C61116

COURT OF APPEAL FOR ONTARIO
(ON APPEAL FROM THE DIVISIONAL COURT)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

- and -

CHRISTIAN LEGAL FELLOWSHIP, THE EVANGELICAL FELLOWSHIP OF CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, OUT ON BAY STREET AND OUTLAWS, THE ADVOCATES' SOCIETY, CRIMINAL LAWYERS' ASSOCIATION (ONTARIO), CANADIAN CIVIL LIBERTIES ASSOCIATION, LAWYERS' RIGHTS WATCH CANADA, CANADIAN SECULAR ALLIANCE, ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA, THE SEVENTH DAY ADVENTIST CHURCH IN CANADA, CANADIAN CONSTITUTION FOUNDATION and CANADIAN BAR ASSOCIATION

Interveners

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PART I - OVERVIEW

1. The Law Society Upper Canada's [LSUC's] decision refusing to accredit Trinity Western University's [TWU's] proposed law school suffers from an insurmountable constitutional flaw: TWU's future graduates, though competent and ethical, are completely excluded from the legal profession in Ontario. And the only reason for their exclusion is that they have chosen to study law in a voluntary, private, religious, educational association of like-minded individuals, as is their right under s. 2(d) of the *Charter*. The Divisional Court recognized this problem, and said that the Law Society was "obliged to provide [TWU graduates] with a timely, open, and efficient, accreditation process in order to minimally impair their freedom of religion and association."[1] Having made this finding, however, the court failed to declare that the LSUC had breached the *Charter*, and failed to order a remedy. Rather than simply ordering accreditation, the court stated that LSUC was obligated to create an alternative "accreditation process" for the admission of TWU graduates. The court below thereby failed to grant an actual remedy to the aggrieved parties whose *Charter* rights are violated by the LSUC.

PART II – THE FACTS

2. Evangelical Christians subscribe to traditional biblical moral principles. As but one part of their extensive moral code, they believe that sex outside of the marriage of one man and one woman is morally wrong. The *Canadian Charter of Rights and Freedoms* guarantees these individuals their freedom of belief and the freedom to live according to these beliefs.

3. The *Charter* also guarantees all individuals the fundamental freedom to form and join private associations whose members voluntarily agree to live according to their beliefs. TWU is one such private religious association, a religious community where students study and prepare

[1] *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 (Div. Ct.) at para. 121 [*TWU 2015*]

to enter into professions such as nursing and teaching.

4. The Law Society of Upper Canada does not engage in ideological or lifestyle screening of its individual members. Many members of LSUC are Evangelical Christians who live according to their traditional moral principles. These members do not discriminate against their clients, and are precluded from doing so by the *Rules of Professional Conduct.*[2]

5. Further, many current LSUC members attended private universities outside of Canada which operate according to the same moral principles that are lived at TWU. Others attended TWU itself as undergraduates.[3] LSUC has routinely admitted such members without any examination of their ideological suitability, or that of the law school which they attended. By submitting their academic and professional credentials, they are assessed, and required to take an oath to abide by the *Rules of Professional Conduct.*[4] As explained by Bencher Vern Krishna:

> The accreditation process. I know a little bit about that. For 26 years I was the executive director of the national committee on accreditation and during those 26 years we accredited foreign graduates from approximately 60 different countries and some of those countries were very well-known countries such as the United States and the United Kingdom and Australia and New Zealand and some of those countries were countries which had very backward human rights or legal systems. We have accredited people from Nigeria and Uganda, which have their own views and treatment of gays. We have accredited people from Iran during the height of their crisis and Iraq and Saudi Arabia, which won't allow women into law schools, no matter of what sexual persuasion. From China, one of the most repressive regimes, Russia, and so on. We never once asked what was the moral value of the school or the religious value of the school or the rule of law, the ethical value of the country that you have come from. We evaluated on the basis of the academic criteria and then we said you must do thus [sic] and so in order to become equivalent to a Canadian law graduate from an accredited Canadian law school.[5]

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[2] *Memorandum of John B. Laskin, "Applicability of Supreme Court's decision in Trinity Western University [...]"*, March 21, 2013, Appendix C to the Federation of Law Societies of Canada's Special Advisory Committee on Trinity Western's Proposed School of Law's Final Report: Exhibit Book Vol. III p. 1212.

[3] See e.g. Submission of Kelly P. Hart and Submission of Joel Reinhardt, Respondent's Record of Proceedings in the court below at pp. 1162-63, 1226.

[4] By the National Committee on Accreditation. LSUC has delegated its power to determine the adequacy of a particular curriculum. LSUC recognizes an NCA certificate in the same way they recognize a transcript from an accredited Canadian law school: see LSUC By-law 4, s. 9(1)1(ii)

[5] *Law Society of Upper Canada,* Proceedings at Convocation, April 24, 2014, submissions of Bencher Krishna, transcript of proceedings, pp. 180-181: Exhibit Book Vol. V at pp. 2463-64. [Emphasis added]

6. LSUC, then, routinely admits to its ranks both members who personally subscribe to a variety of diverse ideological viewpoints, and members who have attended law schools taught from diverse ideological perspectives. LSUC is interested only in the competence and professionalism of the prospective member, not her ideology, or that of her law school.

7. Since LSUC has no issue with the individual suitability of graduates of TWU, the real issue that it decided was whether those individuals should be penalized for joining a voluntary private, religious association, and for practicing traditional biblical moral principles while studying law together in community.

8. Certain civil liberties groups including the present intervener, the Justice Centre for Constitutional Freedoms, supported TWU's application for accreditation.[6] With a relatively close margin of 28-21 (only four swing votes), the Benchers of LSUC voted against accreditation for TWU. This decision imposed a serious penalty on potential graduates of TWU: they could not be admitted to the Ontario Bar. Since TWU is an unaccredited school, graduates are not admissible through the standard channel; and since the school is within Canada, the National Committee on Accreditation ["NCA"] process is not available.[7] If TWU were located in the United States, there is no doubt that a graduate would be approved by the NCA and admitted into the LSUC. Bizarrely, then, freedom of association receives more recognition from LSUC when the association exists outside of Canada.

9. The Divisional Court, presented with this problem, failed to observe the fundamental tenets of constitutional law. Rather than simply finding a *Charter* breach which was not justified

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[6] Letter of British Columbia Civil Liberties Association President Lindsay M. Lyster, Respondent's Record of Proceedings in the court below at pp. 2417-2418.

[7] Bencher Krishna explained that as it currently stands, this process is only available to graduates of unaccredited schools outside of Canada. A change of the NCA's mandate would require unanimous approval of all fourteen law societies. *Law Society of Upper Canada,* Proceedings at Convocation, April 24, 2014, submissions of Bencher Krishna, transcript of proceedings, p. 182: Exhibit Book Vol. V at p. 2465.

under s. 1, and ordering a remedy, the Court commented that "TWU graduates would nonetheless be entitled to apply to the respondent for admission to the Bar of Ontario, and the respondent would be obliged to provide them with a timely, open, and efficient, accreditation process in order to minimally impair their freedom of religion and association." The court opted to uphold the decision to refuse accreditation. This decision is a symbolic denunciation of TWU and its Community Covenant, which not only fails to resolve the dispute, but more importantly, fails to vindicate the *Charter* rights of the aggrieved party.

PART III - ISSUES AND LAW

A. The Divisional Court erred in failing to find that the LSUC's decision deprives the individual applicants of their fundamental freedom of association per s. 2(d) of the *Charter*

B. The infringement of s. 2(d) is not justified under s. 1 of the *Charter*.

C. The Divisional Court erred by failing to order a remedy for the infringement.

A. The Divisional Court erred by failing to find a breach of s. 2(d) freedom of association which was not saved under s. 1 of the *Charter*

i. The test for infringement of freedom of association under s. 2(d)

10. Everyone is guaranteed the "fundamental freedom" of association per s. 2(d) of the *Charter*. In *Mounted Police Association of Ontario v. Canada (Attorney General)*, McLachlin C.J. and Lebel J. held that s. 2(d) should be interpreted in "a purposive and generous fashion"[8] and "s. 2 (*d*) confers *prima facie* protection on a broad range of associational activity, subject to limits justified pursuant to s. 1 of the *Charter*."[9] This mirrors the approach under s. 2(b) of the *Charter* when examining freedom of expression, where s. 1 justification is typically the paramount question. With rare exceptions then, the only accepted one being violent associations,

[8] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1 [*"Mounted Police Association"*] at para. 47.
[9] *Mounted Police Association*, 2015 SCC 1 at para. 60. Violent associations, for example, are not *prima facie* protected by s. 2(d).

individuals have "the right to join with others to form associations" and "the right to join with others in the pursuit of other constitutional rights."[10]

11. The test for determining an infringement of s. 2(d) is whether the state conduct constitutes a substantial interference with freedom of association, in *either* its purpose *or* its effects.[11] If there is substantial interference, then the infringement must be justified under s. 1.

ii. Prospective students of TWU and TWU itself fully enjoy the fundamental freedom of association enshrined in s. 2(d) of the Charter

12. In order to determine whether there has been "substantial interference" it is necessary to first examine the purpose of s. 2(d) and therefore the scope of protection afforded to different associations. As a private and voluntary religious, educational, and vocational association, the association of TWU sits at the very core of what is protected by s. 2(d) of the *Charter*.

13. In the seminal *Alberta Reference*, Dickson J. held that association "has always been the means through which political, cultural and racial minorities, religious groups and workers have sought to attain their purposes and fulfil their aspirations."[12] He then set forward several principles which inform the s. 2(d) analysis in this case.

14. First, freedom of association is closely related to and manifested by other constitutional rights including freedom of religion and educational rights.[13] Indeed, in *Mounted Police Association*, McLachlin C.J. and Lebel J. pointed out that "[t]he historical emergence of association as a fundamental freedom ... has its roots in the protection of religious minority groups."[14] Here, TWU is an educational association of a religious minority who hold unpopular opinions. This type of association lies at the very core of what s. 2(d) aims to protect.

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[10] *Mounted Police Association*, 2015 SCC 1 at para. 47.
[11] *Mounted Police Association*, 2015 SCC 1, at paras. 111, 72, 121
[12] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 ["*Alberta Reference*"] at para. 87, quoted and adopted in *Mounted Police Association* at para. 57.
[13] *Alberta Reference*, [1987] 1 S.C.R. 313 at para. 85.
[14] *Mounted Police Association* at para. 56.

15. Second, freedom of association protects the activities of the association, not just its existence.[15] Furthermore, it protects the activity of the association even when the activity in question is not an essential purpose of the association.[16] The evidence demonstrates that TWU's Community Covenant is essential to its association.[17] Even if it were not, however, the *Charter* still protects their activity.

16. Third, "discrimination" in one form or another is by definition an indispensable element of freedom of association: "Through association, individuals have been able to participate in determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live."[18] The Community Covenant is a moral code which students of TWU voluntarily adopt. The code creates a set of rules, mores, and principles which govern their Evangelical Christian community.

17. Fourth, associational activity as it relates to "work" enjoys protection under s. 2(d) of the *Charter*. Work is not merely financial but connected to one's identity and ability to contribute to shaping society.[19] LSUC's decision to deny accreditation and thereby impede prospective TWU graduates from becoming lawyers in Ontario strikes at the core of what is protected by s. 2(d).

iii. LSUC's decision infringes the s. 2(d) rights of TWU and its prospective students

18. In order to determine whether there has been "substantial interference," it is necessary to return to the seminal *Charter* jurisprudence defining freedom. When government action involves constraint which limits available courses of conduct, freedom is curtailed. Dickson J. held in the

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[15] *Alberta Reference*, [1987] 1 S.C.R. 313 at para. 82.
[16] *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ["*PIPSC*"] at para. 73.
[17] Report of Gerald Longjohn, Exhibit "C" to the Affidavit of Gerald Longjohn, sworn August 19, 2014, p. 3: Exhibit Book Vol. I p. 152; Affidavit of Robert Wood, sworn August 22, 2014, para. 30: Exhibit Book Vol. I, pp. 9-10.
[18] *Alberta Reference* at para. 86, quoted with approval in *Mounted Police Association* at para. 35.
[19] *Alberta Reference* at para. 91.

Big M Drug Mart: "Freedom can primarily be characterized by the absence of coercion or constraint. ... Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others."[20] In the 2001 *Trinity Western* decision, the Supreme Court relied on this very test to overturn the refusal of the BCCT to accredit TWU.[21] It is still applicable today.

19. In the recent *Mounted Police Association* decision, the Supreme Court of Canada held that as a "starting point," section 2(d) protects "the right to do collectively what one may do as an individual."[22] LSUC does not and cannot screen out individual applicants for ideological suitability, or individual lifestyle choices. Evangelical Christians who live according to traditional biblical morality are perfectly eligible for membership to LSUC. However, in this case, when like-minded individuals form a private association in the form of a Christian law school, LSUC refuses to recognize graduates of that institution. This refusal is not based on evidence that graduates of TWU will fail to be competent and professional. This refusal is a direct result of the associational nature of TWU as an Evangelical Christian school in which students agree to abide by a common moral code of conduct.

20. LSUC's decision "limits the course of conduct" available to TWU graduates. By operation of its decision, TWU graduates are not permitted to become members of the Ontario Bar. Surely this constitutes a substantial interference, because it "limits alternative courses of conduct" available to TWU graduates.

21. In *TWU 2001*, the Supreme Court held that the failure of the BCCT to accredit TWU constituted a substantial interference with freedom of association:

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[20] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94-95 [emphasis added]
[21] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [*TWU 2001*] at para. 28.
[22] *Mounted Police Association* para. 36, quoting Dickson J. in the *Alberta Reference* at para. 172.

> There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year.[23]

The court below failed to follow this binding precedent, which clearly finds a breach of freedom of association.

22. The reason the Divisional Court fell into error is that they misapprehended the scope of the fundamental freedom of association. The court found no violation of s. 2(d) of the *Charter* because LSUC's refusal to accredit did not prohibit TWU from establishing a law school.[24] In other words, so long as the state does not bar individuals from associating, s. 2(d) is not breached. This is an extremely diluted concept of freedom. Rather than looking at whether the decision "limits available courses of conduct" per *Big M Drug Mart*, the court held that only a prohibition on having a school at all could constitute a violation. But excluding qualified individuals from the legal profession due to their decision to form a voluntary, faith-based, educational association "limits available courses of conduct" for those individuals, and thereby violates their fundamental freedom of association.

B. The infringement of s. 2(d) is not justified under s. 1

23. When dealing with section 1 justification for infringements of s. 2(d), the court must have regard to "the nature of a given associational activity and its relation to the underlying purpose of s. 2(d)."[25] Again, this mirrors the approach of freedom of expression analysis under s. 2(b). The evidence demonstrates that the Applicants in this case are situated at the very core of what is

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[23] *TWU 2001* at para. 32. [emphasis added]
[24] *Trinity Western University v. The Law Society of Upper Canada,* 2015 ONSC 4250 (Div. Ct.) at para. 121 at para. 142.
[25] *Mounted Police Association* at para. 61.

protected by s. 2(d) of the *Charter*. TWU is a private, religious, educational institution, where individuals voluntarily associate and agree to live by certain common moral values rooted in their fundamental beliefs. Many in Canada do not agree with these moral values or this world-view, but these values do not and will not translate into offensive, anti-social, or discriminatory conduct by graduates of TWU.

24. In *Doré v. Barreau du Québec*, Abella J. explained that a reviewing court is required to engage in the *Oakes*-type "reasonable limits" balancing when dealing with administrative decisions.[26] The elements of the *Oakes* test are infused into the *Doré* balancing, and therefore, it is useful to analyze them individually in order to determine how they tip the balance.

25. In this case, the LSUC has a pressing and substantial objective, to ensure that LGBTQ and others excluded by the Community Covenant do not experience barriers to access to the legal profession.[27] Therefore, the court must consider the remaining elements of the *Oakes* test: rational connection, minimal impairment, and proportionality.

26. If the measures adopted are "arbitrary, unfair or based on irrational considerations" there is no rational connection.[28] The decision of LSUC to deny accreditation is both arbitrary and unfair, since the record demonstrates that LSUC has admitted graduates from TWU-like schools for many years. Furthermore, there is no evidence on the record that the existence of a single Evangelical law school in British Columbia will create a barrier for the LGBT community to access the legal profession in Ontario.[29] There is no rational connection in this case.

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[26] *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 56-58; *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71.
[27] *TWU 2015* at paras. 96-97.
[28] *R. v. Oakes*, [1987] 1 S.C.R. 103 at para. 70
[29] LSUC claims that TWU adds between 60 and 170 Canadian law school spaces which are not available to LGBTQ students not willing to live by TWU's code of conduct. In its submissions to the Federation of Law Societies of Canada, TWU indicated that its initial law class would have 60 seats, with up to 170 seats by the third year of operations. *Report on Trinity Western University's Proposed School of Law*, Federation of Law Societies of Canada, Canadian Common Law Approval Committee, at para. 22, Exhibit Book Vol. III at p. 899. There are 2782 national universally available spots. Therefore, there is an increase in available space of between 2 and 6%. This explains the holding of the majority in *TWU 2001* at para. 35: "While homosexuals may be discouraged from attending TWU, a

27. The Divisional Court found that the LSUC's decision denying accreditation without making accommodations for individual graduates of the school (who are both competent and will practice ethically) failed to minimally impair the *Charter* rights of prospective graduates. The court below was correct on this point, and this finding should be upheld on appeal.

28. Under this branch, the court must weigh the barrier to access to the profession TWU poses to LGBTQ people against the impact of the decision on prospective TWU graduates. There is no evidence TWU will pose a barrier to access for LGBTQ individuals. On the other hand, there is clear evidence that the LSUC's decision results in a complete exclusion from the profession from prospective TWU students. Proportionality therefore weighs in favour of TWU.

PART IV – ORDER REQUESTED

29. The LSUC violated the *Charter* rights of the applicants, one of whom is a potential graduate of TWU, and the section 1 balancing clearly favours the applicants in this case. The court below declined to grant a remedy, citing the prematurity of the request since the law school does not yet exist.[30] If the court is correct, though, then LSUC's decision would be an *ultra vires* attempt to regulate that which does not exist; or alternatively, this entire case should be summarily dismissed as premature. But the court below was not correct. It falls to this court to clearly and concretely enforce the *Charter* the rights of the applicants and order accreditation.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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private institution based on particular religious beliefs, they will not be prevented from becoming teachers." Indeed, LSUC does not account for the fact that a Canadian law degree is not a pre-requisite for membership per the NCA process.

[30] *Trinity Western University v. The Law Society of Upper Canada,* 2015 ONSC 4250 (Div. Ct.) at paras. 127-128

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5. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295
6. *R. v. Oakes*, [1986] 1 S.C.R. 103
7. *Doré v. Barreau du Québec*, 2012 SCC 12

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TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT (Appellants) and THE LAW SOCIETY OF UPPER CANADA (Respondent)

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE INTERVENOR,

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