No. S-149837
Vancouver Registry

IN THE 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 SUBMISSIONS OF WEST COAST LEAF

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I. Introduction

1. Trinity Western University ("TWU") challenges the Law Society of British Columbia's ("LSBC") decision to not approve its proposed faculty of law for the purpose of the LSBC's admission program (the "Decision"). West Coast LEAF ("WCL") submits the Decision was reasonable and correct and focuses this submission on three issues.

2. First, WCL addresses the test for substantive equality and its role when examining an administrative body's resolution of competing *Charter* values. TWU's Community Covenant Agreement (the "Covenant") is at the centre of the dispute and WCL submits that it discriminates on the basis of sex, sexual orientation and marital status. Second, WCL addresses the Covenant's requirement that students and faculty[1] "treat all persons with respect and dignity, and uphold their God-given worth from conception to death."[2] This is a discriminatory restriction of female reproductive freedom and hence, a violation of women's equality rights.[3] Third, WCL submits that the Decision did not infringe the Petitioners' religious freedoms; but, if it did, the infringement was justified given the competing *Charter* values of equality, human rights and democracy.[4]

II. The Meaning of Substantive Equality

3. The LSBC is charged with promoting the public interest by, *inter alia*, preserving and protecting the rights and freedoms of all persons. This includes protecting historically disadvantaged groups and pursuing the goals of substantive equality. The LSBC must act consistently with the state's section 15 obligations.

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[1] Referred to herein as "TWU Members".

[2] The implication is that female TWU members must refrain from accessing abortion. See para. 106 of the LSBC's Written Argument and see also *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at para. 4, where the Court cites TWU's old Community Standards document prohibiting abortion and citing Ex. 20:13 and Ps. 139:13-16. The excerpt from the current Covenant quoted above also footnotes Ps. 139:13-16 and can be found at Affidavit of Dr. Robert Wood, filed December 18, 2014 ["Wood Affidavit"], Exhibit C, p. 9.

[3] WCL was granted leave to comment on the discriminatory impact of the Covenant on reproductive freedom once LSBC raised it. See: LSBC Amended Response to Petition at paras. 53 and 208-209; LSBC's Written Argument at paras. 5-6, 9, 106-109, 134, and 483-484.

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

4. Section 15 of the *Charter* protects substantive equality. Formal equality (treating everyone the same) ignores many types of discrimination and has been soundly rejected as the standard to be applied under the *Charter*.[5] With regard to sex discrimination, a formal equality approach usually means treating women the same as men.[6] As stated by the SCC, "An insistence on substantive equality has remained central to the Court's approach to equality claims".[7] A narrow construction of equality does not fulfil the purposes of the *Charter*.[8]

5. The substantive equality analysis required by section 15 "recognizes 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".[9] For this reason, substantive equality may require differential treatment to "ameliorate the actual situation of the claimant group",[10] as "identical treatment may frequently produce serious inequality".[11] Substantive equality captures indirect, as well as direct, discrimination.[12] A substantive equality analysis soundly rejects the "separate, but equal" reasoning used to justify discrimination in the past. As was stated by the SCC in *Moore:*

> **30** To define 'special education' as the service at issue also risks descending into the kind of "separate but equal" approach which was majestically discarded in *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954). Comparing Jeffrey only with other special needs students would mean that the District could cut *all* special needs programs and yet be immune from a claim of discrimination. It is not a question of who else is or is not experiencing similar barriers. This formalism was one of the potential "dangers of comparator groups identified in *Withler* [Citation omitted].[13]

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[5] *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 para. 27.

[6] Simone Cusack and Lisa Pusey, "CEDAW and the Rights to Non-Discrimination and Equality", (2013) 14 Melb. J. Int'l Law 54, at 63-64 ["Cusack and Pusey"].

[7] *Kapp* at para 15.

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

[9] *Kahkewistahaw First Nation v. Taypotat*, 2015 SCC 30 ["*Taypotat*"] at para. 17.

[10] *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) [CEDAW General Recommendation 25], at para. 8 and Cusack and Pusey at 64.

[11] *Taypotat* at para 17, citing *Andrews* at para. 26; *Kapp* at para. 27.

[12] *Withler* at para. 64. See also *Withler* at paras. 2, 39, 55 and 64 and *Kapp* at paras. 14-16, 22 and 27.

[13] *Moore v. Biritish Columbia (Education)*, 2012 SCC 61 ["*Moore*"] at para. 30.

6. Since *Withler*, and contrary to the Association for Reformed Political Action's ("ARPA") submission,[14] the SCC has clarified that prejudice and stereotyping are not essential elements of the section 15 test and has moved away from a rigid discrimination analysis.[15] The majority's decision in *Quebec v. A* found that 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 equality. These issues are not essential components of an equality claim and focus on these requirements can unduly hamper the attainment of substantive equality.[16]

7. Specifically, in regard to comparator groups, the SCC recognized that the comparator analysis may be an obstacle to substantive equality. In *Inglis*, Ross J. said this:

> In *Withler* at paras. 56-59, the Court identified several significant problems with the comparative group analysis. The definition of the comparator group may effectively determine the outcome of the litigation, essentially eliminating or marginalizing the factors going to discrimination. As such, the quest to find the "correct" mirror comparator group can take on a level of importance that ultimately reduces the inquiry into a search for sameness rather than disadvantage, thereby obscuring the real issue s. 15 was intended to address. Further, reliance on a mirror group may prove unhelpful where the claimant alleges they have been disadvantaged based on multiple intersecting grounds of discrimination. Finally, finding the "right" comparator group may place an unfair burden on the claimant, as finding such a group may be impossible and it may be difficult to determine what characteristics must be mirrored.[17]

8. Although comparisons may be useful to bolster contextual understanding of a claimant's situation, context, not a particular form of comparison, grounds the equality analysis.[18]

9. Today, and contrary to ARPA's submission, section 15 "requires a 'flexible and contextual inquiry into whether a distinction has the effect of perpetuating arbitrary disadvantage on the

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[14] ARPA argument at para. 11.
[15] See discussion below on *Quebec (Attorney General) v. A*, 2013 SCC 5 ["*Quebec v. A*"].
[16] 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, 20130 pp. 951-1028 at 971-2; and *Quebec v. A* at paras. 319-331. As set out above and as recently reiterated by the SCC in *Taypotat* at para. 18, the focus of section 15 is on "discriminatory distinctions – that is distinctions that have the effect of perpetuating arbitrary disadvantage based on an individual's membership in an enumerated or analogous group".
[17] *Inglis v. British Columbia (Minister of Public Safety)*, 2013 BCSC 2309 ["*Inglis*"] at para. 518.
[18] *Whithler* at para. 65.

claimant *because of his or her membership in an enumerated or analogous group*'".[19] To establish a section 15 breach, the court must determine 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.[20]

10. 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".[21]

III. Discrimination

A. Reproductive Rights and Discrimination Based on Sex

11. The Covenant restricts reproductive freedom. Female TWU members may face sanction for exercising their constitutionally protected right to access abortion, thereby creating institutionalized discrimination against female TWU members. Only women can become pregnant. Discrimination on the basis of pregnancy is discrimination on the basis of sex.[22]

12. Importantly, 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 who believes in reproductive choice for women will not have access to TWU as signing the Covenant would be antithetical to her beliefs. Further, any woman who has an unwanted pregnancy while attending TWU will face an unconscionable restriction on her personal autonomy in having to continue with an unwanted pregnancy or face expulsion or other discriminatory sanctions for accessing legal abortion services. For some women, this issue will

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[19] *Taypotat* at para. 16, citing *Quebec v. A* at para. 331 (emphasis in *Taypotat*).
[20] *Taypotat* at paras. 19 and 20.
[21] *Quebec v. A* at para. 332.
[22] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219; *Inglis* at para. 547.

not arise until they are partially completed their degrees; the fact of being pregnant can change after admission to law school.

13. In *Morgentaler*, the SCC found that a state prohibition on access to abortion violated the section 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".[23] Having resolved the issue under section 7, the SCC did not address the section 15 arguments raised. However, *Morgentaler* is instructive on the importance of the interests at stake and the discriminatory impact that 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".[24]

14. 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. Such punitive responses to women's choice to exercise their constitutionally protected reproductive rights have serious implications for a woman's health, education, employment and livelihood. This is discriminatory.

15. Similarly, the Covenant's prohibition on abortion fosters discriminatory views of female personal autonomy. All TWU members must affirm and commit to promote 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 also uniquely subject to monitoring of their personal health care and physical autonomy by TWU members as the Covenant requires reporting of conduct that violates it, further isolating and alienating a woman with an unwanted pregnancy.[25]

16. Attempting to control or restrict a woman's constitutionally protected rights constitutes sex discrimination. This is a violation of women's equality rights.

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[23] *R. v. Morgentaler*, [1988] 1 S.C.R. 30 ["*Morgentaler*"] at para. 24.
[24] *Morgentaler* at para. 242.
[25] Wood Affidavit, Exhibit C, p. 12.

B. Discrimination Based on Sexual Orientation

17. WCL adopts the LSBC's and LGBTQ Coalition's submissions on sexual orientation discrimination and adds the following. In applying a substantive equality analysis, it is clear that the Covenant perpetuates disadvantage on the basis of sexual orientation by excluding LGBTQ individuals from access to legal education. If the LSBC endorsed the prospective law school, doing so would "[widen] the gap between the historically disadvantaged group and the rest of society rather than narrowing it."[26]

C. Discrimination Based on Marital Status

18. In restricting all sexual activity outside of heterosexual marriage, the Covenant also discriminates against unmarried persons. The SCC has recognized that marital status is an analogous ground for the purpose of section 15 of the *Charter*. 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". Unmarried partners have suffered historical disadvantage and prejudice and have been regarded as less worthy in Canadian society.[27]

D. Intersectionality

19. The types of discrimination addressed above may intersect such that the effects on members of more than one disadvantaged group are compounded. For example, a pro-choice woman who wants a scarce Canadian law school seat may be unmarried, sexually active, and bisexual. She would be excluded from TWU based on her sexual orientation, marital status and sex. Her membership in each of these three groups is integral to her identity. While her exclusion from an avenue to a career in law based on her membership in just one of these groups exacerbates her disadvantage, her exclusion based on her membership in all three groups is even more profound.[28]

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[26] *Quebec v. A* at para. 332.
[27] *Miron v. Trudel*, [1995] 2 S.C.R. 418 at paras. 151-153.
[28] See the discussion in *Inglis* at para. 518.

E. The Petitioners are not Discriminated Against

20. The ARPA claims that other than religion "there is no other equality interest at stake". This assertion is confounding. The section 15 rights of women, LGBTQ persons and unmarried couples are clearly implicated by the Covenant. Conversely, there is no discrimination of TWU graduates on the basis of religion. Leaving aside the issue that TWU has no law school graduates and the issue of whether TWU can claim its equality rights have been violated, WCL submits that the distinction made is not a distinction on the basis of religion. It is a distinction of the basis of discriminatory harmful conduct imposed by the Covenant.

IV. Freedom of Religion is not Unjustifiably Infringed

A. There is no Violation of Freedom of Religion

21. Contrary to the Petitioners' assertion, WCL submits the Decision did not infringe religious freedom. But if it did, the Decision reasonably balanced equality rights and religious freedom.

22. 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".[29] WCL does not challenge the assertion that TWU, or the persons who attend that institution, sincerely adhere to evangelical Christian beliefs. However, freedom of religion is not an absolute freedom. 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.[30]

23. 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

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[29] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 ["*Whatcott*"] at para. 155 citing *Hutterian Brethren of Wilson Colony*, at para. 32; *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at paras. 46 and 56-59; and *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6 at para. 34.

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

religious neutrality is "a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights."[31]

24. WCL submits that the right to discriminate claimed by the Petitioners 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. The translation of private belief into public mutually enforced obligations is key and 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.
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> [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.[32]

25. WCL submits that in interpreting the scope of freedom of religion, this Court must strive to balance the rights of others, including equality. TWU's religious freedom does not entitle them to LSBC approval of a discriminatory program. The LSBC reasonably and correctly declined accreditation. Religious freedom cannot be used to perpetuate inequality and disadvantage.[33]

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[31] *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...while taking into account the competing constitutional rights of the individuals affected..."

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

[33] 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."

B. The Decision is Proportionate

26. If religious freedom is infringed, LSBC's decision reflects the proportionate balance between religious freedom and protecting the equality of women, LGBTQ persons, and persons in unmarried relationships. WCL submits that whether the balancing is considered under the *Doré* or *Oakes* framework, the result should be the same. As the SCC recently reiterated, "*Doré's* proportionality analysis is a robust one and 'works the same justificatory muscles' as the *Oakes* test".[34]

27. The reasoning in *Loyola* supports the argument that 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..."[35] Similarly, 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 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.[36]

28. The discriminatory aspects of the Covenant clearly "conflict with or harm overriding public interests".[37] Such limitations on a woman's autonomy, in order for her to access law school, are a blatant violation of her equality far out of proportion to any infringement of religious freedom committed by permitting her equal access to the law school. It was proportionate to deny accreditation. As stated by the Ontario Divisional Court, "TWU can hold

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[34] *Loyola* at para. 40, citing *Doré* para. 5.
[35] *Loyola* at para. 71.
[36] *Loyola* at para. 47.
[37] *Loyola* at para. 43.

and promote its beliefs without acting in a manner that coerces others into forsaking their true beliefs in order to have an equal opportunity to a legal education".[38]

29. WCL submits that given the equality interests at stake, not only is the Decision reasonable, it would have been unreasonable for the LSBC to endorse TWU's law school. The LSBC is required to consider the equality interests of prospective TWU members. The same would be true if a prospective law school sought to exclude all women or all ethnic minorities. If the LSBC were to endorse such a school it would be a flagrant violation of section 15 of the *Charter*.

V. Conclusion

30. The Decision was both reasonable and correct. The LSBC is the gatekeeper to the future of the administration of justice in British Columbia. It cannot legitimize a university that discriminates in its admissions and discipline of its members. To do so would violate equality guarantees. Accrediting a law school at TWU, a school 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.

31. It is no answer to say that LGBTQ persons or women can access the law school if they agree to not engage in sexual intimacy or access their right to abortion. The exclusion is a violation of the most intimate aspects of an individual's life and autonomy and perpetuates the disadvantage of vulnerable groups. Forsaking these rights is an unacceptable cost of admission for "equality of opportunity" to join the British Columbia bar.[39]

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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[38] *TWU v. LSUC* at para. 117.
[39] See address given by Dickson C.J.C. "Legal Education", 64:2 Can. Bar. Rev. 374 at 377.

Appendix A

List of Authorities

Cases Cited

1. *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143
2. *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219
3. *Doré v. Barreau du Québec*, 2012 SCC 12
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14. *Reference re Same-sex Marriage*, 2004 SCC 79
15. *S.L. v. Commission Scolaire des Chenes*, 2012 SCC 7
16. *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11
17. *Syndicat Northcrest v. Amselem*, 2004 SCC 47
18. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31
19. *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250
20. *Withler v. Canada (Attorney General)*, 2011 SCC 12

Legislation

1. *Canadian Charter of Rights and Freedoms*, Part 1 of the Constitution Act 1982, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c. 11

Secondary Sources

1. 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)
2. Dickson C.J.C. "Legal Education", 64:2 Can. Bar. Rev. 374
3. Simone Cusack and Lisa Pusey, "CEDAW and the Rights to Non-Discrimination and Equality", (2013) 14 Melb. J. Int'l Law 54
4. 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)