SCC File No. 37209 & 37318

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
AND THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

FACTUM OF THE INTERVENER, CHRISTIAN LEGAL FELLOWSHIP

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

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INTERVENERS

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

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PARTS I AND II – OVERVIEW AND POSITION

1. Legal professionals, including the 700 law students, professors, lawyers, and judges from over 30 Christian denominations who form the Christian Legal Fellowship ("CLF"), have the freedom to exercise their religious beliefs and to freely associate with others who share those beliefs without consequential discrimination by law societies or other state actors. Like all Canadians, they have the freedom "to think, to disagree, to debate and to challenge the accepted view without fear of reprisal."[1]

2. Trinity Western University ("TWU") represents a community of students and professors seeking to associate in order to teach, study, and train for the practice of law from a distinctly Christian perspective.[2] This community, like all associations, including lawyers' organizations such as CLF, has a shared mission and purpose which members affirm. This Honourable Court has determined that TWU's specific mission and purpose as expressed in its Community Covenant, and its requirement that all members affirm same, are protected by both human rights legislation and the *Charter*.[3]

3. Yet the Law Societies of Upper Canada and British Columbia (the "Law Societies") have deemed this constitutionally-guaranteed element of TWU's religious association to be contrary to the public interest.[4] They have rejected members of TWU's community – future law graduates who will be ethical, competent, and qualified to practice law[5] – from participating fully in society by denying them equal admission to the legal profession. These decisions of the Law Societies ("Decisions") punish students, solely because they have exercised their associational and religious rights guaranteed under the *Charter*.

4. In addition to violating the *Charter* rights of TWU and its students, the Decisions negatively impact the rights of all legal professionals, particularly those who adhere to minority beliefs. They stifle diversity of belief and independence of opinion in the legal profession. The

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[1] *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 193 [*TWU v LSBC* (BCCA)].
[2] TWU Appellant Factum at paras 7, 9, 11, 16.
[3] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at paras 28 and 32 [*TWU v BCCT*].
[4] Law Society of British Columbia Factum at paras 26, 181, 220 [LSBC Factum]; Law Society of Upper Canada Factum at paras 37, 39 [LSUC Factum].
[5] LSBC Factum at para 94; LSUC Factum at para 46.

Decisions breach the Law Societies' duty to protect the public from the needless erosion of confidence in lawyers who share TWU's beliefs, including members of CLF. These Decisions therefore undermine, rather than promote, the public interest.

PART III: ARGUMENT

5. Is it contrary to the public interest to allow law students and lawyers to associate on the basis of shared religious beliefs in the pursuit of educational and professional goals? As an association that exists precisely for this purpose, CLF is "directly affected"[6] by this question, and submits that the answer must be an unequivocal "no".

6. Such association cannot be against the public interest on the basis that it is "unlawful". TWU's Community Covenant is protected by human rights legislation[7] and the *Charter*. These provisions are not mere "exceptions" to human rights norms;[8] rather, they "confer and protect rights" including the right to associate,[9] and serve an "important equality seeking purpose" necessary for the realization of "true equality".[10]

7. Nor can it be on the basis that the beliefs expressed and manifested by members of the TWU community are themselves contrary to the public interest. The freedom to hold and publicly express a view of marriage as the "union of a man and woman to the exclusion of all others", without censure or sanction, is enshrined in the statute that recognized same sex marriage.[11] The *Charter* protects that view and its public expression.[12]

8. If religiously-informed beliefs regarding marriage and sexuality are a legitimate basis on which to reject TWU's graduates, it would follow that any licensee could potentially be excluded from the profession based on personal beliefs or religious associations.[13] Surely one's religious beliefs, whether exercised alone or in community with others, must not disqualify one from a

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[6] *Trinity Western University v Law Society of Upper Canada*, 2014 ONSC 5541 at para 46 [*TWU v LSUC* (ONSC)].
[7] *Human Rights Code*, RSBC 1996, c 210, s 41(1); *Human Rights Code*, RSO 1990, c H.19, s 18.1 [*OHRC*].
[8] *Caldwell v Stuart*, [1984] 2 SCR 603 at 626; see also *Nixon v Vancouver Rape Relief*, 2005 BCCA 601 at para 51 [*Nixon*].
[9] *Caldwell v Stuart* (1982), 132 DLR (3d) 79 at para 40 (BCCA), Seaton J aff'd 2 SCR 603.
[10] *Gillis v United Native Nations Society*, 2005 BCHRT 301 at para 21.
[11] *Civil Marriage Act*, SC 2005, c 33, preamble and s 3.1.
[12] *Reference re Same-Sex Marriage*, 2004 SCC 79 at paras 57, 58; *Saskatchewan (Human Rights Commission) v Whatcott*, 2013 SCC 11 at paras 50, 159 [*Whatcott*].
[13] *TWU v BCCT* at para 33.

regulated profession.[14] Otherwise, hundreds, if not thousands, of current lawyers and judges who ascribe to traditional Christian, Jewish, Muslim (among other faiths') teachings on marriage and sexuality, including members of CLF, could be disqualified from practice.[15]

9. The Law Societies insist that this is not the case, and that law students and legal professionals are free to individually hold and express religious beliefs such as those contained in TWU's Community Covenant.[16] Yet when students seek to do so in association at TWU, it is deemed such an affront to the public interest that their legal education – culminating in an academically accredited degree which is otherwise valid and meets all applicable standards[17] – cannot and will not be recognized. Why not? Section 2(d) of the *Charter* protects "the right to do collectively what one may do as an individual."[18]

10. The Law Societies assert that they must reject TWU graduates because TWU's Community Covenant is exclusionary to those who cannot affirm its content.[19] Yet the fact that a particular institution is "not for everybody" does not mean it cannot be for *anybody*.[20] Canada's Constitution protects a diversity of educational institutions,[21] including those "designed to address the needs of people who share a number of religious convictions."[22]

11. To decide otherwise would mean the obliteration of institutional diversity; there could never be educational institutions designed to serve a specific group – be they based on language, gender, sexual orientation, or religion.[23] That an institution serves primarily people who affirm

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[14] *Roncarelli v Duplessis*, [1959] SCR 121 at 140-141, 156, 183-184, [*Roncarelli*].
[15] *Trinity Western University v Nova Scotia Barristers Society*, 2015 NSSC 25 at para 259 [*TWU v NSBS*].
[16] LSUC Factum at para 126; LSBC Factum at paras 28, 168.
[17] At the time of both Decisions, TWU had been granted preliminary approval by the Federation of Law Societies and was accredited in BC to grant degrees: see *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326 at paras 34, 49.
[18] *Mounted Police Association of Ontario v Canada (Attorney General)* 2015 SCC 1 at para 36 [*Mounted Police*], quoting Dickson J in *Reference Re Public Service Employee Relations Act (Alberta)*, [1987] 1 SCR 313 at para 172 [*Alberta Reference*].
[19] LSUC Factum at para 74; LSBC Factum at paras 42 and 207.
[20] *TWU v BCCT* at para 25.
[21] *Constitution Act, 1867*, 30 & 31 Vict, c 3, s 93, reprinted in RSC 1985, App. II, No 5.
[22] *TWU v BCCT* at para 25.
[23] *TWU v LSBC* (BCCA) at para 184.

its beliefs, mission, or principles does not mean it does so at the expense of others.[24] A religious university that encourages and helps students within a particular community to obtain an education is a social good.

12. In short, as the Federation of Law Societies' Special Advisory Committee concluded after an extensive review of TWU's law school, there simply is "no public interest reason to exclude future [TWU] graduates" from admission to the bar.[25] Notwithstanding this conclusion, the Law Societies have invoked the "public interest" to reject TWU and its graduates.[26]

13. CLF submits that this approach is problematic. First, the public interest – and the values that are said to inform it – cannot be used as a "freewheeling *deus ex machina*" to subvert *Charter* rights;[27]. Second, the public interest is not a sword to enforce moral conformity with the Law Societies' approved values. Third, the Law Societies' interpretation of the public interest, if upheld, will limit the rights of all lawyers.

A. THE "PUBLIC INTEREST" IS NOT A FREEWHEELING *DEUS EX MACHINA*

14. Statutory objectives are not licenses to "swallow whole *Charter* rights."[28] The need for *Charter* scrutiny of Law Societies' decisions cannot be subverted by a mere appeal to the public interest. The public interest – and the *Charter* values that are said to inform it – must be interpreted in a way that makes their meaning and application predictable and understandable.[29] Otherwise the Law Societies' authority is too vague and uncertain to be "prescribed by law".

15. To be "prescribed by law" the Decisions must be based on a rule that places discernible limits on the Law Societies' discretion to determine eligibility for enrollment in articling and bar admission.[30] The Law Societies' interpretation of the public interest, however, is based not on discernable guidelines but on vague and abstract conceptions of promoting values and interests

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[24] *Nixon* at para 58.
[25] *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 at para 39 [emphasis added].
[26] *Supra* note 4.
[27] See *R v Gomboc*, 2010 SCC 55 at para 87, Abella J.
[28] See *Bracken v Fort Erie (Town)*, 2017 ONCA 668 at para 82.
[29] See *Sauvé v. Canada (Chief Electoral Officer)*, 2002 SCC 68 at paras 22-23.
[30] *Irwin Toy Ltd v Québec (Attorney General)*, [1989] 1 SCR 927 at para 63.

such as "diversity", "equality", and "equity".[31] Further, they have selectively placed such values[32] in impermissible hierarchy above the directly applicable *Charter* rights of TWU and its students.[33]

16. No one's rights are violated if TWU graduates are admitted to the bar.[34] Just as there was no conflict of rights in *TWU v BCCT*, there is no conflict here.[35] But to the extent that the Law Societies purport to be "promoting equality and diversity", two points need to be made.

17. First, the Law Societies' conception of promoting equality and diversity is misguided in this instance. Rejecting TWU does not help any minority, religious or otherwise, enter the profession. It simply prevents students from choosing TWU.[36] The Law Societies do not have a mandate to monitor civil society and interfere with its institutions or associations to ensure that all potential students are comfortable abiding by lawful internal policies. Instead, they have a mandate to set standards governing academic qualifications for admission to the bar.[37]

18. Second, by calling students or members to live by a religious ethic, religious organizations do not ask members to disavow their identity or dignity. Rather, in order to have an ethic at all, drawing distinctions is necessary and permissible, even with regard to sexual conduct.[38]

Rejecting TWU and its graduates *undermines* the public interest

19. To the extent that *Charter* values inform the objective of protecting the public interest, the Law Societies must not consider the equality interests of only one particular group, but the equality rights and fundamental freedoms (including religion, expression, and association) of all

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[31] LSBC Factum at paras; 104, 106, 126, 171, 181; LSUC Factum at paras 20, 50.

[32] On the problematic nature of values language as a justificatory basis for decision making, see *Gehl v Canada*, 2017 ONCA 319 at paras 76-83; see also Barry Bussey, "The Charter is Not a Blueprint for Moral Conformity" in Iain Benson & Barry Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: Lexis Nexis, 2017) at 393-411.

[33] *TWU v BCCT* at para 31.

[34] *TWU v LSBC* (BCCA) at para 115.

[35] *TWU v BCCT* at para 25.

[36] *TWU v LSBC* (BCCA) at paras 174, 179.

[37] TWU Appellant Factum at paras 134-143; TWU Respondent Factum at paras 127-132.

[38] *Whatcott* at para 122: "sexual orientation and sexual behaviour can be differentiated for certain purposes." See also *Chamberlain v Surrey School District No 36*, 2002 SCC 86 at para 134, Gonthier and Bastarache JJ (dissenting) [*Chamberlain*].

groups, including TWU and its students and all religious or other minorities.[39] The Decisions violate TWU students' religious and associational *Charter* rights – and thereby undermine the public interest – in at least three ways.

20. First, they impose a significant burden on students who wish to attend TWU since the Law Societies refuse to recognize a TWU law degree. That reality may force students to forego an education at TWU, robbing them of the opportunity to associate and study law in a Christian environment for the purpose of becoming a practicing lawyer.

21. Second, if students nevertheless attend TWU, once they become graduates, they will be excluded from *practicing* law in BC and Ontario. The right to exercise religious freedom and association in the communal setting of a law school, without the ability to become a lawyer, is an impoverished right. Students who desire to exercise their religious beliefs by serving their God and neighbour through the vocation (or "calling") of law – by studying law in order *to become a lawyer* – may attend TWU precisely because no other school community is similarly capable of supporting them in developing their mind, spirit, and character to prepare for the practice of law in accordance with their faith. The motivation is religious. CLF understands this, as it also believes legal practice is a vocational calling from God. Being denied the opportunity to attend TWU and practice law impedes the freedom to realize one's religious calling.[40]

22. Third, the students' freedom of association is violated. The Decisions fail to recognize the fundamental difference between discrimination prohibited by law and distinctions permitted by law. TWU's Community Covenant creates a distinctly religious environment. This is not unlawful "discrimination". It is lawful association. Distinction is a necessary prerequisite for any association, which is not only permitted by law but is a right guaranteed by s. 2(d) of the *Charter*.

23. Canadian jurisprudence has long valued and protected the role of religious association in public life. Freedom of association is "essential to the development and maintenance of the vibrant civil society upon which our democracy rests", "permits the growth of a sphere of civil society largely free from state interference", and "has its roots in the protection of religious

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[39] *TWU v BCCT* at paras 32, 34; *Waycobah First Nation v Canada (Attorney General)*, 2010 FC 1188 at para 31, aff'd 2011 FCA 191.
[40] *TWU v BCCT* at para 35.

minority groups."[41] Association "has always been the means through which [religious groups] have sought to attain their purposes and fulfil their aspirations" and protects individuals' right to determine "the rules, mores and principles which govern the communities in which they live."[42]

24. TWU, like CLF, is such a community of people freely associating for a religious purpose, a purpose that touches on education, vocation, and personal conduct. By so doing, religious minorities are equipped and encouraged to enter professions, such as law. But requiring associations such as TWU (or, in future, associations like CLF) to be open to those who do not affirm their mission, or to amend their mission to conform with state dictate, would not only violate fundamental *Charter* freedoms, but harm the public interest.[43] Diverse associations and institutions are necessary to a free and democratic society,[44] but such communities cease to exist when the state dictates what their core beliefs ought to be, or requires them to deny such beliefs.

B. THE "PUBLIC INTEREST" IS NOT A SWORD TO ENFORCE MORAL CONFORMITY

25. That which causes offense or is contrary to public opinion must not be conflated with that which legitimately and lawfully attracts condemnation by state powers. Here, the Law Societies have taken a public position on an essentially religious matter,[45] and have misapplied their authority to coerce a philosophical change within a religious community.[46]

26. While the Law Societies now allege that lawyers are free to hold traditional beliefs about marriage, those beliefs as expressed in TWU's Community Covenant have been variously described by the Law Societies and their Benchers as "derogatory" and "harmful";[47] "offensive

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[41] *Mounted Police* at paras 49, 56.
[42] *Alberta Reference* at para 86, quoted with approval in *Mounted Police* at para 35.
[43] *Lavigne v Ontario Public Service Employees Union*, [1991] 2 SCR 211 at para 236.
[44] *Loyola High School v Quebec (Attorney General)*, 2015 SCC 12 at paras 44 and 64; *TWU v LSBC* (BCCA) at paras 184-185.
[45] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para 50; *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at para 73 [*Saguenay*].
[46] LSBC urged TWU to remove its religious beliefs on marriage from its Covenant (TWU Respondent Factum, para 29). Likewise, LSUC's decision was motivated by its objection to TWU's "harmful" and "highly problematic" religious beliefs (TWU Appellant Factum, para 83).
[47] TWU Respondent Factum at para 120.

and morally diminishing";[48] "offend[ing] human dignity";[49] "perpetuat[ing] prejudice";[50] and comparable to racism.[51] This is not neutrality. It is moral condemnation.

27. It is not the role of a Law Society to, in the name of the "public interest", exercise moral condemnation over students' and lawyers' lawful religious beliefs or those of the organizations to which they belong.[52] As state actors, Law Societies must be neutral towards a religious academic institution's lawful, religiously-informed code of conduct for members, whether it finds the organization's beliefs praiseworthy or objectionable. A legal profession that is diverse, inclusive, and reflective of Canadian society as a whole "does not mean the homogenization of private players in that space" but "requires the state to encourage everyone to participate freely in public life regardless of their beliefs."[53] This includes religious legal communities such as TWU and CLF, and their individual members who seek to participate in the profession.

The Decisions unreasonably undermine public confidence in lawyers who hold traditional religious beliefs

28. By publicly condemning the religiously-informed views of TWU and its graduates, the Law Societies have not only breached their duty of neutrality; they have breached their duty to protect the public from the needless erosion of trust in lawyers who share TWU's beliefs, including members of CLF.[54]

29. A decision to deny someone a professional license inevitably undermines their reputation in the eyes of the public.[55] When such decisions are based on case-specific determinations that a candidate lacks competence or integrity, the loss of public confidence in their abilities is warranted. Where, however, a blanket exclusion is imposed automatically on all graduates of a law faculty for reasons irrelevant to their integrity and competence – namely, their association with a religious covenant – the Law Societies cast unwarranted aspersions on their professionalism and capabilities, and on those of all like-minded lawyers.

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[48] Trinity Western University Appeal Book, Vol II, Reasons for Decision – LSUC Convocation Transcript (April 24, 2014), Tab 2 at 313.
[49] LSUC Factum at para 69.
[50] *Ibid* at para 71.
[51] LSBC Factum at para 199.
[52] *Saguenay* at paras 74, 83.
[53] *Saguenay* at para 75.
[54] See *Green v Law Society of Manitoba*, 2017 SCC 20 at para 97, Abella J, dissenting [*Green*].
[55] See *Green* at paras 94-95, Abella J, dissenting.

30. The Law Societies have, throughout these proceedings, expressed concern about the "harmful message" they would send if they were to approve TWU. But in rejecting TWU, they have done exactly that. They have sent the harmful message that the evangelical Christian community's lawful view of marriage is "abhorrent", "archaic" and "hypocritical".[56]

31. It is clear that TWU violates no law, yet it is alleged that the school does harm in other ways. The implication is that there is something inherently wrong and harmful about TWU's religious beliefs about marriage and sexual conduct, and that those who adhere to such views, or at least manifest those beliefs in association with others who do, are "tainted"[57] and undeserving of equal access to the legal profession. Indeed, the sole gatekeepers of the legal profession in BC and Ontario have conveyed a clear message to aspiring TWU students that they are not worthy of admission to the profession, even if their completed academic studies meet the same substantive requirements as graduates of other Canadian law schools.

32. The Decisions exclude qualified, competent, and ethical law graduates[58] from the practice of law solely because of their decision to associate under TWU's Community Covenant. This is "so far removed" from ensuring the public's confidence in the legal profession that it is "manifestly unjust."[59] It is, as a result, unreasonable and inconsistent with the Law Societies' duty to protect the public interest.[60]

C. THE DECISIONS, IF UPHELD, WILL LIMIT THE RIGHTS OF ALL LAWYERS.

33. The Decisions imperil the ability of all legal professionals to hold and manifest religious and conscientious beliefs that do not conform to prevailing viewpoints. If signing TWU's

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[56] *TWU v LSBC* (BCCA) at para 189.

[57] LSBC Amended Response to Petition in BCSC proceedings [cited in TWU Respondent Factum, para 185] at para 183: "It is contrary to LSBC's statutory mandate and constitutional obligations to admit graduates of a law program tainted by an exclusionary and mandatory Covenant."

[58] *Supra* note 5.

[59] *Green* at para 96, Abella J, dissenting; see also *Roncarelli* at 140-141, Rand J.

[60] *Green* at para 97, Abella J, dissenting. While the majority held that the impugned educational rules regarding mandatory CPD activities were within Law Society authority, that does not mean that religious individuals or institutions can be precluded from providing CPD on the basis of their beliefs or a Law Society's concerns about being perceived as condoning same.

Community Covenant is enough to justify rejecting a prospective licensee, the same might be said of past or present membership in a church, mosque, temple, or any religious association such as CLF.[61] This is inconsistent with a free and democratic society, which requires diversity of opinion and independence of thought within the legal profession.[62]

34. The message conveyed by the Decisions is that it is not enough to serve all colleagues and clients impartially, with integrity, and according to law. The message is that lawyers must also refrain from publicly expressing or associating with beliefs which conflict with those approved by the state.

35. For example, would the Law Societies deny a license to someone who studied as an undergraduate at TWU (as several current articling students and lawyers in CLF's membership have done),[63] or at Notre Dame University or Boston College? What of a law school whose tenured professor expressed a faith-based view on marriage, or that ratified a campus club for religious law students with a membership policy similar to TWU's? Would the Law Societies revoke accreditation? The Decisions imply that the answer to these questions should be "yes".

36. The Decisions stifle diversity of beliefs and opinion. The version of "diversity" the Law Societies seek to promote is one that ends at the point of conflicting, unfashionable views. This is not diversity, but intolerance. True diversity does not mean "obliterating disagreement"; it requires grace and tolerance to live respectfully with disagreement:[64]

> "A society that does not admit of and accommodate differences cannot be a free and democratic society - one in which citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal."

PARTS IV & V: COSTS AND ORDER SOUGHT

37. CLF does not seek costs, asks that no costs be awarded against it, and takes no position on the disposition of the appeals.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 5th day of September, 2017.

Counsel for Christian Legal Fellowship

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[61] *TWU v BCCT* at para 33.
[62] See *R v Oakes*, [1986] 1 SCR 103 at para 64; *Roncarelli* at 142, Rand J.
[63] *TWU v LSUC* (ONSC) at paras 18, 46.
[64] *TWU v LSBC* (BCCA) at para 193; see also *Chamberlain* at para 134.

PART VI: TABLE OF AUTHORITIES

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Barry Bussey, "The Charter is Not a Blueprint for Moral Conformity" in Iain Benson & Barry Bussey, eds, *Religion, Liberty and the Jurisdictional Limits of Law* (Toronto: Lexis Nexis, 2017)	15

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