the majority (one judge of the five wrote separately, concurring in the result) said that, although that legislation would authorize commissioners to refuse to perform marriages of various combinations (interfaith, multiracial...), he was going to focus on their refusing to perform same-sex marriages. He acknowledged that, given the expansion of the definition of marriage, there was an infringement on an objecting marriage commissioner's s. 2(a) right in a way that was not trivial or insubstantial; in fact, the infringement was a serious one because, absent the proposed new legislation, refusal by a marriage commissioner to perform a gay or lesbian

## 2. The Nature of the Religious Interest at Stake

The last of the passages from *Hutterian Brethren* that has relevance here is found very near the beginning of Chief Justice McLachlin’s discussion of how courts should assess the seriousness of particular infringements of freedom of religion. It reads as follows:

“Some aspects of a religion, like prayers and the basic sacraments, may be so sacred that any significant limit verges on forced apostasy. Other practices may be optional or a matter of personal choice. Between these two extremes lies a vast array of beliefs and practices, more important to some adherents than to others.”<sup>85</sup>

The language that the Chief Justice uses in this passage suggests that she sees the many possible “aspects of religion” that the courts might be asked to protect under s. 2(a) falling on a broad spectrum based on the importance of the role they play in the lives of adherents. The implication of that suggestion, given the context in which it is made, is that courts are entitled to factor into their assessment of the seriousness of any infringement resulting from state action where on that spectrum a particular “religious aspect” – or, to use the term we have used in this paper, religious interest - falls. State action that adversely affects religious interests falling on the more important end of the spectrum will be held to be more serious than state action that adversely affects religious interests falling on the less important end.<sup>86</sup>

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marriage would mean having to leave one’s job (at para. 65). He then applied the *Oakes* test and said that the matter came down to a question of proportionality. In assessing the seriousness of the infringement on s. 2(a), he invoked the distinction between beliefs and actions, and held that

“the [proposed legislation is] concerned only with the ability of marriage commissioners to act on their beliefs in the world at large. *[It does] not in any way concern the freedom of commissioners to hold the religious beliefs they choose or to worship as they wish. This reality means the benefits flowing from the [proposed legislation] are less significant than they might appear on the surface*” (at para. 93, emphasis added).

<sup>85</sup> *Supra*, note 22, at para. 89.

<sup>86</sup> The Supreme Court of Canada’s approach to measuring the seriousness of infringements on freedom of expression reflects a similar willingness to attach greater importance to some exercises of that right than to others. Hence, the various forms of political expression have been held to lie at the more important end of the freedom of expression spectrum while child pornography, commercial expression and soliciting for the purposes of prostitution have been held to lie at or near the less important end. The Court has come to use the terms “core” and “periphery” as labels to describe the two ends of the spectrum. Neither term carries any independent normative content; they are simply convenient descriptors for conclusions reached on the basis of considerations the Court has come to identify

The critical question, of course, is how courts should go about assessing the relative importance of particular religious interests. Chief Justice McLachlin does not purport to provide a comprehensive answer to that question. She does, however, provide at least a partial answer: it seems clear from the quoted passage that she is of the view that there is a distinction to be drawn between religious practices of an *obligatory* nature and religious practices of an *optional* nature and that, at least as a general rule, limits on the former are to be assessed as more serious than limits on the latter. If that is her view, it follows that one of the considerations that courts called upon to measure the seriousness of a particular limit on s. 2(a) should factor into their analysis is whether or not the religious practice at issue can be said to be obligatory in nature. If the practice is obligatory, then it follows that any infringement on it is very likely to be adjudged to be at the serious end of the spectrum; if it is not obligatory, it follows that any infringement on it is likely to be adjudged less serious.

Chief Justice McLachlin does not tell us how courts should go about answering that question (perhaps because she had no need to in the context of that case, given that she had accepted that the claimants sincerely believed that it would violate their understanding of the Second Commandment to have their photographs taken, and that she was therefore dealing with an obligatory religious (non)practice). However, given the Court's insistence that courts should limit themselves to assessing the sincerity of the claimant's beliefs in defining the contours of the sphere of protection offered by s. 2(a) – that is, in deciding whether or not the practice in question is entitled to be protected under that provision of the *Charter* – it is safe to assume that in cases in which the question is an open one, the answer to it should also turn primarily on the testimony of the claimant. As a general rule, then, if the claimant can satisfy the court that the

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as relevant to assessing the importance of particular exercises of the right. Chief Justice McLachlin makes no mention of the terms “core” and “periphery” in her discussion of the relative importance of particular religious interests, but we see no reason why those terms could not perform the same function as convenient descriptors that they have come to play in relation to freedom of expression. All of that said, we have not used them in this paper.

practice in question is understood by him or her to be obligatory, and that that understanding is sincere, then, unless there is compelling evidence before the court indicating otherwise, the court would be bound to accept that characterization.<sup>87</sup> That said, there will be cases – and in our view, the *TWU* case is one - in which, because of the nature of the particular religious interest the claimant is seeking to vindicate, the question will not be an open one, and it will be clear one way or another that the practice in question is or is not obligatory. In cases of that nature, the testimony of individual witnesses will play a very limited role.<sup>88</sup>

The Court of Appeal did not address the question of whether the religious practice at issue in the *TWU* case is obligatory in nature. Were it to have done so, it would in our view have had great difficulty reaching any conclusion other than that the religious practice that TWU is seeking to vindicate is *not* obligatory. We do not say that because we doubt that evangelical Christians consider it obligatory to conduct their lives at all times in accordance with the principles and

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<sup>87</sup> It is worth noting that the Supreme Court of Canada has had no difficulty accepting, on the basis of exactly such testimony, that the religious practices that claimants have sought protection for in some of the s. 2(a) cases that have come before them were of an obligatory nature – see, e.g., *Syndicat Northcrest v. Amselem*, *supra*, note 20 (erecting a succah at a particular time of the year), *Multani v. Commission scolaire Marguerite-Bourgeoys*, [2006] 1 SCR 256, 2006 SCC 6 (wearing a kirpan) and *Hutterian Brethren*, *supra*, note 22 (not having one’s photograph taken).

<sup>88</sup> We acknowledge that the distinction between obligatory and optional in this context is not a neat and tidy one, and that there will be religious practices that do not clearly fall – or at least are viewed by adherents as not clearly falling – within one category or another. That would be a serious concern if the outcome of freedom of religion cases turned solely on which of the two categories the practice in question was assigned to. But the distinction would not play that role here. In fact, its role would be a limited one. It would function simply as one of a number of factors that courts can take into account in assessing the seriousness of a given infringement (some of which we discuss later in the main body of the text), which itself functions as a preliminary step in the balancing process that will ultimately determine the outcome. As such, if the reviewing court is unable to categorize a particular practice as either obligatory or optional – perhaps because it falls into an amorphous area in between – the result is that this factor ends up serving a neutral role, and hence assists neither party.

We also acknowledge that Justice Iacobucci, in his majority reasons for judgment in *Syndicat Northcrest v. Amselem*, *supra*, note 20 expressed serious reservations about the propriety of judges deciding whether particular religious practices were obligatory or not (see paras. 43-50). Those reservations were expressed, however, in the course of deciding whether or not s. 2(a) of the *Charter* should be understood to protect only those practices that were obligatory, and they led him to conclude that it should not be. And they were based in part on the fear that such a limited understanding of s. 2(a) would require “judicial determinations of theological or religious disputes, or of contentious matters of religious doctrine, [and] unjustifiably entangle the court in the affairs of religion” (at para. 50). The interpretation that we are giving to the above-quoted passage in *Hutterian Brethren* would not result in the scope of s. 2(a) being in any way reduced. Nor, if the courts approach the question to which that interpretation leads in the manner we have described above – that is, if the answer to the question of whether or not a particular practice should be understood to be obligatory or optional turns primarily on the sincerity of the claimant’s belief in that regard – there is little if any need to fear the courts becoming “entangle[d]... in the affairs of religion.” We would add, in respect of the latter concern, that that concern has not stopped the Supreme Court of Canada from getting “entangled ... in the affairs” of Judaism (see *Braker v. Markovitz*, [2007] 3 SCR 607, 2007 SCC 54). (See also the much earlier decision in *Hofer v. Hofer*, [1970] SCR 958, in which the Court was called upon to resolve a dispute between members of a Hutterite community.)



prescriptions articulated in the Covenant (which interest, as we have already noted, was left intact by the refusal of the Law Society to approve TWU's new law school, as was the narrower interest that evangelical Christians at TWU have in being able to conduct their lives in accordance with their beliefs, both as individuals and together, during their time at TWU). Nor do we say that because we doubt the value to the evangelical Christians who work and study at TWU of working and studying in a supportive environment. We say that because none of those interests is the religious interest that TWU is seeking to have the courts protect in this litigation. That interest, as we have argued above, is *the interest in being able to establish a new law school at TWU in which the Evangelical Christians who teach, provide staff support and enroll as students will receive support for their belief that the Bible treats as sinful sexual intimacy outside marriage between a man and a woman, with that support coming from a prohibition against sexual intimacy outside such a relationship that is enforced by the threat of disciplinary measures*. There is nothing in the Bible that TWU has identified, at least to our knowledge, or that we are otherwise aware of, that comes close to suggesting that the pursuit of that interest is in any sense obligatory.<sup>89</sup> In particular, there is nothing in the Bible that we are aware of that suggests that establishing a law school, or authorizing university administrators to discipline students who engage in acts of sexual intimacy outside marriage between a man and a woman, including students who are not evangelical Christians, has the character of religious obligation.

A determination that the religious interest at stake is not obligatory is not, of course, sufficient in and of itself to warrant concluding that that interest is not an important one. There are other criteria that courts can use to assist them in making that assessment, and the application of those criteria could well lead to the conclusion that, even though the interest may not be obligatory, it is nevertheless a very important one. In our view, one of those other criteria is the importance that religious adherents attach to the interest. In this case, evidence of that nature was adduced by TWU, and the Court of Appeal relied upon that evidence in support of its view that “the Covenant is an integral and important part of the religious beliefs and way of life advocated by

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<sup>89</sup> That same conclusion would be reached, we submit, even if one were to accept the Court of Appeal's much broader understanding of the religious interest at stake. That understanding was expressed in terms of *the interest in being able to rely on a biblically grounded Covenant to assist TWU in creating and strengthening a religious community for the evangelical Christians who work and study there that fosters their moral and spiritual growth in an academic setting*. To the best of our knowledge, there is nothing obligatory about the establishment of post-secondary educational institutions that make use of documents akin to the Covenant.

TWU and its community of evangelical Christians.”<sup>90</sup> The problem with that finding is that it was based on evidence that speaks to the importance of a very different religious interest than the one that is at stake in this case. And that means, of course, that it has very little relevance to a proper assessment of the real interest at stake. To make a proper assessment of the importance of that interest, one has to look to other kinds of evidence. It is our view that, when one takes account of that other evidence, it provides strong support for finding that the infringement on freedom of religion in this case is at the very low end of the seriousness spectrum.

We begin our review of that other evidence by again noting that the Covenant provides that TWU “welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University’s Christian identity” to its current degree programs. As we understand TWU’s plans for the new law school, that same admissions policy will be used for it. By expressly providing that it will admit students without reference to whether they affirm evangelical Christian beliefs or not, TWU has clearly decided that there are other interests more important than establishing and/or preserving a uniformly evangelical Christian community. In effect, TWU has itself made it clear that it does not attach overriding significance to the interest it has – and is asking both the Law Society and now the courts to vindicate – in creating such a community. We do not know the reason why TWU has decided that its interest in opening its doors *inter alia* to students (though not, at least expressly, faculty or staff) of other faiths, atheists, and Christians who reject the claim that homosexual conduct is sinful, provided that they are nevertheless willing to sign the Covenant, outweighs the importance of achieving a uniformly evangelical Christian community. It may be that it values diversity within its student body; it may be that it values the opportunity to expose non-evangelical Christian students to the religious views it sees as its mission to promote; it may be that it wants to benefit from the tuition fees that it might otherwise have to forgo if it limited itself to evangelical Christian students; or it may be that exposure to non-evangelical Christians provides a greater sense of distinctiveness.<sup>91</sup> Regardless of the reason for having chosen to adopt an open admissions policy, the fact that TWU has that policy must surely weaken any claim of a

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<sup>90</sup> *Supra*, note 1 at para. 103.

<sup>91</sup> The last of these possibilities was proposed in the Nova Scotia Supreme Court judgment, *supra*, note 77, which referred to evidence that “[m]embers get a greater sense of their distinctiveness through interaction with non-evangelicals”, which it was said could serve to enhance the importance of convictions (at para. 125), though it is not clear that this evidence was cited to explain TWU’s decision to welcome non-evangelicals.

right to be approved by the Law Society on the basis of its interest in a community of shared values.

That open admissions policy is relevant for another, related reason. It means that TWU is not threatening punishment for those who violate the Prohibition – or for that matter, commit any of the prohibited acts – in order to ensure that all of those whom it admits share the beliefs of evangelical Christianity. It has effectively conceded, by virtue of its own choices, that some, perhaps even a significant minority, will not share those beliefs regardless of the contents of the Covenant. This renders of dubious merit any argument that the Prohibition serves to ensure maintenance of a community in which religious beliefs are shared. Thus, while it may be that TWU finds sexual intimacy outside marriage between a man and a woman to be offensive on the basis of its interpretation of the Bible, its intention in banning such conduct is not to realize the objective of a community of shared religious values, or, in the words of the Court, a community of “like-minded persons bound together by their religious principles”.<sup>92</sup>

Another relevant consideration is the list of prohibited forms of conduct identified by the Covenant. It is clear from our comparison of the code of conduct in the Covenant that was before the courts in *TWU #1* and the code of conduct in the current Covenant that TWU is no longer seeking through its prohibitions to ensure Christian conduct, as TWU understands the Bible, in everything that the members of its community do. The role played by the “code of conduct” part of the Covenant in “strengthen[ing] commitment to the [evangelical Christian] subculture and thus strengthen[ing] the subculture,” to borrow from the evidence given by one of TWU’s experts, therefore has to be said to be a more limited one, at least insofar as the defining features of that subculture are concerned. Moreover, as we have pointed out above, with the exception of the Prohibition, the categories of behaviour that are prohibited by the Covenant map closely onto those which one would expect to find in any university’s code of conduct, religious or secular. It is far from obvious, therefore, that the “code of conduct” at TWU has the character of a “distinctive moral code” given to such codes of conduct by that same expert.

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<sup>92</sup> *Supra*, note 1, at para. 178.

Finally, in this regard, the very fact that TWU has seen fit to make a number of changes to its Covenant, and in particular to the code of conduct in Part III, renders dubious any claim that the contents of that document are in any sense sacrosanct, or that removing one form of prohibited conduct – like the Prohibition - will do irreparable damage to its meaning or effect. We have noted above that abortion has been removed from the list of explicitly prohibited forms of conduct.<sup>93</sup> We do not know why TWU chose to remove abortion from that list, but whatever the reason, that it was removed suggests that TWU does not consider a prohibition against abortion to be integral to its mission. And if prohibiting abortion is no longer considered to be integral to that mission, it is difficult to understand why retaining the Prohibition should be taken to be.<sup>94</sup> Even if TWU were to take the position that abortion is implicitly prohibited by virtue of the reference in the first section of Part III of the Covenant to the need to “treat all persons with respect and dignity, and uphold their God-given worth from conception to death,” the fact remains that the contents of the code of conduct have changed over time.<sup>95</sup>

Also significant is the explanation given in the “Community Covenant Agreement: Frequently Asked Questions” document that TWU has posted on its website<sup>96</sup> for the deletion of the complete prohibition against the consumption of alcohol from the list. That explanation includes the statement that “the Bible allows for the enjoyment of alcohol in moderation,” but also makes note of the fact that “70% of TWU’s student body expressed the desire to have the prohibition of alcohol removed in a fall 2007 survey and 91% of the internal and external stakeholders providing feedback... in the spring of 2009 were in favour of the changes being proposed.”<sup>97</sup> The

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<sup>93</sup> See the discussion of TWU’s position on abortion in footnote 36, *supra*.

<sup>94</sup> At least on the basis of the record in this case.

<sup>95</sup> While not clearly relevant to an assessment of the importance of the religious interest at stake in TWU, we think it worth adding here a note about the form of punishment that TWU has chosen to use in order to enforce the Prohibition. TWU is not seeking to inflict a form of punishment that it claims is dictated by religion. That is, there is nothing to our knowledge that TWU has identified in the Bible or other expressions of evangelical Christian beliefs directing that those who engage in sexual intimacy outside of marriage between a man and woman be suspended or expelled from university. On the contrary, the form of punishment that TWU is claiming the right to impose is the same form of punishment applied by secular universities for serious breaches of their codes of conduct. In that sense, TWU is seeking in essence to exercise a secular form of punishment, one that does not purport to inflict spiritual consequences but rather very practical ones, such as making it more difficult for a student to obtain a degree or, eventually, employment. It might be argued that suspension or expulsion from the university amounts to suspension or expulsion from the evangelical Christian community, but, as we have pointed out above, that argument is belied by the fact that TWU has chosen to create a community that is composed in part of non-evangelical Christian students.

<sup>96</sup> *Supra*, note 37.

<sup>97</sup> *Ibid.*, p. 2.

implication of the latter statement, particularly when set alongside the general comment made later in the document that “TWU today exists in a different world from 1962 or even 1985 when TWU became a full degree granting university,”<sup>98</sup> is that the contents of the Covenant are, to a significant degree, a function of the times in which the evangelical members of TWU’s community find themselves living. That implication is strengthened by the acknowledgement in that same document that, “[a]s administrative policy, the Community Covenant will be reviewed after one year of implementation and every three years thereafter.”<sup>99</sup> The reliance on survey results generated at a specific point in time further weakens any claim that the contents of the Covenant are in any sense set in stone.

Incorporating the evidence about these features of the Covenant into an assessment of the seriousness of the infringement on freedom of religion resulting from the Law Society’s decision does not require the Court to assess questions of religious doctrine or value. It simply helps to show the extent to which TWU itself has prioritized the religious interest at stake and how it has designed the Covenant to serve that interest.

We conclude this part of the paper with a few comments on the Court of Appeal’s unwillingness to accept the argument that TWU was free to establish its law school in the absence of approval by the Law Society. Such an argument, the Court said, “fails to recognize that the main function of a faculty of law is to train lawyers.”<sup>100</sup> That response is troubling on at least two levels. One is that it lacks any evidentiary foundation.<sup>101</sup> The Court simply assumed that graduates of an unapproved Canadian law school would not be accepted by the provincial and territorial law societies for admission to the profession. It is difficult to believe that that is true. The law societies have developed processes to deal with applicants for admission to the profession who have graduated from foreign law schools.<sup>102</sup> Why the Court of Appeal assumed that they would not be able to develop a similar process for dealing with applicants from an unapproved

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<sup>98</sup> *Ibid.*

<sup>99</sup> *Ibid.*

<sup>100</sup> *Supra*, note 1, at para. 169.

<sup>101</sup> The Court made reference to the fact that the provincial government had revoked the ministerial consent under the *Degree Authorization Act*, R.S.B.C. 2002, c. 24 that had been given to TWU prior to the Law Society’s decision, but acknowledged that “this revocation may not be irreversible” (*ibid.*, at para. 168).

<sup>102</sup> Information related to the National Committee on Accreditation, and the process by which a law graduate from an unaccredited law school may be admitted, can be found at <http://flsc.ca/national-committee-on-accreditation-nca/>.

Canadian law school is unclear. It is also worth noting that a growing number of the applicants for admission from foreign law schools are Canadians;<sup>103</sup> clearly they are not deterred from obtaining degrees from law schools that lack accreditation here in Canada by the special processes through which they are required to go. Finally, we would also note that people go to law school for many reasons, including to teach and/or work for government, NGO's and international organizations and institutions, not all of which involve or require being called to the bar.

We much prefer the approach taken by the Ontario Court of Appeal to this aspect of the case. While that court acknowledged that “currently there is no process by which a law graduate from an unaccredited law school in Canada could be admitted to the Ontario bar,” it added that “[t]hat does not, however, end the inquiry.”<sup>104</sup> That led the Ontario Court of Appeal to make the very argument that the B.C. Court of Appeal dismissed – “Even absent accreditation, TWU would be free to operate its law school in the manner it chooses.”<sup>105</sup> That court then noted that, “While TWU has suggested that it may not open its law school absent accreditation by the LSUC, there is no evidence before us that the LSUC’s decision would have so dramatic an effect.”<sup>106</sup>

The B.C. Court of Appeal’s response to this argument is also troubling on the level of principle. If it is in fact the case that TWU would abandon its law school project if the Law Society refuses to approve it, the significance of that position on TWU’s part is not that, as the Court of Appeal suggested, its freedom of religion claim is strengthened, but that that claim is weakened. What it means is that the real interest that TWU is advancing is that of being able to “train lawyers”; providing a supportive Christian environment for its teachers, staff and students, at least insofar as the provision of legal education is concerned, is secondary to that interest.

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<sup>103</sup> We do not have any hard data from the Federation of Law Societies to support this assertion. However, based on information provided on the websites of two of the foreign universities that have established law programs specifically for Canadian students, we believe the assertion to be a valid one. The Bond University website (<https://bond.edu.au>) says that “over 150 Canadian students” are currently attending law school there, and the University of Leicester website (<https://le.ac.uk>) says that “over 240 Canadian students and Canadian staff” are currently at its law school.

<sup>104</sup> *Supra*, note 1, at para. 169.

<sup>105</sup> *Ibid*, at para. 97.

<sup>106</sup> *Trinity Western University v. The Law Society of Upper Canada*, *supra*, note 1, at para. 99.

### 3. *Loyola High School v. Quebec*

We turn now to the Court of Appeal’s reliance on the Supreme Court’s decision in *Loyola* in support of its holding that the infringement on the freedom of religion resulting from the Law Society’s decision was “severe.” That reliance was based in part on the fact that, like TWU, Loyola High School is a private, religiously based educational institution<sup>107</sup> and in part on the Court of Appeal’s conviction that “the context of the decision made in *Loyola* is similar [to the context of the *TWU* case]: ‘how to balance robust protection for the values underlying religious freedom with the values of a secular state.’”<sup>108</sup>

In our respectful view, the Court’s reliance on *Loyola* was misplaced. While it is true that both cases involved claims under s. 2(a) by private, religiously based educational institutions and required the courts to balance freedom of religion against secular values, there are important differences between them, and those differences render *Loyola* of very limited if any use to anyone seeking to rely on it to support a finding that the infringement on freedom of religion in *TWU* is “severe.”<sup>109</sup> In fact, we would go so far as to say that, such guidance as *Loyola* offers to a court assessing the seriousness of that infringement would support assessing it at the low end of the spectrum.

The differences between the two cases on which we rely relate to both the nature of the religious interest at stake and the nature of the infringing state action. The religious interest at stake in *Loyola* was the interest that parents have in directing the religious education that their children receive, and in particular the education that they receive in relation to their core religious beliefs.<sup>110</sup> That interest has long been understood to lie at the heart of our conception of freedom

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<sup>107</sup> *Supra*, note 1, at para. 122.

<sup>108</sup> *Ibid.*, at para. 131.

<sup>109</sup> The Court of Appeal acknowledged that *TWU* differed from *Loyola* in that “the state’s accommodation of religious freedom in *Loyola* did not have a direct detrimental impact on the equality rights of others” (*supra*, note 1, at para. 131). That acknowledgement is of no relevance to the issue with which we are concerned here, which is the seriousness of the infringement on freedom of religion resulting from the impugned state action in the two cases.

<sup>110</sup> The interest of which we speak here is the interest that the Catholic parents had in directing the manner in which their children would be taught Catholic doctrine and ethics. The interest the parents had in directing the manner in which their children would be taught the ethics of other religions would be formulated differently. The Supreme Court of Canada was unanimous in vindicating the former interest, but only the three minority judges voted to vindicate the latter one.

of religion,<sup>111</sup> and warrants a great deal more protection than the interest at stake in the *TWU* case in being able to establish a new law school in which the evangelical Christians who teach, provide staff support and enroll as students there will be supported in their belief that the Bible treats as sinful sexual intimacy outside marriage between a man and a woman by authorizing TWU to discipline students who engage in acts of sexual intimacy outside such a relationship. The distinction between the *religious* education of *children* in one case and the *legal* education of *adults* in the other is critical to any fair assessment of the relative importance of these two interests.

The nature of the infringing measure in the two cases is also different. In *Loyola*, the state was seeking to coerce the claimant into teaching the substance of the Catholic faith from a neutral (or non-Catholic) perspective, whereas, as we have explained above, in *TWU*, the state is simply denying a benefit that TWU wishes to obtain on behalf of the members of the evangelical Christian community. *Hutterian Brethren* tells us that that difference, in and of itself, means that, while the infringement in the former case had to be adjudged – as it was, by the full Supreme Court of Canada – as serious, the infringement in the latter case should be adjudged at the less serious end of the spectrum. That difference also has significant implications when one examines the impact of the state action on the religious interests of the two claimants. In *Loyola*, the parents were going to lose a constitutionally protected right of fundamental importance, and one that they had held for a long time, whereas in *TWU*, none of the constitutionally protected rights currently enjoyed by the evangelical members of the TWU community – to believe what they wish to believe, to act in their own lives consistently with those beliefs and to advocate in their personal dealings with others in support of those beliefs - has been placed in jeopardy; all that they would lose is the interest they have in being able to extend one aspect of those rights - the interest in being supported in their belief that the Bible treats as sinful sexual intimacy outside marriage between a man and a woman by authorizing TWU to discipline students who engage in acts of sexual intimacy outside such a relationship – into a new sphere with state approval.

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<sup>111</sup> Justice Abella acknowledged the importance of that interest in her majority reasons in *Loyola* when she said, “an essential ingredient of the vitality of a religious community is the ability of its members to pass on their beliefs to their children, whether through instruction in the home or participation in communal institutions” (*supra*, note 13, at para. 64). Perhaps the best evidence of its importance in Canada is the inclusion of the denominational school provisions in s. 93 of the *Constitution Act, 1867*.



It is noteworthy in this regard that the Court of Appeal chose to quote the following passage from the majority reasons for judgment of Justice Abella in *Loyola*, implying that it had application to the *TWU* case: “Ultimately, measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom.”<sup>112</sup> However apt terms like “undermine” and “disrupt” may have been in describing the impact on Loyola High School of the state action being challenged in that case, they would clearly be inapt as descriptors of the impact on TWU of the Law Society’s decision. In no sense could that decision be said to “undermine the character” of the lawful religious institution that is TWU or “disrupt the vitality” of the religious community that TWU represents. The Law Society’s decision left intact the program of studies that TWU has proposed for its law school. And, as we have pointed out before, that decision has no bearing on TWU’s ability to continue operating as it now operates, offering the same programs and requiring all of the students who are admitted to pursue those programs to sign the existing Covenant; both the “character” and the “vitality” of TWU remain intact.<sup>113</sup>

#### 4. Summary

For all of the reasons set forth above, we are of the view that the infringement of freedom of religion resulting from the Law Society’s refusal to approve TWU’s new law school is far from “severe.” Given both the nature of the infringing measure (the refusal of a benefit) and the nature of the religious interest (neither obligatory nor, on the basis of the available evidence, otherwise warranting being seen as of particular importance) as well as the significant differences between *TWU* and *Loyola*, it falls instead at the low end of the seriousness spectrum. We think that a plausible argument could be made that it falls below the “trivial and insubstantial” threshold that the Supreme Court has established for finding a true infringement. We see no need to make that argument here because we believe that the equality interest on the opposing side of the ledger is sufficiently strong that it should prevail in any competition between it and the freedom of religion interest. We now turn to our consideration of the equality interest.

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<sup>112</sup> *Supra*, note 1, at para. 128 (quoting from para. 67 in *Loyola*).

<sup>113</sup> We should point out that the character and vitality of TWU as an evangelical Christian religious community are already diluted by the fact that its admissions policy welcomes prospective students who do not adhere to the precepts of evangelical Christianity.

## II. The Nature and Strength of the Equality Interest

We are no less troubled by the Court of Appeal’s assessment of the strengths of the equality interest than we are by its assessment of the strengths of the freedom of religion claim. As in the case of the freedom of religion claim, we begin our critique of the Court’s handling of this issue by addressing the question of how, given the context out of which the dispute between TWU and the Law Society arose, the interest underlying the equality claim should be characterized. The Court of Appeal did not address that question explicitly; its understanding of that interest – which it termed simply “the equality rights of LGBTQ individuals”<sup>114</sup> - emerges from the reasons it gave for giving very little weight to it. Rather than attempting to summarize that understanding here, we will let it come to light as we examine those reasons. Suffice it to say here that we do not agree with it.

Properly understood, the equality interest in *TWU* has two distinct dimensions. The first dimension, which reflects the interest of LGBTQ individuals looking to enter law school, we would formulate as follows: *the interest that members of the LGBTQ community seeking admission to a state-approved law school and who satisfy the academic and other qualifications for admission have in being free to attend that law school on a non-discriminatory basis, and in particular, without being obliged to sign a code of conduct that makes it clear that TWU does not accept the legitimacy of same sex marriages.* The second dimension, which reflects the interest of married LGBTQ individuals who might attend TWU’s law school in spite of the existence of the Prohibition, we would formulate in these terms: *the interest of married LGBTQ students at a state-approved law school who want the same right that married heterosexual students at the law school have to engage in acts of sexual intimacy with their spouse without fear of being subject to discipline.*<sup>115</sup> The Court of Appeal’s understanding of the equality interest, as will become apparent, was limited to the first dimension. While it summarized some of the expert evidence bearing on the second dimension that had been adduced in support of the Law Society’s

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<sup>114</sup> *Supra*, note 1, at para. 170. The Court used similar language to describe the interest elsewhere in its reasons; see, e.g., para. 108: “the equality right of LGBTQ persons under the law.”

<sup>115</sup> We limit the scope of this interest to married LGBTQ students because the Prohibition bans acts of sexual intimacy by unmarried heterosexual students as well as unmarried LGBTQ students. We do not foreclose the possibility that a convincing argument could be made that this limit also discriminates on the basis of marital status.

decision,<sup>116</sup> it did not make use of that evidence in its analysis of the equality interest. In our view, that was a mistake. Unless one were to be satisfied that, because of the Prohibition, TWU's law school would never have any LGBTQ students, which seems implausible,<sup>117</sup> it is clear that those who did enroll there would have a distinct equality interest from those whom the Prohibition deters from applying. And that distinct interest should be included in the balancing exercise.

### **A. The equality interest of LGBTQ individuals seeking admission to law school**

We begin with an examination of the manner in which the Court of Appeal treated the equality interest that it did consider, that of LGBTQ individuals seeking admission to law school. The Court considered two bases on which the equality rights of these individuals could be negatively impacted by approval: impediments to access and endorsement of discrimination. We examine each of those bases in turn in the order in which the Court of Appeal dealt with them, and in some detail. We wish to make it clear at the outset, however, that we have serious problems with the Court of Appeal's use of these two rubrics to frame its analysis of both the nature of the equality interest at stake in this case and the extent to which that interest would be harmed by a decision by the Law Society to approve TWU's new law school. We believe that the first, at least as the term "impediments to access" was understood by the Court of Appeal, was based on a fundamental misconception of the nature of that equality interest. And we believe that the second, endorsement of discrimination, provides far too narrow a basis upon which to explore the harm that would be done to that equality interest if TWU were to receive approval. There is, in our respectful view, much more to the Law Society's contention that approval would cause

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<sup>116</sup> *Supra*, note 1, at para. 172: "We have described the adverse effects on LGBTQ persons that would ensue if they were to sign the Community Covenant to gain access to TWU: they would have to either "live a lie to obtain a degree" and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action including expulsion."

<sup>117</sup> We say this not only because the demand for law school places in Canada far exceeds the supply, which could lead to LGBTQ individuals hiding their sexual orientation when they apply, but also because individuals who had not expressed their identity as LGBTQ prior to attending may do so during the course of their legal studies (see, for example, Lindsay, "A university's queer covenant", *supra*, note 32).

serious harm to that equality interest, and in particular to the human dignity value that underlies that interest, than the Court of Appeal was prepared to acknowledge.<sup>118</sup>

### 1. Impediments to access

The first basis for the equality claim considered by the Court of Appeal was whether there was evidence that approval “would impede access to law school and hence the profession for LGBTQ students”.<sup>119</sup> The Court ultimately concluded that there was not. It rested its conclusion on four findings: (i) refusing approval would not enhance accessibility to LGBTQ individuals because the Law Society could not control whether a non-discriminatory law school would be created in lieu of TWU if TWU was not approved;<sup>120</sup> (ii) very few LGBTQ individuals would want to study at TWU even if TWU accepted the Law Society’s offer to approve its law school if the Prohibition was dropped because “TWU’s faculty of law would be part of an evangelical Christian community that does not accept same-sex marriage and other expressions of LGBTQ sexuality”;<sup>121</sup> (iii) TWU’s law school would add only 60 seats to a total of approximately 2,500 places available in common law schools in Canada;<sup>122</sup> and (iv) the increase in seats would enhance opportunities for all students, including LGBTQ students.<sup>123</sup>

Except for (iii), to which we return later, our difference with the Court is less with the factual accuracy of these findings than with their legal significance. In particular, our difference lies largely in our belief that the Court relied on them to answer the wrong question. Simply put, the real question for the Court was not whether accreditation would “impede access” to law school or the profession for LGBT students, but whether it would result in access on an unequal footing. Another way to express our view on this is to return to our characterization of the (first) equality interest at stake: *the interest that members of the LGBTQ community seeking admission to a state-approved law school and who satisfy the academic and other qualifications for admission*

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<sup>118</sup> For a discussion of some of the difficulties that have been posed by courts to those seeking to enforce their equality rights, see Sonia Lawrence, “Choice, Equality and Tales of Racial Discrimination: Reading the Supreme Court on Section 15”, (2006) 33 S.C.L.R. (2d) 115.

<sup>119</sup> *Supra*, note 1, at para. 173

<sup>120</sup> *Ibid.*, at para. 175.

<sup>121</sup> *Ibid.*, at para. 176.

<sup>122</sup> *Ibid.*, at para. 179.

<sup>123</sup> *Ibid.*

*have in being free to attend that law school on a non-discriminatory basis, and in particular, without being obliged to sign a code of conduct that makes it clear that TWU does not accept the legitimacy of same sex marriages.* The interest is not, in other words, in fewer impediments to access to state-approved law schools; it is in access to this school on a non-discriminatory basis.

We find support for our position in the Supreme Court of Canada’s jurisprudence on equality. A consistent thread in that jurisprudence has been the notion that the interest protected by the right to equality is assessed in comparative, not absolute, terms, and that the comparison lies not as between the claimants’ current position and the position they would be in absent the differential treatment, but the claimants’ position relative to others who do not fall within the enumerated or analogous ground. As McIntyre J. put it in *Andrews v. Law Society of British Columbia*, equality “is a comparative concept, the condition of which may only be attained or discerned by comparison with the condition of others in the social and political setting in which the question arises”.<sup>124</sup> The Supreme Court’s emphasis on the comparative nature of the interest at stake was sufficiently great that for a time it led the Court to impose a very strict requirement of a “comparator group” against which the claimant’s position could be measured.<sup>125</sup> Although the Court dispensed with that requirement in *Withler v. Canada (Attorney General)*, it did not do away with the notion that any impact on the interest protected by the right to equality must be measured by reference to whether an individual is “denied a benefit *that others are granted* or carries a burden *that others do not*” on the basis of an enumerated or analogous ground, and not to whether they are denied a benefit *that they were once granted* or carry a burden *that they did not previously carry*.<sup>126</sup>

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<sup>124</sup> [1989] 1 SCR 143, at para. 164.

<sup>125</sup> See, for example, *Lovelace v. Ontario*, [2000] 1 S.C.R. 950, 2000 SCC 37; and *Hodge v. Canada (Minister of Human Resources Development)*, [2004] 3 SCR 357, 2004 SCC 65.

<sup>126</sup> [2011] 1 SCR 396, 2011 SCC 12 at para. 41 (emphasis added). We acknowledge that there may be cases in which the focus of analysis in assessing an equality claim suggests that the question to be answered is whether access to a certain service is enhanced or impeded. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 SCR 624, 1997 CanLII 327 in which the Court found that the failure to include medical interpreter services to the deaf as a “benefit” under B.C.’s Medical Services Plan infringed section 15, is one such case. There, the enquiry could be understood to focus on whether the failure to provide such services effectively impeded access of individuals within the enumerated ground of being disabled to hospital services. Nevertheless, the Court was clear that that enquiry took place to answer a question that was measured in comparative terms: whether the claimants “receive the *same level of medical care as hearing persons*” (para. 71, emphasis added).

We do not mean to suggest that the Court of Appeal was unaware that it was assessing an equality interest. In fact, its analysis of the question of access took place under the heading “Inequality of access to law schools”. Yet as the findings and conclusion cited above reflect, the assessment actually undertaken by the Court was one that concentrated on whether approval would impede LGBTQ students relative to the access *LGBTQ students currently have*, rather than whether it would mean that their access would be impeded as compared to non-LGBTQ individuals. There is no other way to make sense, for example, of why the Court of Appeal considered it relevant that “it is incontrovertible that refusing to recognize the TWU faculty will not enhance accessibility”<sup>127</sup> for LGBTQ students.

It is true that the Court of Appeal considered whether approval would impede LGBTQ individuals’ access, or its refusal enhance that access, relative to the access that LGBTQ students currently have to support its finding that the equality interest was not significantly impacted, not to deny that there was any impact. However, that does not in our view make it any more relevant to assessing the implications of accreditation for the equality interest at stake. The concern voiced on behalf of LGBTQ individuals – and the right to which they are entitled – was that they not be denied a “right to equal access”.<sup>128</sup> It was not that they be permitted enhanced access relative to the access they have now, nor that impediments to the access that they have now be reduced. Whether or not that access was enhanced or decreased relative to LGBTQ individuals’ current position does not come into the equation when assessing the impact on the interest that the right to equality protects.<sup>129</sup>

The crux of the Court’s conclusion on this aspect of the equality interest turned largely on its finding that TWU’s law school would add “only” 60 seats to a total of approximately 2,500 places available in common law schools in Canada. Indeed, this is the only finding in respect of which the Court made meaningful reference to the interest in *equal* access, holding that the

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<sup>127</sup> *Supra*, note 1, at para. 175.

<sup>128</sup> *Supra*, note 1, at para. 113.

<sup>129</sup> Of course it would be relevant if, in addition to accrediting a law school that would discriminate against LGBTQ students, the Law Society also took steps to otherwise impede LGBTQ students’ access to law schools that do not currently discriminate, but again, its relevance for the purposes of an equality analysis would arise only if those steps affected non-LGBTQ students differently in comparative terms.

relatively few places that TWU’s law school would begin by offering meant that the “detrimental impact on LGBTQ equality rights” would “be insignificant in real terms”.<sup>130</sup>

We accept that the number of seats that would be offered by TWU’s law school relative to those already available is relevant to assessing the impact on the equality interest at stake. However, we would not attribute to that figure anywhere near the significance that the Court of Appeal did. As we point out in the next section of this paper, the Supreme Court of Canada’s jurisprudence on section 15 has made it clear that damage to the equality interests of individuals who are subject to discrimination is not quantifiable by mere reference to how many specific individuals might be directly affected. A measure of the marginalization and exclusion experienced by LGBTQ individuals that is calibrated by degrees of numerical disparity would not only mischaracterize the interests that the right to equality protects, it would severely devalue them.

In any event, even to the limited extent that the number of seats that would be offered by TWU’s law school relative those already available is relevant, we disagree with the Court’s conclusion that in this case these numbers mean that the impact on the equality interest is “insignificant”. On the contrary, they support a very different conclusion. We say this because we think that the Court ought to have worked from the basis of different numbers both in terms of the number of seats that TWU’s law school could add and the number of available spots against which that number should be measured. Beginning with the former, that TWU’s law school would offer only 60 seats initially does not mean that TWU would not seek at some point to expand that number. To our knowledge, TWU has not committed to restricting its admissions to that number henceforth, and given that 60 seats would put TWU’s law school over 100 seats below the average of the 16 common law schools whose total number of first year students in 2013 was tallied up in evidence cited by the Nova Scotia Supreme Court,<sup>131</sup> it is at least possible that it would increase its intake once it has the capacity, and potentially to a significant extent. Were it to expand the number, it is difficult to see what recourse the Law Society would have to

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<sup>130</sup> *Supra*, note 1, at para. 179.

<sup>131</sup> *Supra*, note 77.

reconsider its approval. It would be more appropriate, therefore, to regard approval as providing for a minimum of 60 seats, and the possibility of considerably more.<sup>132</sup>

The Court's decision to use the number of 2,500 as the appropriate measure of the available seats suffers from a different problem, which is that that figure is given as the total number of seats available nation-wide. As a creature of provincial, not federal, statute, the Law Society's mandate relates, first and foremost, to British Columbia and reference to the "public interest" in the *Legal Profession Act* must be read in that context. Accordingly, for the purposes of the Law Society decision, in measuring the impact on the access of prospective LGBTQ law students, the primary focus ought to be concentrated on British Columbia, which would exclude the vast majority of those 2,500 law school seats. In British Columbia there are currently only three approved law schools – the University of British Columbia, the University of Victoria and Thompson River University – which, according to the respective websites, have roughly 400 spots among them. For those LGBTQ individuals in British Columbia, it is reasonable to assume that there would be advantages to their studying law in their resident province, rather than Ontario, for example, let alone New Brunswick. It is also reasonable to assume that many and perhaps most law students who study in British Columbia and wish to practise law will apply to the Law Society, and that there will be at least some correlation between the demographics of those who study in British Columbia and the demographics of members of the provincial bar, which is a further reason for the Law Society to focus on the seats available in British Columbia specifically. A more appropriate comparison between the number of seats that a TWU law school could add and the existing number would have taken the latter to be considerably fewer than the 2,500 relied on by the Court, and as few as approximately 400.<sup>133</sup>

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<sup>132</sup> This reasoning also has relevance to the Court of Appeal's finding (i), summarized above, that refusing approval would not enhance accessibility to LGBTQ individuals because the Law Society could not control whether a non-discriminatory law school would be created in lieu of TWU if TWU was not approved. Even if this were a factor that could properly be considered in the context of an equality claim, which for the reasons we have set out above it is not, it would have been entirely reasonable for the Law Society to conclude that, while it may not have the power to create a non-discriminatory law school instead of approving TWU's, the granting of an additional 60 law school places to TWU now would make it less likely that a non-discriminatory institution would open a law faculty in British Columbia at some point down the road, particularly if by then TWU had expanded its intake.

<sup>133</sup> In preferring the 2,500 number, the Court of Appeal appears to have accepted a line of reasoning that was long ago rejected by the United States Supreme Court in assessing the lawfulness of discrimination in law school admissions by a university in that country. *Missouri ex rel. Gaines v. Canada*, 305 U.S. 337 (1938) concerned Mr. Gaines, a graduate of Lincoln University, Missouri's state university for black students, who had been denied admission to the University of Missouri's law school on the basis of his race, and been advised by the school that he



For all of these reasons, even if one could attribute the import to the specific numbers at issue in measuring the impact of approval on the equality interest at stake that the Court did, those numbers do not provide a proper basis upon which to minimize that impact. Considering that the question must be considered in light of the interest’s comparative nature; the possibility if not likelihood that TWU would expand the number of seats that it offers; and the Law Society’s need to consider the impact in terms of its provincial mandate, the impact on access was far more than “insignificant”. Moreover, it is entirely plausible that that impact will increase with time, and that within a few years LGBTQ individuals in British Columbia could be faced with a situation in which nearly a fifth or more of the available law school seats in their province would be

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could apply for a scholarship provided for by state law, according to which university officials “shall have the authority to arrange for the attendance of negro residents of the state of Missouri at the university of any adjacent state, and which are not taught at the Lincoln University”. Mr. Gaines sought mandamus, but was unsuccessful before the Missouri Supreme Court, which found that he would only suffer minor inconvenience if he attended the state law schools of Kansas, Nebraska, Iowa or Illinois (certain of these facts are taken from Linda Greenhouse’s article “Chasing Abortion Rights Across the State Line”, *The New York Times*, November 24, 2016, available at [https://www.nytimes.com/2016/11/24/opinion/chasing-abortion-rights-across-the-state-line.html?\\_r=0](https://www.nytimes.com/2016/11/24/opinion/chasing-abortion-rights-across-the-state-line.html?_r=0)). That decision, however, was overturned by the United States Supreme Court on the basis that “[t]he basic consideration here is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to negroes solely upon the ground of color” (at p. 305). The Court further held that:

“If a State furnishes higher education to white residents, it is bound to furnish substantially equal advantages to negro residents, though not necessarily in the same schools.

The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. By the operation of the laws of Missouri, a privilege has been created for white law students which is denied to negroes by reason of their race. The white resident is afforded legal education within the State; the negro resident having the same qualifications is refused it there, and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up...” (at p. 305).

We recognize that the factual and legal contexts in the *Gaines* and *TWU* cases are different in a number of important respects. For one thing, there is no indication that British Columbia will offer scholarships to LGBTQ law students who are forced to pursue their legal education in other provinces because they are not prepared to sign the Covenant or have been expelled from TWU for breaching it; for another, as the quoted passages make clear, having been issued over 15 years before *Brown v. Board of Education*, 347 U.S. 483 (1954), the prevailing interpretation of the equal protection clause in 1938 accepted the notion of “separate but equal”. However, the basic principle underlying the ruling in *Gaines* is very much applicable to the Law Society’s decision. That principle is that state or provincial decision-makers – here the Law Society - whose jurisdiction does not extend beyond that state or province are not entitled to mitigate or otherwise justify the impact of discrimination that results from one of their decisions by relying on opportunities that might be available outside of their jurisdiction to those who suffer that discrimination. The Court of Appeal at least implicitly rejected that principle, preferring instead to consider on the same footing the availability of spots in all ten provinces; it provided no reason for doing so, however, and for the reasons we have given in the body of the text, and because any other interpretation ignores practical realities as well as equality and federalism principles, we think that it was wrong to do so.

available to them only at significant personal cost. Even if one were to take a purely numerical approach to the question of equality of access, we cannot see how a court could reasonably characterize such a result as anything other than a significant one.

The Ontario Court of Appeal provided a number of additional reasons for attaching significant weight to the access dimension of the equality interest of LGBTQ individuals seeking admission to law school that should be noted here. One is the “important role of ... the law societies ... in ensuring equality of admission to the legal profession.”<sup>134</sup> Another is the fact that Ontario’s human rights legislation provides for “a right to equal treatment with respect to membership in any ...self-governing profession without discrimination because of ....sexual orientation,”<sup>135</sup> which right, the Ontario Court of Appeal said, the Law Society of Upper Canada was obliged to respect. While the language of the counterpart provision in British Columbia’s *Human Rights Code* is slightly different – the professions are not mentioned but are included by virtue of the definition of the term “occupational association” – the same right and concomitant obligation exist in this province.<sup>136</sup> And thirdly, the article in the *International Covenant on Civil and Political Rights* that protects freedom of religion limits the scope of that protection to exercises of the right that respect “the fundamental rights and freedoms of others.”<sup>137</sup>

Before leaving the impediment to access basis, we should comment on the Court of Appeal’s final finding in respect of the question of LGBTQ individuals’ access to law schools and the profession, which was that “the increase in the number of seats overall is likely to result in an enhancement of opportunities for all students,”<sup>138</sup> including LGBTQ students. The Court of Appeal made this finding without citing any actual evidence in its support,<sup>139</sup> and there is reason to think that, as a factual matter, it is incorrect. For example, it may be that students who would

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<sup>134</sup> *Supra*, note 1, at para. 132.

<sup>135</sup> *Ontario Human Rights Code*, R.S.O. 1990, c. H. 19, s. 6

<sup>136</sup> *Human Rights Code*, R.S.B.C. 1996, c. 210, ss. 14 and 1.

<sup>137</sup> 19 December 1966, 999 U.N.Y.S. 171, Can. T.S. 1976, Art. 18(3).

<sup>138</sup> *Supra*, note 1, at para. 179

<sup>139</sup> The Court of Appeal said that it was giving deference to a finding of the Special Advisory Committee of the Federation of Law Societies, which had stated in its final report that “an overall increase in law school places in Canada seems certain to expand choices for all students”, a statement that the Court of Appeal said was “based on numerous submissions to the Federation, including legal advice sought by the Federation” (at para. 174). However, review of that report does not indicate that this statement was based on any actual evidence; rather, it appears to rely, as its use of the word “seems” indicates, simply on the Committee’s own reasoning.

otherwise have left Canada to study law would decide to remain if they had the opportunity. Considering the high number of people seeking admission to Canadian law schools,<sup>140</sup> that seems entirely plausible. Our disagreement with the Court in relation to this finding stems, however, from more than the concern that the Court has made assumptions without proper evidentiary support. As a matter of principle, we would strongly oppose, even if there was an evidentiary basis for it, a line of reasoning that attributes benefits to individuals in the very discrimination to which they are subject. And as a matter of law, doing so seems wholly contrary to the important role given to human dignity in the Supreme Court of Canada’s interpretation of the interest protected by the right to equality, which we discuss below.<sup>141</sup> Indeed, advising those subject to discrimination that there are benefits to them arising from that discrimination is not only inconsistent with the importance given to human dignity; it is arguably itself an affront to that dignity.

## 2. Endorsement of discrimination

The second basis on which LGBTQ interests could be impacted, the Court of Appeal said, was that the Law Society, as a public actor, would be seen as endorsing the discriminatory aspects of the Covenant. The Court credited this argument with even less merit than the access argument, dismissing it for the following reasons: (i) the aforementioned American decision in *Bob Jones University v United States* was distinguishable and therefore unhelpful;<sup>142</sup> (ii) the Law Society was prepared to approve TWU’s law school if it removed the Prohibition and so regulatory approval did not amount to an endorsement of the university’s continued substantive beliefs

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<sup>140</sup> Elaine Craig has pointed out that the submission that TWU made to the Government of British Columbia in support of its contention that the province needs more law schools contains the following passage: “Canada has the lowest number of law schools per capita of any Commonwealth country....\_[Applications] currently vastly outnumber the spaces available.” Craig goes on to argue on the basis of that passage that “Some LGBTQ students may not have the option to attend another Canadian law school,” *supra*, note 12, at p. 633.

<sup>141</sup> A similar point may be made in respect of the Court of Appeal’s finding that very few LGBTQ individuals would want to study at TWU even if the Prohibition were removed (*supra*, note 1, at para. 176). Again, leaving aside the absence of evidence cited in support of this finding, reasoning that diminishes the value of removing or decreasing discrimination engaged in by an institution on the basis that that institution will either discriminate in other ways or continue to be associated with discrimination is, as we argue, contrary to the Supreme Court of Canada’s jurisprudence on equality and the relevance of human dignity to it. It also flies in the face of one of the basic premises of human rights legislation, which is that, while eradicating discrimination entirely may not be achievable – as evidenced by, *inter alia*, section 41 of the *Code*, which as we discuss further later in this paper exempts certain contraventions of the *Code* – reducing it is a worthy and important aim.

<sup>142</sup> *Supra*, note 1, at para. 182.

regarding marriage;<sup>143</sup> (iii) if regulatory approval amounted to an endorsement of an institution's beliefs, no religious faculty could be approved by the state;<sup>144</sup> and (iv) the language of “offense and hurt” is not helpful to balancing rights, and thus the argument that the Prohibition “is deeply discriminatory and ... hurts” LGBTQ individuals was not relevant and could be ignored.<sup>145</sup>

We have already dealt with the Court of Appeal's treatment of the *Bob Jones* case above. Reasons (ii) and (iii) overlook the fundamental distinction between belief and practice, reflecting – to repeat ourselves once more – a total disregard for the Prohibition's role in the Covenant. The Prohibition is not simply an expression of belief, let alone a belief full stop. It is a prohibition on a specific form of conduct, and one that applies to non-evangelical Christians as well as evangelical Christians. The Supreme Court of Canada has consistently recognized that there is a distinction between the right to hold beliefs and the right to act on them, the latter of which has the potential to significantly impact, and harm, third parties.<sup>146</sup> Clearly regulatory approval does not amount to an endorsement of beliefs. Denying approval to TWU would not prevent regulatory approval being given to religious institutions or individuals; it would simply support not giving it to religious institutions or individuals that reserve for themselves the right to punish lawful conduct on a discriminatory basis. We are at a loss as to how such a result could be cause for the caution the Court of Appeal apparently considered it worthy of, and it is certainly not a basis to undermine the legitimacy of the equality interest at stake.

That leaves reason (iv) and the Court of Appeal's dismissing as unhelpful the language of “offence and hurt” in the context of the balancing exercise it had to perform. That reason is problematic on at least two levels. One is that that reasoning ignores expert evidence that the Court recited earlier in its reasons for judgment that defined the harm suffered by members of the LGBTQ community who experience discrimination in very different terms from those of “offence and hurt.”<sup>147</sup> This evidence, which the Court appeared to accept, was summarized as “TWU's admission policy and the Covenant perpetuate and exacerbate existing stigmatization

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<sup>143</sup> *Ibid*, at para. 183.

<sup>144</sup> *Ibid*, at para. 184.

<sup>145</sup> *Ibid*, at paras. 188 to 189.

<sup>146</sup> See, e.g., *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, 1995 CanLII 115 (SCC), [1995] 1 S.C.R. 315, at para. 226 and *TWU #1*, *supra*, note 9; see also *Marriage Commissioners Appointed under the Marriage Act (Re)*, *supra*, note 84.

<sup>147</sup> *Supra*, note 1, at paras. 109-110.

and marginalization.”<sup>148</sup> Why the Court chose to completely ignore this evidence when it came to perform its balancing exercise is not explained.

That reason is also troubling because it pays no heed to Supreme Court of Canada judgments in which the Court has recognized the seriousness of the harm done to members of the LGBTQ community who suffer discrimination on the basis of their sexual orientation.<sup>149</sup> The best example of such recognition for the purposes of the *TWU* case is *Vriend v. Alberta*,<sup>150</sup> in which the Court ruled unconstitutional the omission of sexual orientation from the list of prohibited grounds of discrimination in Alberta’s *Individual Rights Protection Act*.<sup>151</sup> In the course of his reasons for judgment in that case, speaking for a unanimous court, Justice Cory said:

“Even if the discrimination [suffered by people like Mr. Vriend, who was fired by his employer because he was gay] is experienced at the hands of private individuals, it is the state that denies protection from that discrimination. *Thus the adverse effects are particularly invidious.*”<sup>152</sup>

That statement has particular resonance in the context of the *TWU* case because, were the Law Society to approve TWU’s new law school, the state would not only be denying protection from the discrimination that members of the LGBTQ community would suffer at the hands of TWU, but would also be knowingly facilitating it.

The impact of TWU’s discrimination against members of the LGBTQ community should also be analyzed through the lens of human dignity, the value that the Supreme Court says lies at the heart of the right that s. 15 protects.<sup>153</sup> While human dignity can be given a broad range of meanings depending on the context,<sup>154</sup> it is a term to which the Supreme Court provided a good

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<sup>148</sup> *Ibid*, at para. 111.

<sup>149</sup> See *Egan v. Canada*, [1995] 2 SCR 513, *Vriend v. Alberta*, [1998] 1 SCR 493, *M v. H*, [1999] 2 SCR 3, and *Ref. re Same-Sex Marriage*, [2004] 3 SCR 698.

<sup>150</sup> *Supra*, note 115.

<sup>151</sup> R.S.A. 1980, c. I-2.

<sup>152</sup> *Supra*, note 149, at para. 103 (emphasis added). It should be noted that the Court of Appeal quoted a lengthy passage from Justice Cory’s reasons for judgment in that case which included these two sentences. However, it made no reference to the above-quoted portion of that passage in its own reasoning.

<sup>153</sup> See, e.g., *Law v. Canada*, [1999] 1 SCR 497, and *R. v. Kapp*, [2008] 2 SCR 483. The fact that the Court chose to use the language of “hurt” when it analyzed the nature and strength of the equality interest of the LGBTQ community is particularly curious, because it used the language of dignity in the paragraph in which it introduced the arguments that were made in support of that interest (see para. 170).

<sup>154</sup> For a small sampling of the large body of literature discussing human dignity as a constitutional value, see Christopher McCrudden, “Human Dignity and the Judicial Interpretation of Human Rights,” (2008), 19 *Eur. J. of*

deal of substance in *Law v. Canada*.<sup>155</sup> Speaking through Justice Iacobucci, a unanimous Court described the conception of human dignity underlying s. 15 in the following terms:

“... the equality guarantee in s. 15(1) is concerned with the realization of personal autonomy and self-determination. Human dignity means that an individual or group feels self-respect and self-worth. It is concerned with physical and psychological integrity and empowerment. Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits.... Human dignity is harmed when individuals and groups are marginalized, ignored or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.”<sup>156</sup>

So conceived, many of the aspects of the human dignity of LGBTQ individuals would be engaged if TWU were to be approved by the Law Society. The evidence referred to by the Court was sufficient on its own to show that their personal autonomy and self-determination would be jeopardized, as would their sense of empowerment. The unequal treatment that they would experience would be based on a personal trait rather than their needs, capacities or merits, and would result in marginalization. It would deny them their full place within Canadian society.

The Supreme Court of Canada has itself recognized the harm to human dignity that results from prohibitions against acts of sexual intimacy between persons of the same sex. In *Whatcott v. Saskatchewan*,<sup>157</sup> Justice Rothstein, writing for all six members of the Court who sat on that case, quoted with approval a lengthy passage from the dissenting reasons for judgment on Justice L’Heureux-Dube in *TWU #1* in which she rejected what she called “the status/conduct or identity/practice distinction for homosexuals and bisexuals.”<sup>158</sup> At the end of that passage Justice L’Heureux-Dube argued that rejection of that distinction was necessary “to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable

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Int. L 655, Vicki Jackson, “Constitutional Dialogue and Human Dignity: States and Transnational Constitutional Discourse,” 65 Mont. L.R. 15 (2004), and Emily Kidd White, “There Is No Such Thing As Human Dignity: A Reply to Conor O’Mahoney”, (2012) 10:2 Int.’l J. Const. Law 575.

<sup>155</sup> *Supra*, note 153. We recognize that the test prescribed in this case for determining whether or not s. 15 has been infringed, which turned ultimately on whether or not, taking a range of considerations into account, the differential treatment complained of violated human dignity, has been abandoned (see *R. v. Kapp*, *supra*, note 153). As *Kapp* makes clear, however, the fact that the *Law* test is no longer used does not mean that human dignity is irrelevant to equality analysis.

<sup>156</sup> *Ibid*, at para. 53.

<sup>157</sup> 2013 SCC 11, [2013] 1 SCR 467.

<sup>158</sup> *Ibid*, at para 123.

minority without thereby discriminating against its members and *affronting their human dignity and personhood.*”<sup>159</sup>

It is important to keep in mind that the equality of access at stake in the *TWU* case is not simply equality of access to a legal education, significant as that is given the role played by lawyers in our society. It is equality of access to a legal education *at an institution that has been granted formal approval by the state*. To be denied equality of access to a legal education at any institution on a ground protected by s. 15 can be expected to cause harm to human dignity as understood in the *Law* sense. But to be denied such access at an institution to which the state, *knowing that that institution is going to discriminate on a ground protected by s. 15*, has granted formal approval is to suffer an attack on one’s human dignity of quite a different order of magnitude. That is particularly true in circumstances in which, as would have to be the case here, that approval is granted by a state agency on the basis of its obligation “to uphold and protect the public interest in the administration of justice.”<sup>160</sup> To face the prospect of being a victim of discrimination that flows directly and inevitably from a decision made by a state agency acting on that basis is, we contend, profoundly denigrating to one’s human dignity.

To interpret the impact of Law Society approval of TWU’s law school in this manner is not to claim, as the argument before the Court of Appeal did, that the Law Society would be endorsing discrimination against members of the LGBTQ community. In our view, it is unnecessary to go that far in order to establish that approval causes serious harm to the equality rights of those individuals. In fact, we would go so far as to say that the question of whether or not approval would amount to endorsement of TWU’s discrimination is irrelevant to the equality analysis in this case. Having said that, we would note that, if it is indeed the case, as the Court of Appeal appeared to accept, that TWU would not proceed with its plan to establish a law school without Law Society approval, that discrimination would not occur *but for* the state approval; in a very

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<sup>159</sup> *Supra*, note 8, at para. 99. The Court of Appeal included this passage in its reasons for judgment, but made no reference to its concluding sentence in its own reasoning.

<sup>160</sup> *Legal Profession Act, supra*, note 2, s. 3.

real sense, therefore, it would be the state that would be responsible, at least indirectly, for that discrimination.<sup>161 162</sup>

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<sup>161</sup> Another way of thinking about the harm caused to the equality interest by Law Society accreditation of TWU's law school is suggested by the decision of the Saskatchewan Court of Appeal in *Marriage Commissioners Appointed under the Marriage Act (Re)*. (*supra*, note 84). When Justice Richards came to assess the significance of the competing equality interest of gays and lesbians in the course of his s. 1 balancing exercise in that case, he noted that they would be treated differently from other people who wished to be married because, under the proposed legislation, a same-sex couple could be told by a commissioner that he or she would not perform the ceremony. Those seeking to have the legislation upheld argued that such an impact would be small because such a couple could get another commissioner. Richards, J.A. rejected that argument for two reasons, the first of which was “the importance of the impact on gay or lesbian couples of being told by a marriage commissioner that he or she will not solemnize a same-sex union.”(para. 41). It is the second reason that we believe has particular relevance to the *TWU* case. That reason he explained as follows:

"[the proposed legislation] would undermine a deeply entrenched and fundamentally important aspect of our system of government. In our tradition, the apparatus of the state serves everyone equally without providing better, poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender. The proud tradition of individual public officeholders is very much imbued with this notion. Persons who voluntarily choose to assume an office, like that of marriage commissioner, cannot expect to directly shape the office's intersection with the public so as to make it conform with their personal religious or other beliefs. Any idea of this sort would sit uneasily with the principle of the rule of law to the effect that “the law is supreme over officials of the government as well as private individuals, and thereby preclusive of the influence of arbitrary power”...Marriage commissioners do not act as private citizens when they discharge their official duties. Rather, they serve as agents of the Province and act on its behalf and its behalf only. Accordingly, a system that would make marriage services available according to the personal religious beliefs of commissioners is highly problematic. It would undercut the basic principle that governmental services must be provided on an impartial and non-discriminatory basis" (paras. 97 & 98).

We recognize that, unlike the marriage commissioners at issue in that case, TWU is not an agent of the government of British Columbia, and that, if it were to establish an approved law school, it could not be said to be acting “on [the government's] behalf and its behalf only” when it delivered its program of legal education to its students. Despite those differences, the proposition that “the apparatus of the state serves everyone equally without providing poorer or different services to one individual compared to another by making distinctions on the basis of factors like race, religion or gender” can still be said to have application in the context of the *TWU* case. The Law Society forms part of the apparatus of the state for purposes of regulating the legal profession in the public interest, with the service it offers being the opening up of access to approved laws schools. To approve a law school that “mak[es] distinctions on the basis of factors such as [sexual orientation]” would not be to serve equally everyone seeking a legal education at an approved law school, and like empowering marriage commissioners to refuse to grant marriage licences to gays and lesbians, would “undermine a deeply entrenched and fundamentally important aspect of our system of government.”

<sup>162</sup> The Court's failure to appreciate the true nature of the equality interest at issue is driven home by its apparent attempt to equate the harmful impact on members of the TWU community of expression by some Benchers and members of the Law Society of opinions that the Prohibition was “hypocritical”, “archaic” or “abhorrent” with the harmful impact of accreditation upon the LGBTQ individuals being discriminated against (*supra* note 1 at para. 189). Taken at face value, it would presumably follow from the Court of Appeal's reasoning that the harmful impact



**B. The equality interest of married LGBTQ individuals attending TWU's law school**

As we noted above, the Court of Appeal did not consider this dimension of the equality interest. We therefore have no reasoning in respect of it on which to comment, and are free simply to offer our own thoughts on the manner in which it should be dealt with. We begin by reciting a portion of the summary given by the Court of Appeal of the expert evidence that bore on the situation in which LGBTQ students at the law school might find themselves:

“Signing the Covenant would require self-censorship by gay and lesbian people – hiding relationships even though they are legally sanctioned in Canada...; it would require gays and lesbians to isolate themselves...; and it would be harmful because it potentially ‘re-pathologizes’ homosexual identity and denies recognition of the harm of homophobia.”<sup>163</sup>

It is difficult to see how, given that evidence, the equality interest of such individuals could not be given considerable weight. That is particularly so given that TWU prohibits conduct between spouses of a highly intimate nature and that occurs away from other members of the TWU community. TWU has not limited the Prohibition to conduct which takes place on campus or in the context of university-related activity, as it has, for example, with the consumption of alcohol. On the contrary, it has reserved for itself the right to discipline students who engage in that conduct no matter how distant from campus, how unrelated to university activities or community, or how private. And, as noted above, the nature of that punishment could extend to suspension or even expulsion from one's studies, which could in turn have significant consequences not only for the student's studies, but for their future career prospects. It is important also to remember that, if one accepts that TWU would not open a law school in the absence of Law Society approval, the assault on this second dimension of the equality interest, like the assault on the first, would not occur *but for* the Law Society's decision to accredit

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on religious believers of criticism of beliefs and practices that, for example, contradict principles of racial and gender equality is no different from the harmful impact on the dignity of individuals who face discrimination on the basis of their race or gender. We doubt that the Court of Appeal would endorse drawing such an equivalency; why it was prepared to draw one here is unclear. We can only say that the Court of Appeal's suggestion that the harm that comes from having one's discriminatory behaviour subjected to criticism can be seen as equivalent to the harm that comes from that discriminatory behaviour not only reflects a troubling attempt to devalue the interests of LGBTQ individuals, it lies in direct contradiction to the Supreme Court of Canada's understanding of the right to equality.

<sup>163</sup> *Supra*, note 1, at para. 110.

TWU's law school; again, in a very real sense, it would be the state that would be responsible, at least indirectly, for that discrimination.

### C. Summary

For all of these reasons, we believe that the Court of Appeal was wrong to attach so little weight to the equality interest at stake in the *TWU* case. While it may be possible to imagine contexts in which the harm done to the equality interest of members of the LGBTQ community by discrimination on the ground of sexual orientation would be greater – being denied any protection from discrimination on that ground in human rights legislation, as in *Vriend*, for example – the harm that would be done to the LGBTQ community if the Law Society were to approve TWU's new law school would be both real and significant. That is true in respect of each of the two dimensions of the equality interest that we contend are at stake viewed separately; it is even truer when those two dimensions are combined, as they should be. The equality interest should therefore receive a good deal of weight in the contest between it and the religious interest that TWU is invoking.

### III. The Balancing Exercise

The Court of Appeal did not consider the decision in *TWU #1* to be dispositive of the outcome in this second *TWU* case. It did, however, extract a number of what it termed “principles” from that decision that, it said, “are highly relevant to the present case in that it involves balancing freedom of religion against the Law Society’s public interest in considering the impact of its decision on other Charter values, including sexual orientation equality.”<sup>164</sup> Those “principles” included: the *Charter* does not apply to TWU;<sup>165</sup> “TWU as a private institution is exempted in part from human rights legislation”;<sup>166</sup> it was nevertheless appropriate for the Law Society to take into account “the equality guarantees under the *Charter* and provincial human rights legislation” when it discharged its responsibility to make decisions in the public interest;<sup>167</sup> “the

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<sup>164</sup> *Supra*, note, 1, at para. 149.

<sup>165</sup> *Ibid.*, at para. 150.

<sup>166</sup> *Ibid.*

<sup>167</sup> *Ibid.*, at para. 152.

reconciliation of competing rights must take into account the context of private religious institutions”;<sup>168</sup> and “in balancing competing rights and values, the impact of a decision must be assessed on the basis of ‘concrete evidence’, not conjecture.”<sup>169</sup>

The only one of these principles which causes us any concern,<sup>170</sup> and which therefore warrants comment, is the second one<sup>171</sup> – that “TWU as a private institution is exempted in part from human rights legislation.” In combination with the first – the *Charter* does not apply to TWU – that principle led the Court of Appeal to assert that, while the Prohibition was discriminatory, TWU could not be said to be engaging in “unlawful discrimination.”<sup>172</sup> And that, in turn, the Court said, was an “important consideration”, for “the lawfulness of TWU’s policy is significant to the balancing exercise”.<sup>173</sup> The Court did not provide any legal analysis to support its conclusion that TWU was “exempted in part” from the *Human Rights Code* of British Columbia (the “*Code*”).<sup>174</sup> In fact, all one has to go on in terms of understanding how the Court reached this conclusion is reference to a passage from the Supreme Court of Canada in *TWU #1*, which similarly did not engage in any analysis of the issue, and the assertion that the law is “clear that as a private institution, it would be open to TWU to accept only students who subscribe to its adopted religious views — *a right also ensconced in this province’s Human Rights Code at s. 41*”.<sup>175</sup>

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<sup>168</sup> *Ibid.*, at para. 154.

<sup>169</sup> *Ibid.*, at para. 156. Curiously, the Court of Appeal did not refer back to these principles when it came to perform its balancing exercise. It instead introduced three different ones: that “the Charter does not create a hierarchy of rights;” that “[a]cting in ‘the public interest’ does not mean making a decision with which most members of the profession or public would agree;” and that “the nature and degree of the detrimental impact of the statutory decision on the rights engaged must be considered” (at paras. 164-166).

<sup>170</sup> While not causing us concern as a matter of principle, we note that the last of the “principles” – the need to measure the impact of a decision on the basis of evidence rather than conjecture – was not always honoured by the Court of Appeal. Examples of its failure to honour it can be found in the text accompanying notes 101 and 139, *supra*.

<sup>171</sup> Although it is important to note that that second principle is relevant to the manner in which the two following principles are applied.

<sup>172</sup> *Ibid.*, at para. 151.

<sup>173</sup> *Ibid.*

<sup>174</sup> *Supra*, note 1 at paras. 150-151.

<sup>175</sup> *Ibid.*, at para. 115 (emphasis added). The Court’s phrasing here is odd, for as we have explained, TWU does not accept only students who share its religious views. Moreover, the passages in which the Court of Appeal refers to TWU being exempted from the *Code* do not appear to depend on TWU accepting only evangelical Christian students (see para. 150). Because they do not, we deal with this argument on the basis that the Court’s own conclusion on this point was on the understanding that TWU does not limit admissions to students who share its religious views.

Yet in our view the law is far from clear on section 41's applicability to TWU. Pursuant to section 8(1), the *Code* proscribes discrimination in the delivery of "services customarily available to the public" *inter alia* on the ground of sexual orientation. The Court's references to TWU being "exempted" from the *Code* (rather than compliant with it) and to section 41 imply that the Court considered the Prohibition to contravene section 8(1), with the question being whether the discrimination is nevertheless "lawful" because of the exemption provided in section 41.<sup>176</sup> Section 41 provides:

"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, 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."<sup>177</sup>

Assuming that TWU were held to satisfy all of the criteria prescribed by the opening clause of section 41, the question is whether the presence of the Prohibition in the Covenant amounts to TWU "granting a preference to members of the identifiable group or class of persons". We do not intend to engage in a full legal analysis of this question, primarily because the existing jurisprudence does not provide sufficient guidance to permit us to arrive at a definitive conclusion given the relevant evidence we currently have at our disposal. It is enough for our purposes here to make two points. The first is that, contrary to the implication of the Court of Appeal's finding on this point, the *Code* does not provide for blanket exemptions to institutions. Rather, it provides for exemptions on a case-specific basis that requires an enquiry into, amongst other things, whether the allegedly discriminatory action can be said to grant a preference to members of the relevant identifiable group or class of persons.

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<sup>176</sup> The argument that the Prohibition constitutes at least a *prima facie* violation of s. 8(1) would proceed as follows: (1) given the decision in *UBC v. Berg*, [1993] 2 SCR 353, and the fact that TWU is willing to admit all qualified applicants, TWU's law school would be held to be providing "services commonly available to the public"; (2) the impugned provision in the Covenant would be held to discriminate in the provision of that service on the ground of sexual orientation; and (3) while section 8(1) includes a BFOR defense, if our analysis of section 41 is correct (see following paragraphs in the main body of the text), we do not believe that that defense should be available to TWU, because if it were available, that would permit TWU to effectively make an end run around the specific exemption provided for in section 41.

<sup>177</sup> *Supra*, note 136, s. 41.

The second point is that, while the existing jurisprudence and relevant evidence at our disposal may make it impossible to arrive at a definitive conclusion, that jurisprudence does provide reason to believe that section 41 would *not* apply in at least some cases in which TWU sought to rely on the Prohibition either to exclude or to discipline students. The leading case on section 41 (though it dealt with its predecessor provision), which also happened to deal with the provision's application to a religious educational institution, is the Supreme Court of Canada's decision in *Caldwell et al. v. Stuart et al.*<sup>178</sup> That case concerned the decision by St. Thomas Aquinas High School, a Roman Catholic post-secondary institution, not to renew the employment contract of a female Roman Catholic teacher who had married a divorced man contrary to Church doctrine. The Court found that the decision fell within the scope of the exemption under section 41's predecessor on the basis that the school authorities were "exercising a preference for the benefit of the members of the community served by the school and forming the identifiable group by preserving a teaching staff *whose Catholic members all accepted and practised the doctrines of the Church*".<sup>179</sup> In other words, the discriminatory act was exempted from the *Code* because the school was able to establish that it had a hiring preference for teachers that was being exercised to ensure uniformity in the acceptance and practice of Catholic doctrines by those who professed the Catholic faith.<sup>180</sup> Had it been the case that the preference was being exercised for a purpose other than ensuring that uniformity amongst members of the faith – for example, had the teaching position been given to a Catholic teacher who contravened other Catholic doctrines – it would seem to follow from the Court's reasoning that the school would not have been able to benefit from the exemption.

As already noted, TWU has chosen to prohibit through the Covenant only certain categories of conduct that the evangelical Christian faith considers biblically condemned, rather than all such conduct, as it had before. If, in a given case, it could be shown that an LGBTQ individual was denied admission because they would not sign the Covenant, or was expelled because they engaged in sexual intimacy outside of marriage between a man and woman, and in their place an individual who committed some other form of biblically condemned conduct that was not prohibited by the Covenant, was admitted or permitted to continue their studies, it is probable

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<sup>178</sup> 1984 CanLII 128 (SCC), [1984] 2 S.C.R. 603.

<sup>179</sup> *Ibid.*, at p. 628 (emphasis added).

that section 41 would not apply. At least, based on the holding in *Caldwell*, that would be the outcome if both of those two individuals otherwise professed the evangelical Christian faith, and it seems logical that it would also be the outcome if neither did so.

Furthermore, the Court in *Caldwell* found it significant that although St. Thomas Aquinas had not always hired Roman Catholic teachers, its failure to do so was only because it had not been possible, and that the school “would prefer to have a fully Catholic teaching faculty”.<sup>181</sup> In the case of TWU, the Covenant states expressly that TWU welcomes students who do not affirm the evangelical Christian faith. At least if this means that TWU does not prefer evangelical Christian students – and there is nothing in the Covenant to suggest that this is its policy – this difference also casts into doubt the Court of Appeal’s assumption that the presence of the Prohibition in the Covenant, insofar as it applies to students, is necessarily exempted from the application of the *Code*.<sup>182</sup>

We do not claim that our analysis of section 41’s application to TWU’s use of the Prohibition is exhaustive,<sup>183</sup> nor could it be without a detailed factual context to which to apply it. But it strikes

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<sup>181</sup> *Supra*, note 178, at p. 609.

<sup>182</sup> There is another feature of *Caldwell* that suggests that the Court’s finding that the school’s decision granted a preference to members of the Roman Catholic faith may not be so easily transposed to TWU’s claim in respect of the Prohibition and its application to students. That feature is the Court’s finding that the role of teachers in forming “the mind and attitudes of the student depends not so much on the usual form of academic instruction as on the teachers who, in imitation of Christ, are required to reveal the Christian message in their work and as well in all aspects of their behaviour” (at p. 608). That is, the benefit to Catholics, being the “identifiable group”, was linked to the conduct of the individuals in respect of whom the preference was being exercised due to the particular nature and importance attributed to teachers’ behaviour in advancing the interests of that group. In the case of TWU, the individuals at issue would be students, rather than teachers. It seems clear from the Court’s emphasis on the role of teachers that it would not understand the same benefit to flow from students’ conduct, which would not be performing the same function in “reveal[ing] the Christian message” or forming “the mind and attitudes” of other students.

<sup>183</sup> In *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601, another important decision on the meaning and scope of section 41, the Court of Appeal found that it applied to the denial to a transgender woman of the opportunity to train (and serve) as a volunteer at an organization providing services to women victims of male violence. The Court understood the exemption as providing “that a group can prefer a sub-group of those whose interests it was created to serve, given good faith and provided there is a rational connection between the preference and the entity’s work, or purpose. Just as the school [in *Caldwell*] was not required to establish that it only served practising Catholics in order to lawfully prefer practising Catholics in its hiring practices for purposes of the group rights exemption, so here the Society is not required to establish that it only serves women raised and who have lived as females. And just as the School was not required to show that it never employed non-Catholics, here the Society is not required to show it never provided services to transsexuals.” It will be noted that although here the Court found that the “identifiable group” need not always be preferred, the grounds upon which the preference rests must be those that define the “identifiable group”. Moreover, the question of whether a preference is being granted to the benefit of women subject to violence and a religious community clearly involves different considerations. In

us that, at a minimum, the Court of Appeal should not simply have assumed that the presence of the Prohibition in the Covenant did not amount to “unlawful discrimination” under the *Code*. To make that assumption, and then to attach the significance the Court gave it for the purposes of its balancing exercise, was, in our respectful view, an error on the Court of Appeal’s part.<sup>184</sup> The complications in determining whether TWU’s use of the Prohibition is exempted from the *Code* ought to have led the Court either to ask counsel to make formal submissions in relation to it or to leave the question open and remove it from the scales.

We think it important to add to our analysis of section 41 a cautionary note about the weight to be given in the balancing exercise to a finding that TWU is entitled to claim the benefit of the exemption for which it provides in relation to the discriminatory character of the Prohibition. In our view, that weight should be very limited. Whatever the balance may be that is struck by section 41 between freedom of religion and equality rights, it is a balance struck in ordinary legislation that, like all ordinary legislation, is open to being challenged under the *Charter*. The ultimate question is what the *Charter* is understood to require when these two rights find themselves competing with each other. And that, of course, is the very question that the *TWU*

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particular, it would not be possible to assess whether, in the latter case, the preference is being given to ensure that all members of the former group are committed to the same beliefs and engage in the same practices, as *Caldwell* required in the case of preferences granted for the benefit of those of a particular religion. Further, while it is true, as the quoted passage notes, that *Caldwell* did not find it fatal to St. Thomas Aquinas’ section 41 argument that the school did not hire only Catholics, the Supreme Court of Canada evidently did consider it relevant that St. Thomas Aquinas’ failure to do so was due to practical impossibility, and that in fact the school would have preferred to hire only Catholics had that been a realistic possibility. The same does not appear true of TWU in respect of students, having chosen to state expressly in the Covenant that it welcomes all students regardless of their faith.

Finally, it is important to note that the majority in *TWU #1*, on which the Court of Appeal relied, found that TWU was “exempted, in part, from the British Columbia human rights legislation” (*supra*, note 10 at para. 25); that the *Code* “specifically provides for exceptions in the case of religious institutions” (at para. 32); and that s. 41 provides “that a religious institution is not considered to breach the Act where it prefers adherents of its religious constituency” (at para. 35). However, these statements could not reasonably have been relied upon by the Court of Appeal to resolve this question. As explained above, the version of the Covenant before the Supreme Court of Canada in that case was materially different from the version at issue in the present case. In particular, it prohibited *all* biblically condemned conduct, not merely some of it. The granting of preferences could thus be more easily linked to the interest in uniformity, at least insofar as conduct is concerned. Furthermore, the Supreme Court of Canada’s statements were made without any meaningful analysis of the question or evidence, and were made in the context of a case in which the focus was on students who attend TWU, and their post-graduation conduct, and thus the circumstances in which TWU’s Covenant might contravene the *Code* was at most indirectly in issue.

<sup>184</sup> The point is also an important one to make because we do not believe that the Court of Appeal’s ruling should be interpreted to offer to TWU – or any other institution – any form of blanket exemption from the *Code* to discriminate against LGBTQ (or any other) individuals.

case requires the courts to answer. For the courts to rely in answering that question on the balance struck in section 41 would in effect be to put the cart before the horse.<sup>185</sup>

The Court of Appeal summarized the outcome of the balancing exercise it performed in *TWU* in very simple terms in the following paragraph:

“In light of the severe impact of non-approval on the religious freedom rights at stake and the minimal impact of approval on the access of LGBTQ persons to law school and the legal profession, and bearing in mind the *Doré* obligation to ensure that Charter rights are limited ‘no more than necessary’, we conclude that a decision to declare TWU not to be an approved law faculty would be unreasonable.”<sup>186</sup>

We have explained why we disagree with the two most important features of that summary – the finding that the impact of the Law Society’s decision to refuse approval on the religious interest at stake was “severe” and the finding that the impact of a decision to grant approval on the equality interest of LGBTQ individuals would be “minimal.” In our view, the appropriate assessments in the circumstances of this case would be that the impact of the Law Society’s decision to refuse approval on the religious interest is minimal and the impact of a decision to grant approval on that equality interest would be real and significant. To the extent that the *Doré* obligation can be said to apply in a case in which the infringed *Charter* right is being balanced against another *Charter* right rather than, as was the case in *Doré*, a non-*Charter* interest, we contend that that decision, given that the Law Society was prepared to approve TWU if it removed the Prohibition from its Covenant, limited freedom of religion ‘no more than necessary’ in order to protect the equality rights of LGBTQ individuals. We would therefore conclude that the Law Society’s decision not to declare TWU an approved law faculty would not only be entirely reasonable, but correct.

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<sup>185</sup> This would be equally true, of course, if s. 41 were ultimately found not to be available to TWU – that is, if the courts held that the balance struck by s. 41 favours equality rights over freedom of religion.

<sup>186</sup> *Supra*, note 1, at para. 191.



**Appendix A**

<p><b>Trinity Western University Covenant Prohibited Conduct</b></p>	<p><b>University of British Columbia Code of Conduct</b>  (available at <a href="http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,285,0,0#15613">http://www.calendar.ubc.ca/vancouver/index.cfm?tree=3,285,0,0#15613</a>)</p>
<p>communication that is destructive to TWU community life and inter-personal relationships, including gossip, slander, vulgar/obscene language, and prejudice</p>	<p><b>4.2.3</b> No student shall, by action, threat, or otherwise, disrupt any activity organized by the University or by any of its faculties, schools, or departments, or the right of other persons to carry on their legitimate activities, to speak or to associate with others</p>
<p>harassment or any form of verbal or physical intimidation, including hazing</p>	<p><b>4.2.1</b> Misconduct against persons, which includes:</p> <p>(a) physically aggressive behavior, assault, harassment, intimidation, threats or coercion</p> <p>...</p> <p>(d) engaging in a course of vexatious conduct, harassment, or discrimination that is directed at one or more specific persons and that is based on any of the protected grounds under the BC Human Rights Code</p> <p>(e) engaging in unwelcome or persistent conduct that the student knows, or ought to reasonably know, would cause another person to feel demeaned, intimidated, or harassed</p> <p><b>4.2.12</b> No student shall engage in hazing, which is defined as an act which endangers the mental or physical health or safety of a student for the purposes of initiation or admission into, affiliation with, or as a condition for continued membership in, a group or organization</p>
<p>lying, cheating, or other forms of dishonesty including plagiarism</p>	<p><b>4.2.6</b> No student shall knowingly furnish false information to any person or office acting on behalf of the University, or forge, alter or misuse any University document, record or instrument of identification, or knowingly furnish false information to any person regarding their standing, status, or academic record at the University</p>
<p>stealing, misusing or destroying property belonging to others</p>	<p><b>4.2.2</b> Misconduct against property, which includes:</p> <p>(a) taking without authorization, or misusing, destroying, defacing, or damaging University property or property that is not their own, or information or intellectual property owned by the University or by any of its members</p> <p><b>4.2.14</b> No student shall contravene any provision of the Criminal Code or any other federal, provincial, or municipal statute or regulation</p>
<p>sexual intimacy that violates the sacredness of marriage between a man and a woman</p>	<p>N/A</p>
<p>the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent, including, but not limited to pornography</p>	<p>[The provision stating that no student shall contravene any provision of the Criminal Code (section 4.2.14) would capture some of this conduct, though the Covenant’s proscription is broader in respect of this category of conduct]</p>

<p>drunkenness, under-age consumption of alcohol, the use or possession of illegal drugs, and the misuse or abuse of substances including prescribed drugs</p>	<p><b>4.2.11</b> No student shall use, possess, or distribute a controlled or restricted substance or contravene provincial liquor laws or the policies of the University governing the possession, distribution, and/or consumption of alcoholic beverages</p> <p>[These policies include, for example, Policy 13, entitled, “Serving and Consumption of Alcohol at University Facilities and Events” (available at <a href="http://universitycounsel.ubc.ca/files/2015/08/policy13.pdf">http://universitycounsel.ubc.ca/files/2015/08/policy13.pdf</a>), the purposes of which are to “establish a process for the provision and consumption of alcohol at University facilities and at off-campus University events”, as well as to “promote the health and safety of faculty, staff, students, and visitors who attend University events where alcohol is served”.]</p> <p><b>4.2.14</b> No student shall contravene any provision of the Criminal Code or any other federal, provincial, or municipal statute or regulation</p>
<p>the use or possession of alcohol on campus, or at any TWU sponsored event, and the use of tobacco on campus or at any TWU sponsored event</p>	<p><b>4.2.11</b> No student shall use, possess, or distribute a controlled or restricted substance or contravene provincial liquor laws or the policies of the University governing the possession, distribution, and/or consumption of alcoholic beverages.</p> <p>[These policies include, for example, Policy 13, referred to above. In addition, Policy 15, entitled “Smoking and Smoking Product Promotion on Campus” (available at <a href="http://www.universitycounsel.ubc.ca/files/2012/07/policy15.pdf">http://www.universitycounsel.ubc.ca/files/2012/07/policy15.pdf</a>), prohibits, amongst other things, smoking “in any UBC controlled and occupied building, structure, hazardous materials storage location, or other UBC controlled and occupied place that is fully or substantially enclosed, or within a distance prescribed in the procedures from any prescribed place”]</p>
<p><b>TRINITY WESTERN UNIVERSITY AFFIRMATION</b></p>	<p><b>UNIVERSITY OF BRITISH COLUMBIA DECLARATION</b></p>
<p><b>By my agreement below I affirm that:</b></p> <ul style="list-style-type: none"> <li>• I have accepted the invitation to be a member of the TWU community with all the mutual benefits and responsibilities that are involved;</li> <li>• I understand that by becoming a member of the TWU community I have also become an ambassador of this community and the ideals it represents;</li> <li>• I have carefully read and considered TWU’s Community Covenant and will join in fulfilling its responsibilities while I am a member of the TWU community.</li> </ul>	<p>Upon registering, a student has initiated a contract with the University and is bound by the following declaration:</p> <p><b>"I hereby accept and submit myself to the statutes, rules and regulations, and ordinances (including bylaws, codes, and policies) of The University of British Columbia, and of the faculty or faculties in which I am registered, and to any amendments thereto which may be made while I am a student of the University, and I promise to observe the same."</b></p> <p>The student declaration is important. It imposes obligations on students and affects rights and privileges including property rights. You must not enrol as a student at the University if you do not agree to become bound by the declaration above. By agreeing to become a student, you make the declaration above and agree to be bound by it.</p>