No. S149837
VANCOUVER REGISTRY

IN SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

PETITIONERS

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

RESPONDENT

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

INTERVENERS

WRITTEN ARGUMENT OF THE ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

Counsel for the Intervener
The Association for Reformed Political Action:

André Marshall Schutten
Suite 2010 - 130 Albert Street
Ottawa, Ontario K1P 5G4
Tel: 613-297-5171
Fax: 613-249-3238
Email: andre@arpacanada.ca

Eric L. Vandergriendt
McQuarrie Hunter LLP
Barristers & Solicitors
Suite 1500, 13450 – 102nd Avenue
Surrey, BC V3T 5X3
Tel: (604) 581-7001
Fax: (604) 581-7110
Email: evandergriendt@mcquarrie.com

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Outline and Facts

1. On May 14, 2015 the Honourable Mr. Chief Justice Hinkson granted The Association for Reformed Political Action (ARPA) Canada ("ARPA Canada") leave to intervene in this matter, allowing 10 pages of written submissions. A determination on leave to present oral arguments will be made at a later date.

2. ARPA Canada sought leave to intervene in this application for judicial review of the Law Society of British Columbia's ("the LSBC") October 31, 2014 decision ("the LSBC Decision") that the proposed law school of Trinity Western University ("TWU") is not an approved faculty of law for the purposes of the LSBC's admission program.

3. ARPA Canada agrees with the facts as set out in the Written Argument of the Petitioners, paragraphs 9 – 100, filed with this Court on July 20, 2015.

4. ARPA Canada is a not-for-profit and non-partisan organization devoted to educating, equipping, and assisting members of Canada's Reformed churches ("Reformed Christians") and the broader Christian community as they seek to participate in the public square. Reformed Christians are a distinct subset of the broader Evangelical Christian community.

5. There is a real and wide-spread concern among Reformed Christians generally that legal developments are making it increasingly difficult to openly apply their faith in public life and, if a decision such as the LSBC Decision is upheld, even to apply their faith within their corporate and professional lives. The proceedings before this Honourable Court are one example of the types of recent developments generating grave concern among Reformed Christians.

6. Reformed Christians across Canada have a direct interest in the legal, public policy and constitutional issues that have been raised in these proceedings and, in particular, (though certainly not limited to) the proper interpretation of their constitutionally assured equality rights as enshrined in section 15(1) of the *Charter*. These submissions will focus on the legal questions surrounding equality rights only.

7. ARPA Canada is acutely aware that section 2(a) (freedom of religion), section 2(b) (freedom of expression) and section 2(d) (freedom of association) *Charter* rights are also raised in this application. While those freedoms are fundamental and need to be vigorously protected, ARPA Canada is confident that they will be adequately addressed by other intervenors.

Issues

8. The following five issues will be addressed in this factum.

a. Does the LSBC Decision constitute "government action" and "law" within the meaning of section 15(1) of the *Charter*?

b. If so, does the LSBC Decision violate the section 15(1) equality rights of Evangelical and Reformed Christians?

c. Does the entire group need to be targeted in order for stereotyping or discrimination to occur and for the test for section 15(1) discrimination to be met?

d. Does section 15 specifically, and do "*Charter* values" generally, create an obligation or justification for the State to violate the equality rights or other constitutional freedoms of an individual who is a member of a group listed in the enumerated grounds of section 15(1)?

e. What is the proper approach the State should adopt in balancing competing rights?

Argument and Analysis

9. When religious rights are implicated in a legal struggle between citizens and their civil government, the natural inclination is to look to the express protection of religious freedom in section 2(a) of the *Charter*,[1] where our Constitution protects from State interference the "**fundamental**" "**freedom of** conscience and **religion**".[2] That is where the bulk of jurisprudence on religious freedom has been established. Legal scholar Dr. Iain Benson makes this observation:

> Over the years it has been startling to see how, for example, one aspect of an equality right, such as "sexual orientation," is hived off and played against a Section 2(a) right without any realization that there is also a corresponding equality right touching on religion within Section 15 itself."[3]

Courts must look beyond section 2(a) to other sections of the *Charter*, including section 15(1), which protects the equality rights of, *inter alia*, religious individuals.

10. Section 15(1) of the *Charter* states that "every individual... has the right to the ...equal benefit of the law... without discrimination based on... religion".[4]

11. To demonstrate a violation of section 15(1) *Charter*, a claimant must prove, on a balance of probabilities, four things. The first two are preliminary:

> (1) That the infringer of the right is a State actor;[5] and
>
> (2) That the action constitutes "law" within the meaning of section 15(1).[6]

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[1] *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 ["*Charter*"].
[2] *Charter*, *supra* note 1 at s. 2(a).
[3] Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 Emory Int'l L. Rev. 111 at 148.
[4] *Charter*, *supra* note 1 at s. 15(1), [emphasis added].
[5] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 265, ["*McKinney*"].

Once a claimant demonstrates that the *Charter* applies, then the claimant must pass the two-stage section 15(1) analysis:

First: Does the law create a distinction based on an enumerated or analogous ground?

Second: Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?[7]

a. The LSBC's decision is subject to Charter scrutiny

12. ARPA Canada submits that the LSBC, as a regulatory body of the Province of British Columbia empowered by the *Legal Professions Act*,[8] is subject to the *Charter*. The Supreme Court confirmed the applicability of the *Charter* to law societies in finding that two rules of the Law Society of Alberta violated section 6 of the *Charter*.[9]

13. The Supreme Court stated in *Eldridge* that "it is a basic principle of constitutional theory that since legislatures may not enact laws that infringe the *Charter*, they cannot authorize or empower another person or entity to do so."[10] The LSBC's statutory mandate is to regulate the practice of law in British Columbia. In fact, it has a monopoly on that function as no lawyer can practice in the province without LSBC approval. If the B.C. legislature cannot ignore *Charter* rights when deciding who can become a lawyer in the province, neither can the LSBC.

14. A related question as to whether the LSBC is bound by the *Charter* is whether the LSBC Decision constitutes "law" within the meaning of section 15. Professor Hogg suggests the term applies "to the same range of governmental action as other Charter rights" and that "law" covers the "range of governmental action… defined in s. 32" of the *Charter*.[11] The Supreme Court confirmed this in *McKinney*, where Justice LaForest explained that, for the purposes of section 15, the "exercise by government of a statutory power or discretion would, if exercised in a discriminatory manner prohibited by s. 15, constitute an infringement of that provision."[12]

b. The LSBC decision violates the Section 15(1) equality rights of individuals associated with an Evangelical Christian community

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[6] Peter W. Hogg, *Constitutional Law of Canada: Fifth Edition Supplemented* (Toronto: Thomson Reuters Canada Ltd., 2007), pp.55-10 – 55-11 ["Hogg"].
[7] *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, ["*Withler*"] at para. 30.
[8] *Legal Professions Act*, S.B.C. 1998, c.9.
[9] See *Black v. Law Society of Alberta* [1989] 1 SCR 591, conclusion of the court at p. 634, 635.
[10] *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624 at para. 35.
[11] Hogg, *supra* note 6 at 55-11.
[12] *McKinney*, *supra* note 5 at 276. Incidentally, in this case universities were not found to be subject to the *Charter*, and so their retirement policies are not considered "law" within the meaning of section 15(1).

15. Section 15(1) of the *Charter* applies to the LSBC and to its regulations, actions and decisions. There is a two-part test for analyzing whether the LSBC violated section 15(1) when it refused to approve the TWU law school: "(1) Does the law create a distinction based on an enumerated or analogous ground? (2) Does the distinction create a disadvantage by perpetuating prejudice or stereotyping?"[13]

16. First, does the LSBC Decision create a distinction? ARPA Canada submits that **the LSBC Decision makes a distinction on the basis of religion**, an enumerated ground. In particular, the LSBC Decision makes a distinction between graduates of Canadian secular law schools and graduates of a Canadian Christian law school that is in every respect acceptable and qualified under the LSBC agreement with the Canadian Federation of Law Societies, except for the fact that it has a community agreement that is grounded on shared religious beliefs. Association with the TWU community covenant is what the LSBC has decided distinguishes TWU graduates from graduates of all other law schools in Canada.

17. Having demonstrated that the law creates a distinction, **it is necessary to demonstrate that the distinction creates a disadvantage.** "The analysis at the second step is an inquiry into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, **or** [2] by stereotyping in a way that does not correspond to actual characteristics or circumstances."[14] The word "or" indicates that a demonstration of only one of the two patterns of discrimination is required.

18. The first means of substantive inequality:

> The first way that substantive inequality... may be established is by showing that the impugned law, in purpose or effect, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1).[15]

19. Already in the first *Trinity Western* case,[16] a professional government body (the British Columbia College of Teachers) held TWU graduates to a different standard, seemingly not trusting them to teach children without "secular" oversight of a significant component of their education even though instruction at TWU complied with all professional and academic standards. The public attention showered on the TWU Law School demonstrates that many people believe students/graduates of the TWU Law School are, *ipso facto,* less qualified, or *not* qualified, to practice law because of a tenet of their religious beliefs and practices. The LSBC Decision perpetuates this prejudice.

20. The second means of substantive inequality:

> The second way that substantive inequality may be established is by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the

[13] *Withler, supra* note 7 at para. 30.
[14] *Ibid.*, at para. 65 [emphasis added].
[15] *Ibid.*, at para. 35.
[16] *Trinity Western University v. B.C.C.T.*, [2001] 1 S.C.R. 772, ["*Trinity Western*"].

> actual circumstances and characteristics of the claimant or claimant group. Typically, such stereotyping results in perpetuation of prejudice and disadvantage. However, it is conceivable that a group that has not historically experienced disadvantage may find itself the subject of conduct that, if permitted to continue, would create a discriminatory impact on members of the group.[17]

21. The LSBC Decision stereotypes all TWU Law School students and graduates, and by extension all Evangelicals including Reformed Christians, as being predisposed to discriminate generally, and more particularly in the practice of law, and inclined to be intolerant of others. This stereotype is baseless.[18] Importantly, the Supreme Court of Canada guides us to not only ask whether there is different treatment based on characteristics, "but also whether those characteristics are relevant considerations under the circumstances."[19] The personal view on marriage and sexuality of TWU graduates are *not* relevant to their ability to practice law. The moral standards by which a person governs their own life is immaterial to the LSBC. Licensed members of the LSBC are required to adhere to the professional code of conduct of the LSBC as the measure by which their practice capacity and performance will be assessed. If the characteristics of their religious beliefs are not relevant, then any discrimination is unjustified and the claimant passes the section 15(1) test.

22. The important thing to demonstrate at this stage is **impact or effect:**

> We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will perpetuate prejudicial or stereotypical attitudes towards them. Such an approach improperly focuses attention on whether a discriminatory *attitude* exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*."[20]

23. In *Andrews*, the Supreme Court applied this standard to measure the effect of the prohibition in B.C. on non-citizens from practicing law there. Justice McIntyre, for the majority decision on section 15(1), concluded that "[t]he distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory."[21] McIntyre J. also noted that what made the discrimination especially problematic was that the lawyers were otherwise qualified. He wrote,

> [a] rule which bars an entire class of people from certain forms of employment, solely on the grounds of a lack of citizenship status and <u>without consideration of educational and</u>

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[17] *Withler*, *supra* note 7 at para. 36.
[18] The discussion of stereotyping by Justice LeBel is helpful for understanding this point. *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61, at para. 201-203, ["*Quebec v. A.*"].
[19] *Withler*, *supra* note 7 at para. 39.
[20] *Quebec v. A.*, *supra* note 18 at para. 327. See para. 325 – 334 for a fuller discussion on this point.
[21] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 at 183, ["*Andrews*"].

> professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.[22]

The unacceptable discriminatory effect for non-citizens in *Andrews* was "some delay" before being called to the bar for otherwise qualified lawyers.

24. The practical effect of the LSBC Decision will at a minimum include "some delay" for otherwise qualified lawyers to be called to the bar. The discriminatory effect is that a qualified lawyer, having completed an academically and professionally approved program of law vetted and approved by the Federation of Law Societies and the British Columbia Ministry of Advanced Education and admitted to be academically and professionally sound by the LSBC[23] is nevertheless effectively banned (or, at the very least, delayed) from practicing law in the province on the sole basis of his or her personal ethic on marriage and sexuality. As the Supreme Court of Canada has already stated in an analogous case, "There is no denying that the decision… places a burden on members of a particular religious group".[24]

25. In *Andrews*, the Supreme Court defined discrimination as

> a distinction… based on grounds relating to personal characteristics of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group… or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination.*[25]

26. As set out above, the LSBC Decision squarely fits this definition:

(1) The group: TWU graduates;

(2) The personal characteristics: "the voluntary adoption of a code of conduct based on a person's own religious beliefs";[26]

(3) The disadvantage or limited access: banned or delayed from practicing law in British Columbia for publicly adopting a religiously informed code of conduct;

(4) Available to others: the adoption of a personal moral code is done by all people – no person is morally neutral – but the decision of the LSBC does not distinguish between those moral actors and does not delay or ban their admission to the practice of law;

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[22] *Andrews*, *supra* note 21 at p. 183, [emphasis added].
[23] While the LSBC does not explicitly admit to the academic soundness of TWU's proposed law school, it implicitly does so because the exclusive focus of disagreement is on the community covenant and not on the academic or professionalism qualifications of the school. See paras. 73 – 82 of the Respondent's **Amended Response to Petition**, filed 27 April 2015.
[24] *Trinity Western*, *supra* note 16 at para. 32.
[25] *Andrews*, *supra* note 21 at p. 174.
[26] *Trinity Western*, *supra* note 16 at para. 25.

(5) Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group: The LSBC Decision specifically disadvantages those Christians (and other non-Christian graduates of TWU law school) who choose to associate with people who identify with the Christian faith by signing a personal commitment to live according to a perfectly legal standard of moral living.

27. The *Charter* applies to the LSBC and the LSBC Decision constitutes "law" within the meaning of section 15(1). The LSBC Decision creates a distinction based on the enumerated ground of religion, and the distinction creates a discriminatory disadvantage for TWU graduates/students (Evangelical Christian law students) on the basis of religion.

c. Discrimination need not be applied universally to a group for a claim to be made out

28. Some object to the conclusion that the LSBC has violated the equality rights of Evangelical Christians since not <u>all</u> Evangelical Christians are effectively barred from practicing law in the province. Indeed, it is possible that many Evangelical Christians will attend secular law schools and could then apply and be accepted to practice law in British Columbia. Does this fact undermine the conclusion that the LSBC has violated section 15(1)?

29. The Supreme Court has addressed this objection directly. In *Quebec v. A.*, Justice Abella wrote,

> heterogeneity within a claimant group does not defeat a claim of discrimination... [This Court] squarely rejected the idea that for a claim of discrimination to succeed, all members of a group had to receive uniform treatment from the impugned law. ...[E]ven if only some members of an enumerated ...group suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination.[27]

30. The LSBC has not yet discriminated directly against Evangelical Christian law students who attend <u>secular</u> law schools (or who attend other Christian law schools in the United States or around the world). Nevertheless, ARPA Canada submits that the unconstitutional discrimination has been demonstrated in regard to TWU graduates. Furthermore, the effect of this overt discrimination against those holding a Biblical view of marriage and sexuality will no doubt have consequential negative effects for other lawyers in the province, including other Evangelical and Reformed Christian lawyers, whether they attended TWU or not. By way of their decision, the LSBC has sent a message to the profession and the public about the place and value of religious individuals, particularly Evangelical Christian lawyers.

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[27] *Québec v. A., supra* note 18 at para. 354-55. See also *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at 1288-89 and *Nova Scotia (Workers' Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 76.

d. Section 15 and "Charter values" do not create a justification for the State to violate the equality rights or other constitutional freedoms of an individual

31. A second objection to a section 15(1) claim might be, "Doesn't TWU's Community Covenant offend *Charter* values such that the LSBC has an obligation to send a message that violations of *Charter* values are not tolerated in the legal profession?"

32. First, the State cannot take the shield of the *Charter* and turn it into a sword. The *Charter* does not create grounds for the State to impose the *Charter* onto private citizens and private institutions. *Charter* values cannot be applied to private associations and individuals. TWU is not a public university;[28] rather it is private. As stated in *McKinney,* "To open up all private and public action to judicial review could strangle the operation of society and... diminish the area of freedom within which individuals can act."[29] We cannot apply the *Charter* to a private institution through the back door of "*Charter* values" language. The Supreme Court in *Andrews* confirmed this when it stated that section 15(1) does not "impose on individuals and groups an obligation to accord equal treatment to others. It is concerned with the application of the law."[30]

33. The Supreme Court also spoke directly to this issue in the first *Trinity Western* case: "To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion".[31]

34. Furthermore, those who advocate a "*Charter* values" approach should be reminded that freedom of conscience and religion, freedom of expression, freedom of association and the equal benefit of the law *vis-à-vis* the State are all "*Charter* values", and that these principles are to be applied to the activity of State actors including the LSBC.

e. The State is obligated to properly balance competing rights

35. The Petitioners have dealt thoroughly with the question of the proper balancing of rights.[32] ARPA Canada concurs with those arguments and limits its submission here to the discussion on delineating rights with regards to the section 15(1) equality right.

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[28] In fact, this court has recently found that, at least in the exercise of some of its functions, the *Charter* does not bind even public universities. See *BC Civil Liberties Association v. University of Victoria*, 2015 BCSC 39.
[29] *McKinney, supra* note 5 at p. 262.
[30] *Andrews, supra* note 21 at 163-64.
[31] *Trinity Western, supra* note 17 at para. 25.
[32] See the Petitioners' Factum, para. 442 – 466.

36. The proper first step is to delineate the allegedly competing rights to see if, in fact, there are rights in conflict. The delineation of rights for TWU Law School students should include their equality rights on the basis of the enumerated ground of religion; this Court should resist the temptation to "hive off" section 15 as a "sexual orientation" right and put it up against the "religion right" of section 2(a). Rather, it is the section 2(a), 2(b), 2(d) and section 15(1) rights of TWU graduates that must be compared in the aggregate against some other interest.

37. In this case, **there is no conflict because there is no *other* equality interest at stake.** The LSBC does not have sexual orientation equality rights and even if it did, TWU does not discriminate against the LSBC, or anyone for that matter, on the basis of sexual orientation. Only where the State itself is infringing on two competing rights simultaneously can there actually be a requirement to balance competing *Charter* rights. A true example of this would be the conflict between the right to a fair trial (section 7 an 11(d)) and religious freedom (section 2(a)) as found in the *R. v. N.S* case.[33] This scenario is not at play in the case at bar. By admitting TWU graduates to the practice of law in British Columbia, the LSBC would not somehow be discriminating against any individual or group. On the other hand, by not admitting TWU graduates to the practice of law on the sole basis of their moral and religious view of marriage and sexuality, the LSBC discriminates against TWU graduates. There are no competing rights here. In the first scenario, no *Charter* rights are violated. In the second scenario, multiple *Charter* rights of TWU graduates are violated.

38. There is no evidence that the admission of TWU graduates to the practice of law in British Columbia violates the *Charter* rights of anyone. Similarly, there is no evidence that TWU graduates would discriminate against anyone on the basis of sexual orientation. Indeed, the Supreme Court has stated that absent evidence, no such conclusion should be drawn on the basis of TWU and its graduates' view on marriage and sexuality.[34]

Conclusion

39. TWU is a community of 4,000 individuals who see value in governing themselves according to Christian morals as they associate with each other and study together. There is no harm in that. To refuse to recognize a qualified law school simply because its students voluntarily hold themselves to a Christian moral code is to discriminate against those students on the basis of religion.

[33] *R. v. N.S.*, [2012] 3 S.C.R. 726, especially para. 30-33.
[34] *Trinity Western, supra* note 16 at para. 32, 35-36.

40. As the Supreme Court suggested in *Trinity Western* (2001), "if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church."[35] ARPA Canada agrees. In order for justice to be done for all religious individuals in Canada, and to protect their place in Canada's public square, ARPA Canada submits that the decision of the LSBC ought to be set aside.

41. ARPA Canada requests permission to present oral argument at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

this 22nd day of July 2015.

André Marshall Schutten
Counsel for the Intervenor
Association for Reformed Political Action (ARPA) Canada

130 Albert Street, Suite 2010
Ottawa, Ontario K1P 5G4
Tel: 613-297-5172
Fax: 613-249-3238
Andre@ARPACanada.ca

[35] *Trinity Western*, *supra* note 16 at para. 33.