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**COURT OF APPEAL
REGISTRY**

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

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

**ON APPEAL FROM THE JUDGMENT OF THE HONOURABLE CHIEF JUSTICE
HINKSON PRONOUNCED DECEMBER 10, 2015**

BETWEEN:

THE LAW SOCIETY OF BRITISH COLUMBIA

**APPELLANT
(RESPONDENT)**

AND:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

**RESPONDENTS
(PETITIONERS)**

**FACTUM OF THE INTERVENOR
WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND**

Counsel for West Coast Women's Legal Education and Action Fund

**Janet Winteringham, Q.C.
Jessica Lithwick**

Winteringham MacKay
Suite 620 – 375 Water Street
Vancouver, BC V6B 5C6

**Counsel for the Appellant
Peter A. Gall, Q.C.
Donald R. Munroe, Q.C.
Benjamin J. Oliphant**

Gall Legge Grant & Munroe LLP
10th Floor, 1199 West Hastings Street
Vancouver, BC V6E 3T5

Robyn Trask

British Columbia Teachers' Federation
100 – 550 West 6th Avenue
Vancouver, BC V5Z 4P2

**Counsel for the Respondents
Kevin Boonstra
Jonathan Maryniuk**

Kuhn LLP
100-32160 South Fraser Way
Abbotsford, BC V2T 1W5

CHRONOLOGY OF DATES RELEVANT TO THE APPEAL

The West Coast Women's Legal Education and Action Fund adopts the chronology of the Appellant, the Law Society of British Columbia.

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OPENING STATEMENT

Trinity Western University's ("TWU") Community Covenant Agreement (the "Covenant") and its discriminatory effect on the basis of sexual orientation has been prominent in this litigation. The discriminatory impact of the Covenant on women is similarly profound. This submission addresses the stated error that the LSBC's decision did not reasonably balance and resolve competing *Charter* rights and values, focusing particularly on discrimination on the basis of sex.

TWU's Covenant does not bar women from attending TWU; however, it permits their attendance only at an unacceptable cost because it restricts reproductive autonomy. Constraining a woman's right to choose whether or not to carry a child is sex discrimination. Requiring a woman to forego this right to autonomous decision-making regarding her bodily integrity to access law school perpetuates historical disadvantage of women contrary to the equality guarantee in section 15 of the *Charter*. The Covenant not only discriminates in constricting action, it also fosters harmful discriminatory beliefs of female autonomy and compels the policing of women members' private choices by other TWU members.

Equality rights for women and LGBTQ people do not exist in silos. For some women, the Covenant will discriminate on multiple overlapping grounds, namely sex, marital status and sexual orientation. This compounds the disadvantage they will experience.

The Law Society of British Columbia ("LSBC") decided not to approve TWU's faculty of law for the purpose of the LSBC's admission program (the "Decision"). WCL submits the Decision was reasonable and would be correct if that were the applicable standard. It is not an unjustifiable infringement of freedom of religion. The LSBC is subject to the *Charter* and is charged with safeguarding and fostering confidence in the administration of justice in British Columbia. As such, it was required to protect the substantive equality rights of disadvantaged groups, including women, who would be excluded from access to a law school position at TWU.

PART 1 – STATEMENT OF FACTS

1. WCL seeks to achieve equality for women by changing historic patterns of systemic discrimination through equality rights litigation, law reform and public legal education. In this appeal, WCL takes the position that the LSBC's approval of TWU's proposed law school would have been an unjustifiable violation of equality as prohibited by s. 15 of the *Charter*.¹

2. WCL adopts the facts as stated by the Appellant and highlights the following. Through its mandatory Covenant, TWU's admissions policy requires TWU students and faculty² to "treat all persons with respect and dignity, and uphold their God-given worth from conception to death."³ The implication is that female TWU members must not access abortion. TWU members are required to abide by this rule and to "take steps to hold one another accountable to the mutual commitments outlined in [the] covenant". Further, the Covenant invokes "formal accountability procedures to address actions by [TWU] community members that represent a disregard for [the] covenant."⁴ This means that TWU members are bound to abide by, and monitor each other's compliance with, the Covenant. Those who do not do so may be subject to sanction.

PART 2 – ISSUES ON APPEAL

3. WCL makes the following specific submissions:
- a. TWU's admissions policy discriminates against women because the Covenant restricts women's reproductive freedoms.

¹ *Doré v. Barreau du Québec*, 2012 SCC 12 ["Doré"]; *Loyola High School v. Quebec (AG)*, 2015 SCC 12 ["Loyola"] at para. 47.

² Referred to herein as "TWU Members".

³ Affidavit of Dr. W. Robert Wood, Joint Appeal Book #1 ["Wood Affidavit"], Exhibit C. This part of the Covenant footnotes Ps. 139:13-16. In *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 4, TWU's old covenant is cited. It prohibits abortion and cites the same scripture (i.e. Ps. 139:13-16).

⁴ Wood Affidavit, Exhibit C.

- b. The discriminatory impact of the Covenant impacts women on the intersecting grounds of sex, sexual orientation and marital status.
- c. The Decision needed to be informed by, and consistent with, the *Charter's* promise of substantive, not formal, equality. The LSBC was obligated to act consistently with that promise and its decision was reasonable.

PART 3 – ARGUMENT

Discrimination on the basis of sex

4. TWU's admissions policy plainly discriminates against multiple groups protected by s. 15 of the *Charter*, including women. This was recognized by the Ontario Divisional Court in *Trinity Western University v. The Law Society of Upper Canada*:

[104] On the other side of this issue are the equality rights of persons who might wish to attend TWU's law school in order to pursue their legal education but who, at the same time, wish to be true to themselves and to their own beliefs. While much attention in this case was directed at the discriminatory effect of TWU's Community Covenant on LGBTQ persons, the reality is that the discrimination inherent in the Community Covenant extends not only to those persons but also to women generally; to those persons of any gender who might prefer, for their own purposes, to live in a common law relationship rather than engage in the institution of marriage; and to those persons who have other religious beliefs.

[105] We use the words discrimination and discriminatory in this context intentionally. Despite some efforts by TWU to contend that the Community Covenant does not operate in a discriminatory fashion, it is self-evident that it does. It requires, by its very content, that individuals adhere to a particular view, and a particular belief system, in order to attend TWU. In addition, this is not merely an aspirational code. To the contrary, failure to adhere to the conduct imposed by the Community Covenant, carries with it serious consequences.⁵

5. At paras. 117-140, TWU submits that equality rights of LGBTQ people and women are not engaged by the Decision because "TWU is a private institution." That submission disregards the true impact of the Decision. The LSBC did not enter a private sphere; it refused to be conscripted in discrimination by a private institution seeking to

⁵ *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 ["*TWU v. LSUC*"].

enter a public sphere. TWU's submission ignores the impact of the Decision on LGBTQ people and women. The LSBC was obligated to consider the impact of TWU's admissions policy on protected groups seeking equal access to careers in law.

6. TWU's Covenant discriminates against women, a group that has been historically disadvantaged, because it restricts reproductive autonomy.⁶ Female TWU members must promise to forego their constitutionally protected rights to access abortion before being admitted to TWU's proposed law school and may face sanction for exercising that right after admission. This creates institutionalized discrimination against female TWU members. Only women can become pregnant. Discrimination on the basis of pregnancy is discrimination on the basis of sex.⁷

7. The Covenant discriminates against women by impeding access to TWU and a coveted law school position. Any woman who is unwilling to relinquish her reproductive rights or any person who believes in reproductive choice for women will not have access to TWU as signing the Covenant would be antithetical to their beliefs. Further, any woman who has an unwanted pregnancy while attending TWU will face an unconscionable restriction on her autonomy in having to continue with that pregnancy or face expulsion or other discriminatory sanction for accessing legal abortion services. For some women, this issue will not arise until they have partially completed their degrees; the fact of being pregnant can change after admission to law school.

8. In *Morgentaler*, the SCC found that a state prohibition on access to abortion violated the s. 7 *Charter* rights of women. As Dickson C.J. and Lamer J. held, forcing a woman to carry a foetus to term "is a profound interference with a woman's body and thus an infringement of security of the person".⁸ Having resolved the issue under s. 7, the SCC did not address the s. 15 arguments raised. However, *Morgentaler* is instructive on the importance of the interests at stake and the discriminatory impact that

⁶ *Weatherall v. Canada (Attorney General)*, [1993] 2 S.C.R. 872.

⁷ *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ["*Inglis*"] at para. 547.

⁸ *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ["*Morgentaler*"] at para. 24.

restrictions on reproductive choice have on women. As Wilson J. stated in her concurring reasons, the right to abortion also engages women's liberty: "The right to reproduce or not to reproduce... is properly perceived as an integral part of modern woman's struggle to assert her dignity and worth as a human being".⁹

9. The Covenant does not impose criminal sanctions, but it does render female TWU members uniquely subject to penalty, including discipline or expulsion from TWU for exercising autonomy over their own bodies. Punitive responses to women's choice to exercise their constitutionally protected reproductive rights have serious implications for women's health, education, employment and livelihood. This is discriminatory.

10. Similarly, the Covenant's restriction on reproductive freedoms fosters discriminatory views of female personal autonomy. All TWU members must affirm and commit to promoting the view that it is wrong for a woman to exercise her constitutionally protected reproductive rights and access lawful healthcare services regardless of her own personal aspirations, dignity and autonomy. Further, female TWU members are uniquely subject to monitoring of their physical autonomy by TWU members because the Covenant mandates that violations be reported. This adds to the discriminatory impact on women by isolating a woman with an unwanted pregnancy.

11. The LSBC is subject to s. 15 of the *Charter* and is charged with promoting the public interest by, *inter alia*, preserving and protecting the rights and freedoms of all persons.¹⁰ This includes protecting historically disadvantaged groups and pursuing the goals of substantive equality. Just as it would be discriminatory for the LSBC to endorse a law school that excluded all women, it would be discriminatory for the Law Society to endorse a law school that restricts women's reproductive rights.

⁹ *Morgentaler* at para. 242.

¹⁰ *Legal Profession Act*, S.B.C. 1998, c. 9, s. 3.

12. Formal equality (treating everyone the same) ignores many types of discrimination¹¹ and has been repeatedly rejected by the SCC. TWU, at paras. 132 and 135 of its factum, frames the equality issue in a manner that incorporates a formal (not substantive) equality analysis. This is an unduly narrow conception of the equality guarantee and does not fulfil the purposes of the *Charter*.¹² As stated by the SCC, “[a]n insistence on substantive equality has remained central to the Court’s approach to s. 15”.¹³ Pursuant to the promise of substantive equality, “separate, but equal” reasoning that was historically used to justify discrimination has been “majestically disregarded”.¹⁴

13. In protecting substantive equality, government actors (such as the LSBC) must avoid indirect, as well as direct, discrimination.¹⁵ Further, they must recognize “that persistent systemic disadvantages have operated to limit the opportunities available to members of certain groups in society and seeks to prevent conduct that perpetuates those disadvantages”.¹⁶ For this reason, substantive equality may require differential treatment to “ameliorate the actual situation of the claimant group”,¹⁷ as “identical treatment may frequently produce serious inequality”.¹⁸

¹¹ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [“*Andrews*”] at paras. 26-34; *R. v. Kapp*, 2008 SCC 41 [“*Kapp*”] at paras. 15 and 27.

¹² *Andrews* at paras. 26-34; *Withler v. Canada (Attorney General)*, 2011 SCC 12 [“*Withler*”] at para. 2.

¹³ *Kapp* at para 15.

¹⁴ *Moore v. British Columbia (Education)*, 2012 SCC 61 [“*Moore*”] at para. 30.

¹⁵ *Withler* at para. 64 (see also paras. 2, 39, 55, and 64 and *Kapp* at paras. 14-16, 22 and 27).

¹⁶ *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 [“*Taypotat*”] at para. 17.

¹⁷ *Withler* at para. 39. See also Convention on the Elimination of All Forms of Discrimination against Women, *General Recommendation 25, On article 4, paragraph 1, on Temporary Special Measures*, UN Doc. HRI/GEN/1/Rev.7 at 282 (2004).

¹⁸ *Taypotat* at para 17, citing *Andrews* at para. 26; *Kapp* at para. 27.

14. Since *Withler*, the law has evolved away from a rigid discrimination analysis towards one that requires the courts to consider the alleged discrimination contextually to determine whether the government has perpetuated disadvantage for a protected group.¹⁹ As stated in the majority's decision in *Quebec v. A*, assessment of harms to dignity, identification of mirror comparator groups, deference to the good intentions of government and inquiry about the presence of stereotyping or prejudice no longer form part of a "rigid template" for analyzing discrimination. Focus on these issues are not essential components of an equality claim and can hamper the attainment of substantive equality by obscuring from the real issues and creating unnecessary obstacles for equality-seeking groups.²⁰

15. Section 15 "requires a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the claimant *because of his or her membership in an enumerated or analogous group*'".²¹ The test is whether:

- a. On its face or in its impact, a law creates a distinction on the basis of an enumerated or analogous ground; and
- b. The impugned law fails to respond to the actual capacities and needs of the members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage.²²

16. In other words, "If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory".²³ The LSBC could not wash its hands of its obligations to protected groups excluded by the Covenant in considering whether to accredit TWU's law school.

¹⁹ *Quebec (Attorney General) v. A*, 2013 SCC 5 ["*Quebec v. A*"]; *Withler* at para. 65.

²⁰ Smith, Lynn and William Black, "The Equality Rights" in E. Mendes and S. Beaulac (eds.), *Canadian Charter of Rights and Freedoms* (5th ed.) (Toronto: LexisNexis, 2013) at 971-2; *Quebec v. A* at paras. 319-331; *Taypotat* at para. 18; *Inglis* at para. 518.

²¹ *Taypotat* at para. 16, citing *Quebec v. A* at para. 331 (emphasis in *Taypotat*).

²² *Taypotat* at paras. 19 and 20.

²³ *Quebec v. A* at para. 332.

Just because the LSBC did not create the discriminatory elements of the Covenant does not mean that it can be a party to the serious disadvantage that results.

Intersecting grounds of discrimination

17. A prospective law school student may be impacted by the Covenant on multiple prohibited grounds including sex, sexual orientation and marital status. In addition to its discriminatory impact on women and LGBTQ people, by restricting all sexual activity outside of heterosexual marriage, the Covenant also discriminates against unmarried persons. This was recognized by the Ontario Divisional Court.²⁴ Section 15 prohibits discrimination on the analogous ground of marital status because unmarried partners have suffered historical disadvantage and prejudice and, as stated by the SCC, an “individual’s freedom to live life with the mate of one’s choice in the fashion of one’s choice” is a “matter of defining importance to individuals”.²⁵

18. The discriminatory impact of the Covenant on different protected groups intersects such that the effects on members of more than one disadvantaged group are compounded. For example, a pro-choice woman who wants to attend law school in Canada may be unmarried, sexually active, and bisexual. She would be excluded from TWU based on her sexual orientation, marital status and sex. Exclusion from an avenue to a career in law based on membership in one of these groups is a disadvantage; exclusion based on membership in two or three groups is even more profound.²⁶

The Decision reasonably balances implicated rights

19. Contrary to TWU’s’ assertion, the Decision did not infringe religious freedom. But if it did, the Decision reasonably balanced equality rights and religious freedom.

²⁴ *TWU v. LSUC* at para. 104.

²⁵ *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paras. 151-153. Based on the positions taken by the parties, WCL will not engage further with the issue of marital status.

²⁶ See the discussion in *Inglis* at para. 518.

20. Freedom of religion is infringed where “(1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant’s ability to act in accordance with his or her religious beliefs”.²⁷ WCL does not challenge the assertion that TWU or its members sincerely hold evangelical Christian beliefs. However, freedom of religion is not absolute. It allows every individual to:

...be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own.²⁸

21. In *S.L.*, the SCC recognised limits of fundamental freedoms in the public sphere and held that mandatory attendance at a public school Ethics and Religious Culture class did not interfere with the religious freedoms of Catholic parents and their children, stating that religious neutrality is “a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights.”²⁹

22. The right to discriminate claimed by TWU is not protected by freedom of religion. The Covenant is not simply an expression of belief; rather, adherence is mandatory and TWU members are called upon to police observance. This translates private belief into public mutually enforced obligations.³⁰

23. WCL submits that in interpreting the scope of freedom of religion, this Court must strive to balance the rights of others, including equality. Religious freedom does not

²⁷ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 at para. 155; *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 34.

²⁸ *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at para 123.

²⁹ *S.L. v. Commission Scolaire des Chenes*, 2012 SCC 7 at paras. 10. See also paras. 32 and 40 wherein it was stated: “State neutrality is assured when the state neither favours nor hinders any particular religious belief...”

³⁰ *TWU v. LSUC* at paras. 104-105.

entitle TWU to the LSBC's approval of a discriminatory program. Religious freedom cannot be used to perpetuate inequality and disadvantage.³¹

24. Whether or not freedom of religion is engaged, the Decision reflects the proportionate balance between religious freedom and protecting the equality of women, LGBTQ persons, and persons in unmarried relationships. *Doré's* proportionality analysis is robust and "works the same justificatory muscles' as the *Oakes* test".³²

25. The state is not required to endorse a discriminatory Covenant. In *Loyola*, the SCC found that it was permissible for the Minister to require a Catholic school to teach about the ethics of *other* religions in a neutral manner. This requirement "would not interfere disproportionately with the relevant *Charter* protections..."³³ Requiring equal access to a legal education in order to receive the LSBC's endorsement does not interfere disproportionately with freedom of religion. The SCC reiterated that religious freedom must be understood within the context of the state's role in promoting equality:

These shared values -- equality, human rights and democracy -- are values the state always has a legitimate interest in promoting and protecting.... Religious freedom must therefore be understood in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights.³⁴

26. The discriminatory aspects of the Covenant "conflict with or harm overriding public interests".³⁵ Such limitations on a woman's autonomy, in order for her to access law school, are a violation of her equality far out of proportion to any infringement of religious freedom arising from equal access to the law school. It was proportionate to deny accreditation. As stated by the Ontario Divisional Court, "TWU can hold and

³¹ See *Reference re Same-sex Marriage*, 2004 SCC 79 at para. 46: "the promotion of *Charter* rights and values enriches our society as a whole and the furtherance of those rights cannot undermine the very principles the *Charter* was meant to foster."

³² *Loyola* at para. 40, citing *Doré* para. 5.

³³ *Loyola* at para. 71.

³⁴ *Loyola* at para. 47.

³⁵ *Loyola* at para. 43.

promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education".³⁶

27. Given the equality interests at stake, it was reasonable for the LSBC to deny accreditation to TWU's law school. The LSBC must consider the equality interests of prospective TWU members. If a law school sought to exclude all women or all ethnic minorities, the LSBC could not endorse it without violating s. 15 of the *Charter*.

Conclusion

28. The Decision was reasonable. The LSBC cannot approve a program that discriminates in the admissions and discipline of its members. To do so would violate s. 15. Accrediting a law school at TWU, an institution that excludes historically disadvantaged groups through the imposition of a mandatory discriminatory Covenant, would negatively affect public confidence in the administration of justice and would be a step backwards in achieving greater representation and equality in the legal profession.

29. It is no answer to say that LGBTQ persons or women may attend TWU's law school if they agree to not engage in sexual intimacy or access their right to abortion. This intrusion into a highly intimate sphere is an unacceptable cost of admission for the "equality of opportunity" to join the British Columbia bar.³⁷ The exclusion of protected groups from TWU perpetuates their historical disadvantage.

PART 4 – NATURE OF THE ORDER SOUGHT

30. WCL seeks leave to make oral submissions at the hearing of this appeal.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 19th day of April 2016.



Janet Winteringham, Q.C., Robyn Trask and Jessica Lithwick
Counsel for West Coast LEAF

³⁶ *TWU v. LSUC* at para. 117.

³⁷ See Dickson C.J.C.'s address: "Legal Education", 64:2 Can. Bar. Rev. 374 at 377.

LIST OF AUTHORITIES

CASES	PARAGRAPH
1. <i>Andrews v. Law Society of British Columbia</i> , [1989] 1 S.C.R. 143	12,13
2. <i>Brooks v. Canada Safeway Ltd.</i> , [1989] 1 S.C.R. 1219	6
3. <i>Doré v. Barreau du Quebec</i> , 2012 SCC 12	1,24
4. <i>Inglis v. British Columbia (Minister of Public Safety)</i> , 2013 BCSC 2309	6,14,18
5. <i>Kahkewistahaw First Nation v. Taypotat</i> , 2015 SCC 30	13,14,15
6. <i>Loyola High School v. Quebec (AG)</i> , 2015 SCC 12	1,24,25,26
7. <i>Miron v. Trudel</i> , [1995] 2 S.C.R. 418	17
8. <i>Moore v. British Columbia (Education)</i> , 2012 SCC 61	12
9. <i>Multani v. Commission scolaire Marguerite-Bourgeoys</i> , 2006 SCC 6	20
10. <i>Quebec (Attorney General) v. A.</i> , 2013 SCC 5	14,15,16
11. <i>R v. Big M Drug Mart Ltd.</i> , [1985] 1 S.C.R. 295	20
12. <i>R v. Kapp</i> , 2008 SCC 41	12,13
13. <i>R. v. Morgentaler</i> , [1988] 1 S.C.R. 30	8,
14. <i>Reference re Same-sex Marriage</i> , 2004 SCC 79	23

15. <i>S.L. v. Commission Scolaire des Chenes</i> , 2012 SCC 7	21
16. <i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11	20
17. <i>Trinity Western University v. British Columbia College of Teachers</i> , 2001 SCC 31	2
18. <i>Trinity Western University v. The Law Society of Upper Canada</i> , 2015 ONSC 4250	4,17,22,26
19. <i>Weatherall v. Canada (Attorney General)</i> , [1993] 2 S.C.R. 872	6
20. <i>Withler v. Canada (Attorney General)</i> , 2011 SCC 12	12,13,14
Legislation	Paragraph
1. <i>Legal Profession Act</i> , S.B.C. 1998, c. 9, s. 3	11
Secondary Sources	Paragraph
1. Convention on the Elimination of All Forms of Discrimination against Women, <i>General Recommendation 25, On article 4, paragraph 1, on Temporary Special Measures</i> , UN Doc. HRI/GEN/1/Rev. 374 31.	13
2. Dickson C.J.C. "Legal Education", 64:2 Can. Bar. Rev. 374	29
3. Smith, Lynn and William Black, "The Equality Rights" in E. Mendes and S. Beaulac (eds.), <i>Canadian Charter of Rights and Freedoms</i>	14

INDEX: ENACTMENT

Legal Profession Act, S.B.C. 1998, c. 9

Object and duty of society

- 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 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, articulated students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.