

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)**

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

and

LAW SOCIETY OF UPPER CANADA

Respondent

and

ATTORNEY GENERAL OF CANADA

Intervenor

FACTUM OF THE INTERVENOR THE ADVOCATES' SOCIETY

May 4, 2015

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ATTORNEY GENERAL OF CANADA, THE CHRISTIAN LEGAL FELLOWSHIP, THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE EVANGELICAL FELLOWSHIP OF CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, OUT ON BAY STREET AND OUTLAWS, THE ADVOCATES' SOCIETY and THE CRIMINAL LAWYERS' ASSOCIATION (ONTARIO) Intervenor

FACTUM OF THE INTERVENOR, THE ADVOCATES' SOCIETY

PART I. OVERVIEW

1. The Advocates' Society, as intervenor, makes two submissions in this application for judicial review of the decision of the Law Society of Upper Canada (the "Law Society") to decline to accredit the proposed school of law at Trinity Western University ("TWU") (the "Decision").

2. First, The Advocates' Society submits the Legislature has granted the Law Society broad and exclusive jurisdiction to govern the practice of law in Ontario in accordance with its public interest mandate. Its Decision, including its review of the Covenant, was an exercise of its statutory discretion fully within the jurisdiction granted by its governing legislation.

3. Second, The Advocates' Society submits that the Decision was a reasonable exercise of the Law Society's discretion, acting in the public interest, itself bound by an obligation of religious neutrality and subject to the *Charter*.¹ The Law Society reasonably concluded that accrediting TWU would be contrary to the Law Society's duty to promote equal access to the profession and advance the cause of justice. The Decision is entitled to deference and moreover, the Decision was correct.

PART II. SUMMARY OF FACTS

A. *The Advocates' Society*

4. The Advocates' Society represents over 5,000 advocates across Canada. Its mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice.

B. *The Statutory Role of the Law Society in the Accreditation of Law Schools*

5. The Legislature has delegated control and exclusive jurisdiction over the practice of law in Ontario to the Law Society, including determining whether a law school will be "accredited" for the purposes of licensing lawyers in Ontario.² In making accreditation decisions, as in the performance of all its statutory obligations, the Law Society is required to advance the cause of justice, to facilitate access to justice, and to protect the public interest.³ The Law Society's broad jurisdiction to determine whether to accredit a law school in the public interest is unfettered by any statutory pre-requisites, other than these public interest criteria.

¹ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c.11("Charter").

² See *Law Society Act*, R.S.O. 1990, C. L.8 ("*LSA*"), and on accreditation specifically: ss. 27(3), 62 (0.1) (4.1). By-Law 4, Licensing, made under ss. 62 (0.1) and (1) of the *LSA* ("*By-Law 4*"). An "accredited law school" is defined in By-Law 4, s. 7 as "a law school in Canada that is accredited by the [Law] Society." It does so through Convocation.

³ *LSA*, R.S.O. 1990, C. L.8, s. 4.1.

6. Accreditation is a two-step process, both of which must be satisfied. First, the Law Society's Convocation has, as a matter of policy, delegated to the Approval Committee of the Federation of Law Societies of Canada ("FLSC") the task of determining whether current and proposed law schools meet the national requirements for entry to the common law bar admission programs.⁴ Second, the Law Society is also obliged to consider its public interest mandate to advance the cause of justice, to facilitate access to justice, and to protect the public interest.

C. TWU's Proposed Law School and the Decision of the Law Society

7. In June 2012, TWU submitted a proposal for a law school program to the FLSC.⁵ TWU identifies as one of its objectives the integration of a Christian worldview into the law school curriculum. TWU's Community Covenant Agreement (the "Covenant") requires all prospective students, faculty and staff to pledge their "acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life," and agreement to "a distinctly Christian way of living" "exemplified fully by Jesus Christ." Teachers and students at TWU commit that Scripture is the "final and ultimate standard of truth, the reference point by which every other claim to truthfulness is measured" and is the "lens by which we view and evaluate our lives and the world." All staff are obliged to teach from this perspective "at all times."⁶

8. The FLSC Approval Committee provided preliminary approval to the TWU law program, while expressing concerns regarding the Covenant.⁷ In particular, the Committee was concerned that the Covenant forbids "sexual intimacy that violates the sacredness of marriage between a

⁴ FLSC is the umbrella organization of the 14 provincial and territorial law societies: Canadian Common Law Program Approval Committee Report on Trinity Western University's Proposed School of Law Program ("FLSC Report"), Record of Proceedings, Tab 31, fn. 1 and para. 1.

⁵ *Ibid.*, para. 19.

⁶ Covenant, Exhibit "C" to the Affidavit of Robert Wood, sworn August 22, 2014, ("Wood Affidavit"), Application Record ("AR") Vol. 2, Tab 5C, p. 442.

⁷ FLSC Report, Record of Proceedings, Tab 31, paras. 21 50, 52.

man and a woman”.⁸ Those who are unable or unwilling to comply are denied entry, or are disciplined, including by expulsion or termination of employment.⁹

9. The issue before the Law Society’s Convocation was whether to accredit TWU’s law school, given this preliminary approval, and with a view to its public interest mandate.¹⁰

10. Before rendering the Decision, Convocation received three legal opinions, and submissions from more than 200 parties, including The Advocates’ Society. TWU provided written submissions, and further written and oral submissions responding to Benchers’ questions.

11. On April 24, 2014, Convocation voted to reject TWU’s application for accreditation.¹¹

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

12. The Advocates’ Society supports and adopts the submissions of the Law Society. In addition to the applicable standard of review, this judicial review raises three issues:

- (a) the Law Society’s statutory authority and jurisdiction to decline to accredit TWU’s proposed law school;
- (b) the appropriate framework for the Law Society’s exercise of statutory discretion in light of *Charter* values; and
- (c) whether the Decision was reasonable, in light of the Law Society’s statutory authority and *Charter* obligations.

PART IV. LEGAL ARGUMENT

13. The Advocates’ Society addresses the above issues, focussing on (a) and (c) as follows:

- (a) The Decision falls squarely within the Law Society’s express statutory jurisdiction over accreditation. The Law Society was obliged to look beyond educational

⁸ Covenant, Exhibit “C” to the Wood Affidavit, AR Vol. 2, Tab 5C, p. 442.

⁹ Trinity Western University Student Handbook, Student Accountability Process, Exhibit “M” to the Wood Affidavit, AR, Vol. 2, Tab 5M, pp. 500-501.

¹⁰ Convocation Transcript, April 24, 2014, AR, Vol. I, Tab 4, p. 217.

¹¹ Record of Proceedings, Tabs 249, 254 and 257. See generally Convocation Transcript, April 24, 2014, AR, Vol. I, Tab 4, p. 201, p. 217.

competencies to consider the public interest, in accordance with its statutory mandate. The Decision was an *intra vires* exercise of the Law Society's discretion;

- (b) Exercising its discretion to determine whether to accredit TWU, the Law Society was required to consider how the *Charter* values in play were consonant or conflicting with the objectives of the *Law Society Act*.¹² Its Decision is subject to the reasonableness standard of review;¹³ and
- (c) The Law Society reasonably considered all *Charter* values in light of its public interest mandate. These values included the requirement of state neutrality vis-à-vis religion, non-discriminatory access to the profession, and prospective law students' religious freedom. Considering the impact of the relevant *Charter* values, the nature of the decision, and the statutory and factual context, the Decision was reasonable and correct.

A. The Law Society had the Jurisdiction to make the Decision

14. The Applicants argue that the Decision is *ultra vires* the Law Society's statutory authority. They submit that the Law Society's jurisdiction to accredit is limited to assessing "competency", and they assert that the Decision has the effect of regulating individual lawyers' beliefs and regulating law school operation, both of which are outside its jurisdiction.¹⁴

15. Questions of an administrative tribunal's jurisdiction are restricted to determining whether a tribunal's "statutory grant of power gives it the authority to decide a particular matter."¹⁵ The Applicants' jurisdictional argument mischaracterizes the scope of the question that was before the Law Society. The Law Society has the express statutory power to accredit law schools from which graduates may seek access to the bar in Ontario.

16. Accreditation is a discretionary decision. The Legislature has given considerable scope to the Law Society to determine the appropriate criteria in exercising its discretion over

¹² *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 ("*Doré*") at paras. 55-56. The Criminal Lawyers' Association will address this analysis in their factum.

¹³ See *Doré supra*, at paras. 43-49. The Law Society's decision to accredit was a discretionary decision squarely within its specialized expertise. The Advocates' Society relies on the submissions of the Law Society in respect of the standard of review.

¹⁴ Applicants' factum, at p. 26, paras. 83, 85.

¹⁵ *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 at para. 59.

accreditation, so long as the decision is made in a manner consistent with the *Law Society Act*.¹⁶ In making an accreditation decision, the Law Society must advance the cause of justice and the rule of law, and facilitate access to justice for the people of Ontario.¹⁷ Considerable deference must be accorded by reviewing courts regarding both the exercise of discretion and the determination of the scope of the decision-maker's jurisdiction.¹⁸

17. In a decision to accredit, even if satisfied that a proposed law school meets educational competency requirements, the Law Society still has a duty to consider all the features of the law school against its public interest mandate.¹⁹ The Law Society was entitled to review the Covenant and assess its discriminatory effects.²⁰ The Law Society was also obliged to consider the impact of accreditation on public trust and confidence, the legal profession, and the legal system as a whole.²¹

18. The Decision is directed only to the accreditation of a law school for the purpose of access to the bar of Ontario. The question before this Court is whether the Law Society acted reasonably when it declined to accredit. The Decision does not amount to the regulation of the beliefs of individual lawyers or the regulation of law schools, nor does it have extra-territorial effect. Within the plurality of aspects considered by the Law Society, any potential ancillary

¹⁶ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at para. 53; *Roncarelli v. Duplessis*, [1959] S.C.R. 121, at p. 140, per Rand J.

¹⁷ See *LSA*, s. 4.2. See also *Edwards v Law Society of Upper Canada*, [2001] 3 SCR 562, at para. 14.

¹⁸ *Baker*, *supra*.

¹⁹ *Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier*, [1985] 2 S.C.R. 164 (“*Oakwood*”) at pp. 174-175.

²⁰ On the issue of the jurisdiction of a regulator, see *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 [“*BCCT*”], at paras. 11-13 and 21, where the Supreme Court held that it was necessary for the regulator to go beyond considerations of training and competence, to “take into account all features of the education program at TWU.” It “would not be correct, in this context, to limit the scope of [regulation in the “public interest”] to a determination of skills and knowledge”.

²¹ *Oakwood*, *supra*, at pp. 174-75; *BCCT*, *supra*, at para. 13; *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825, at para. 84.

effect of the Decision on hypothetical TWU law school graduates does not render the Decision *ultra vires* its jurisdiction.²²

19. The Decision did not restrain the religious views promoted by Evangelical Christians, Evangelical Christian lawyers, or any lawyer who may graduate from TWU's proposed school. As set out below, the Decision does not affect the meaningful exercise of religious freedoms of prospective TWU law students and staff. The Law Society's Decision was directed properly at whether it should accredit a proposed law school with a discriminatory Covenant in the public sphere in Ontario – a question of discretion within its jurisdiction regarding accreditation.

20. While the Law Society is not tasked with regulating the operation of a law school once accredited, it is clearly entitled to assess a proposed law school admission policy as part of its decision on accreditation.²³

21. The Decision does not have extra-territorial effect.²⁴ TWU may well avail itself of exemptions or defences in relation to creed, marital status or sexual orientation discrimination under the human rights regime in British Columbia. The Law Society here was entitled to consider whether the Covenant was discriminatory, notwithstanding any such exemptions.

B. The Decision was Reasonable and Correct

22. In making its accreditation decision, the Law Society reasonably considered its requirement of religious neutrality, the discriminatory impact of the Covenant on law students, the profession and the community as a whole, and the effect of its decision on the rights and

²² The decision may have ancillary effects on other areas which do not amount to regulation, see *Arcade Amusements v. Montreal*, [1985] 1 SCR 368.

²³ *BCCT*, *supra*, at paras. 11-13 and 21.

²⁴ The Law Society, through the Decision did not seek to use its powers to “affect matters in another part of the world” (or the country): see. e.g. *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CarswellBC 115, [1994] 1 S.C.R. 231, at pp.277-278.

freedoms of TWU prospective law students.²⁵ The Law Society considered all interests and *Charter* values at stake, for consistency and conflict, in relation to each other, and in relation to its own statutory mandate.²⁶

23. The Law Society reasonably and correctly exercised its discretion given its obligations as a public regulator bound by the *Charter* and mandated to act in the public interest. Accrediting TWU's proposed law school would conflict with the Law Society's duty of religious neutrality, and would make it complicit in discrimination. The Decision does not deprive TWU students of meaningful religious freedom.

1. **Non-Accreditation Maintains Religious Neutrality**

24. The Law Society must maintain religious neutrality in exercising its functions. The Law Society made the Decision in a manner that shows respect for all postures towards religion, including that of having no religious beliefs, while taking into account the competing constitutional rights of the individuals affected.²⁷ In the *Saguenay* case, the Supreme Court held:

The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. ... When all is said and done, the state's duty to protect every person's freedom of conscience and religion means that it may not use its powers in such a way as to promote the participation of certain believers or non-believers in public life to the detriment of others.²⁸

25. Many religious and non-religious people could not sign the Covenant in good conscience. Accreditation of TWU would increase the number of law school positions available to those willing to sign the Covenant, giving them preferential access to a licence to practice law in Ontario, to the detriment of those who could not sign due to their own religious or ethical beliefs.

²⁵ See e.g. Affidavit of Pamela Klassen, sworn October 23, 2014, Exhibit "B", Responding Application Record ("RAR"), Vol. 2, Tab 4, p. 554-63; Affidavit of Helen Kennedy, sworn October 24, 2014, RAR, Vol. 1, Tab 1, p. 5.

²⁶ *Doré, supra*, at para. 55.

²⁷ *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235, 2012 SCC 7 ("S.L."), at para. 32

²⁸ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 ("Saguenay"), at paras. 75-76.

26. Religious freedom does not require accreditation of religiously-segregated legal education which excludes those unwilling or unable to pledge to an exclusionary oath. Exposing students to a variety of different religious backgrounds and moral perspectives does not in itself infringe the religious freedoms of individuals who would prefer education in a faith-based school; it advances the cause of justice and shows respect for all postures toward religion.²⁹

27. If the Law Society is required to accredit TWU's proposed law school, the Law Society will also be required to accredit future faith-based law schools. The Law Society might next be forced to sanction a law school with a religious-based prohibition against another historically disadvantaged group such as women or a racialized community. The Law Society, given its statutory mission and legal obligations, cannot sanction a model of separate and unequal access to legal education which is offensive to *Charter* principles.

28. The Supreme Court has affirmed the government's right to place reasonable limits on publicly-regulated religious schools to foster equality interests. In *Loyola*, the Supreme Court held that the government could reasonably require a private Catholic high school to teach other religions and ethics in a neutral and objective fashion; it was not free to teach at all times through its Catholic religious lens.³⁰ While this would be a delicate exercise, it was in the public interest that students learn that other religious ethics are not only worthy to the extent they align with their own faith tradition but are also worthy of respect in their own right.³¹ As Justice Abella noted, religious freedom must be understood "in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality,

²⁹ *S.L.*, *supra*, at para. 40.

³⁰ *Loyola*, *supra*, at para. 71, 75-76.

³¹ *Ibid.* at para. 75-76.

and ensuring the vitality of a common belief in human rights.”³²

29. In the social, political and legal context of this case, the Law Society acted reasonably when it declined to accredit a faith-based school which limits admission solely to those persons able and willing to adhere to its exclusionary religious oath. The multicultural reality of Canadian society and the Law Society’s public interest obligations require that legal education promote respect for diverse faith traditions and ways of living, rather than demand student and staff adherence to a singular religious lens, “at all times”.³³ Given its requirement of neutrality, the Law Society could not give its imprimatur to a law school which declares that individuals are only worthy as students to the extent that they align with the school’s own faith tradition.³⁴

2. The Law Society Could Not Condone the Discriminatory Covenant

30. TWU asserts that the Covenant is not discriminatory, and in any event, as a private institution, it is not subject to the *Charter* and is exempt from human rights legislation in its home province.

31. The Law Society was entitled to assess whether the Covenant is discriminatory. What is lawful for TWU, as a private institution, is not the same as what is reasonable, or indeed lawful, for the Law Society, as a public actor governed by the *Charter*. Once a private religious school seeks government recognition, as here, the state must act in the public interest and in compliance with its own constitutional obligations.³⁵

32. The Covenant discriminates on the basis of sexual orientation, among other grounds. TWU denies sexual orientation discrimination by claiming to “love the sinner - hate the sin”, but

³² *Ibid.* at para. 47.

³³ *S.L. supra*, at para. 40.

³⁴ *Ibid.* See also, *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710, at paras. 20 and 66.

³⁵ R.E. Charney, “Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?” 34 *N.J.C.L.*, forthcoming.

the Supreme Court has rejected this false distinction between identity and conduct.³⁶ The impact of the Covenant is to prohibit LGBTQ individuals from living openly within TWU, effectively excluding LGBTQ people from applying, studying, and working there.³⁷

33. The Covenant denigrates LGBTQ individuals. TWU cites its version of the Bible to assert that same-sex sexual intimacy is “vile” and “shameful.”³⁸ Marital different-sex intimacy is permitted but marital same-sex intimacy is not. The Court of Appeal for Ontario has recognized that favouring one form of relationship over another demeans the dignity of same-sex couples and is contrary to the values of a free and democratic society.³⁹

34. TWU claims that it does not “encourage discrimination of any kind against LGBT individuals,”⁴⁰ but the Covenant’s philosophy that same-sex attractions are “destructive”⁴¹ has the power to devastate psychological well-being and contributes to a larger culture of oppression, discrimination, harassment and hate crimes against LGBTQ people.⁴² The actual impact on the human psyche of signing, teaching, policing and living the teachings of the Covenant can be, in the words of the Applicants’ deponent, Mr. Cook, “the type of thing that causes suicides.”⁴³

35. As gatekeeper to the profession, the Law Society could not indirectly apply the Covenant in determining access to a law licence. If the Law Society had been complicit in discrimination,

³⁶ *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 (“*Whatcott*”), at paras. 123-124; citing with approval L’Heureux-Dubé J.’s statement in *BCCT*, *supra*, at para. 69 that the “status/conduct ... distinction for homosexuals and bisexuals should be soundly rejected.”

³⁷ *BCCT*, *supra*, at para. 73: LGBTQ students could only attend TWU “at considerable personal cost.”

³⁸ Covenant, Exhibit “C” to the Wood Affidavit, AR Vol. 2, Tab 5C, p. 442, citing Romans 1:26-27.

³⁹ *Halpern v. Canada (Attorney General)*, 65 OR (3d) 161, 2003 CanLII 26403 (Ont. C.A.), at para. 119; see also *M. v. H.*, [1999] 2 S.C.R. 3, at para. 73; *Quebec v. A*, *supra*, at para. 332.

⁴⁰ Applicants’ factum at para. 31.

⁴¹ Covenant, Exhibit “C” to the Wood Affidavit, AR Vol. 2, Tab 5C, p. 441.

⁴² *Vriend v. Alberta*, [1998] 1 SCR 493 (“*Vriend*”), at para. 84, 99-104, at para. 99-104; *Egan v. Canada*, [1995] 2 SCR 513, at para. 173-175; Expert report of Elise Chenier, Exhibit “B” to the affidavit of Elise Chenier, sworn October 23, 2014, RAR, Tab 5B, p. 600-1.

⁴³ “Living the questions”, Iain Cook, November 21, 2007, Exhibit “A” to the Affidavit of Iain Cook, sworn August 19, 2014, AR Vol. 2, Tab 14A, p. 612. *BCCT*, *supra*, at para. 30: there are limits to the scope of s. 2(a), “especially so when this provision is called upon to protect activity that threatens the psychological well-being of others.”

it would have itself engaged in discriminatory conduct, contrary to the *Charter*.⁴⁴

36. The Law Society acted reasonably and correctly when it concluded that it should not, in the public interest, sanction TWU's discriminatory Covenant. Lawyers have a unique responsibility in relation to the administration of justice arising from their role, and a special responsibility to treat all persons equally without discrimination.⁴⁵ The Law Society was entitled to focus on the protection and promotion of the broader public interest, without requiring proof of discriminatory acts by or against any particular individual.⁴⁶ The Decision confirms for LGBTQ communities, other historically disadvantaged groups, and the public at large that the profession respects diversity and welcomes inclusion. If the Law Society had accredited TWU's proposed law school, it would have sent a "strong and sinister message" that discrimination against LGBTQ people is acceptable.⁴⁷

3. **The LSUC Has Not Deprived TWU Students of Meaningful Religious Freedom**

37. TWU claims the Law Society has infringed its prospective students' religious freedom by denying accreditation to its proposed law school, thereby coercing potential TWU law students away from a preferred faith-based school and toward attendance at a secular law school.

38. The Law Society's Decision did not infringe the freedom of religion of TWU's prospective students. Religious freedom protects against government measures that unreasonably deprive adherents of a meaningful choice to follow or not follow the edicts of their religion;⁴⁸ it

⁴⁴ *Vriend, supra*, at paras. 84, 99-104; *Eldridge v. British Columbia (Attorney General)*, 1997 3 S.C.R. 624, at para. 42; *Quebec v. A.*, 2013 SCC 5 ("*Quebec v. A.*"), at para. 332; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3, at para. 96.

⁴⁵ *Rules of Professional Conduct*, s. 5.6-1 Commentary [1]; and s. 6.3.1.

⁴⁶ *Whatcott, supra*, at paras. 132-133.

⁴⁷ *Vriend supra*, at para. 100.

⁴⁸ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 ("*Hutterian Brethren*") at para. 98.

is not a positive right to support from the state, whether through funding of religious schools,⁴⁹ civil recognition of a church's religious ceremonies,⁵⁰ or accreditation of a faith-based law school. There is only a breach of s. 2(a) of the *Charter* if a measure interferes, in more than a trivial or insubstantial way, with the claimant's ability to act in accordance with practices or beliefs which have a nexus with religion.⁵¹

39. TWU has not established an interference with prospective students' ability to act in accordance with their religious beliefs. Religious activity may occur on-site, but the proposed law school, *qua* law school, is not fundamentally engaged in religious activity in furtherance of religious purposes; it seeks to undertake the commercial purpose of training prospective lawyers to provide secular legal services to the public at large, including LGBTQ clients, persons of varied faiths, and those with no religious beliefs. The Covenant's discriminatory qualifications do not have a direct and substantial relationship to legal education and should have no relationship to access to the profession.⁵²

40. TWU insists its law school will successfully teach *Charter* jurisprudence, equality rights and modern family law, cultural competence and critical thinking. It claims that it welcomes people who hold and express diverse opinions including contrary views.⁵³ TWU's evidence also reveals that the Evangelical community is "thriving" and is strengthened through exposure to difference.⁵⁴ Assuming these claims to be true, TWU could successfully maintain its religious

⁴⁹ *Adler v. Ontario* (1994), 19 O.R. (3d) 1, at p. 10 (C.A.).

⁵⁰ *Halpern*, *supra*, paras. 51-57.

⁵¹ *Syndicat Northcrest v Amselem*, 2004 SCC 47 at para. 56 and *S.L.*, *supra*, at para. 24.

⁵² See for example, in the human rights context, *Heintz v. Christian Horizons*, 2010 ONSC 2105 (Div. Ct.), at para. 103 in which this Court said refusal to employ a personal support worker in a same-sex relationship was "a discriminatory qualification [which] cannot be justified in the absence of a direct and substantial relationship between the qualification and the abilities, qualities or attributes needed to satisfactorily perform the particular job."

⁵³ Wood Affidavit, AR Vol. 2, Tab 5 at p. 417; Convocation Transcript (Mr. Kuhn), April 24, 2014, Record of Proceedings, Tab 295, pages 3045, lines 13-25.

⁵⁴ Affidavit of Dr. Samuel H. Reimer, sworn August 19, 2014, para. 31-33, 38-39, 44-45, AR, Vol. 2, Tab 11.

identity without an expressly discriminatory admission and discipline policy, just as the Supreme Court concluded that Loyola could maintain its Catholic identity while teaching other religious ethics in a neutral and objective fashion.

41. It is unclear what negative impact it would have on prospective law students' religious freedom if TWU permitted attendance of a married gay student who identifies as Evangelical Christian. Similarly, there is a dubious link between policing what happens in an unmarried TWU librarian's bedroom off-campus and offering Evangelical students an educational faith community in which to pursue the study of law.

42. If the religious freedom of prospective TWU students is engaged by LSUC's non-accreditation, the impact on religious beliefs and practices is limited. Evangelical Christians are welcome to attend accredited law schools in Ontario (or elsewhere) or may attend TWU's private law school and take further steps to secure the right to practice in this Province.⁵⁵ TWU adduces no evidence that prospective students' religious beliefs or practices require a segregated legal education, and instead adduces evidence that their religious identity, and law school experience, will be enhanced by diversity and differences of opinion.⁵⁶

43. The Law Society analysed all *Charter* values implicated by the Decision, assessing their consistency or conflict with each other and its statutory mandate.⁵⁷ Even if the Decision has a serious impact on the religious freedom of prospective TWU students, their freedom has to be considered within the context of the Law Society's obligation of religious neutrality, and balanced against its need to promote access to justice.

44. To the extent that there is a conflict of prospective students' religious freedom against the

⁵⁵ Compare *Hutterian Brethren, supra*. Denying access to a driver's licence did not unreasonably deprive Hutterites of their religious freedom; here, prospective law students are not unreasonably deprived of their religious freedom in not being able to attend a law school limited to co-believers.

⁵⁶ Affidavit of Dr. Samuel H. Reimer, sworn on August 19, 201, para. 44, AR, Vol. 2, Tab 11.

⁵⁷ *Doré, supra*, at paras. 55-56.

religious freedoms and equality rights of others, the Law Society's balancing was reasonable in light of the statutory objectives. Given the Law Society's public interest mandate and *Charter* obligations, it reasonably exercised its discretion in favour of religious neutrality and the promotion of non-discrimination, rather than preferring the religious freedom of one group to exclude non-adherents from its law school.

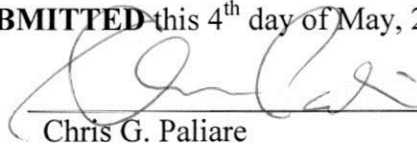
4. **Conclusion**

45. The Law Society acted squarely within its broad and exclusive authority in making the Decision. The Law Society properly considered TWU's admission policy as part of its assessment of whether accreditation is in the public interest. The Law Society reasonably concluded that it would not sanction the Covenant's discriminatory admission, attendance and employment requirements. The Decision maintained religious neutrality, and did not infringe the *Charter* rights of prospective TWU students and staff. The Law Society considered all of the values at play, and its statutory mandate, in making its Decision. The Decision is entitled to deference, and in any event, was correct.

PART V. ORDER REQUESTED

46. The Advocates' Society asks that the Court dismiss the application.⁵⁸

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 4th day of May, 2015.



Chris G. Paliare



Joanna Radbord

Lawyers for the intervenor The Advocates'
Society

⁵⁸ Pursuant to the order of Justice Nordheimer granting intervenor status on September 24, 2014, The Advocates' Society does not seek costs and no costs are to be ordered against it.

SCHEDULE “A”

1. *Doré v. Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12
2. *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9
3. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
4. *Roncarelli v. Duplessis*, [1959] S.C.R. 121
5. *Edwards v. Law Society of Upper Canada* [2001] 3 SCR 562
6. *Oakwood Development Ltd. v. Rural Municipality of St. Francois Xavier*, [1985] 2 S.C.R. 164
7. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31
8. *Ross v. New Brunswick School District No. 15*, [1996] 1 SCR 825
9. *Arcade Amusements v. Montreal*, [1985] 1 SCR 368
10. *Shell Canada Products Ltd. v. Vancouver (City)*, 1994 CarswellBC 115, [1994] 1 S.C.R. 231
11. *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235, 2012 SCC 7
12. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
13. *Chamberlain v. Surrey School District No. 36*, [2002] 4 SCR 710
14. R.E. Charney, “Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?” 34 N.J.C.L., forthcoming
15. *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 SCR 467, 2013 SCC 11
16. *Halpern v. Canada (Attorney General)*, 65 OR (3d) 161, 2003 CanLII 26403 (Ont. C.A.)
17. *M. v. H.*, [1999] 2 S.C.R. 3

18. *Vriend v. Alberta*, [1998] 1 SCR 493
19. *Egan v. Canada*, [1995] 2 SCR 513
20. *Eldridge v. British Columbia (Attorney General)*, 1997 3 S.C.R. 624
21. *Quebec v. A.*, 2013 SCC 5
22. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3
23. *Rules of Professional Conduct*, s. 5.6-1 Commentary [1]
24. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567
25. *Adler v. Ontario* (1994), 19 O.R. (3d) 1 at 10 (C.A.)
26. *Syndicat Northcrest v Amselem*, 2004 SCC 47
27. *Heintz v. Christian Horizons*, 2010 ONSC 2105 (Div. Ct.)

SCHEDULE "B"

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982

Fundamental Freedoms

2. Everyone has the following fundamental freedoms:
 - (a) freedom of conscience and religion;
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
 - (c) freedom of peaceful assembly; and
 - (d) freedom of association.

Law Society Act, R.S.O. 1990, C. L.8

Function of the Society

4.1 It is a function of the Society to ensure that,

(a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.

Principles to be applied by the Society

4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

...

27 (3) If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant.

...

By-laws

62. (0.1) Convocation may make by-laws,

1. relating to the affairs of the Society;

...

4.1 governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence;

By-Law 4, Licensing, made under ss. 62 (0.1) and (1) of the *Law Society Act*, R.S.O. 1990, c. L. 8.

ISSUANCE OF LICENCE

INTERPRETATION

Interpretation

7. In this Part,

“accredited law school” means a law school in Canada that is accredited by the Society;

Rules of Professional Conduct

SECTION 5.6 THE LAWYER AND THE ADMINISTRATION OF JUSTICE

Encouraging Respect for the Administration of Justice

5.6-1 A lawyer shall encourage public respect for and try to improve the administration of justice

...

SECTION 6.3.1 DISCRIMINATION

Special Responsibility

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

TRINITY WESTERN UNIVERSITY et al.

-and- LAW SOCIETY OF UPPER CANADA

Applicants

Respondent

Court File No. 250/14

**ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)
PROCEEDING COMMENCED AT
TORONTO**

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