Court File No. 250/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

- and -

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)

Interveners

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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 marriage and same-sex marriage are 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 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 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 traditional biblical moral principles. These members do not discriminate against their clients, and are precluded from doing so by the *Rules of Professional Conduct*.[1]

[1] *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, Respondent's Record of Proceedings at p. 0517.

5. Further, many 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.[2] 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*.[3] 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 and so in order to become equivalent to a Canadian law graduate from an accredited Canadian law school.[4]

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. Notwithstanding LSUC's long-standing practice, the application of TWU for accreditation of its proposed law school was the subject of intense debate.

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

[3] 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)

[4] *Law Society of Upper Canada*, Proceedings at Convocation, April 24, 2014, submissions of Bencher Krishna, transcript of proceedings, pp. 180-181, Respondent's Record of Proceedings at pp. 3193-94. [Emphasis added]

8. Since LSUC clearly 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.

9. With a relatively close margin of 28-21 (only four swing votes), the Benchers of LSUC voted against accreditation for TWU. LSUC provided no reasons for its decision.

10. The deleterious effects of this decision on potential graduates of TWU are serious. Graduates of TWU cannot be admitted to the Ontario Bar. There was much discussion amongst the benchers on the issue of whether TWU law graduates might be admitted through the National Committee on Accreditation ["NCA"] process. Bencher Krishna explained, however, 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.[5] If TWU was located in the United States, there is no doubt that a student would be approved by the NCA. Bizarrely, freedom of association receives more recognition from LSUC when the association exists outside of Canada.

11. Assuming, however, for the sake of argument, that the NCA process at some point becomes available to TWU graduates: What then? There is no question that TWU graduates meet all the academic requirements, since it has already been pre-approved by the Federation of Law Societies of Canada. All the decision would do is require individual graduates of TWU to spend significant additional time and expense in order to be admitted to the Ontario bar. All this simply because they exercised their right to associate with like-minded individuals in a religious community while studying law, as is their *Charter* right. As explained by Bencher Krishna:

[5] *Law Society of Upper Canada*, Proceedings at Convocation, April 24, 2014, submissions of Bencher Krishna, transcript of proceedings, p. 182, Respondent's Record of Proceedings at p. 3195.

> Then if they got to the national committee, let's say, after all of this, what would the national committee say to all these graduates? It would say you are required to take Canadian courses to bring yourself up to an equivalent that we require of foreign graduates and they will say but I have a certificate that says I have taken all these courses, constitutional law, administrative law, criminal law, all these other courses and they'll say no, no, you have to first of all pay us a fee to have your credentials evaluated, go through the process for six months and then we'll tell you to take the same thing. Do you really think that would withstand judicial scrutiny? Are our judges of that calibre that they're going to buy into that and say oh, yes, that's all entirely proper. They've got a route. A little extra money, six months more, but we haven't done anything untoward.[6]

LSUC is penalizing the individual Evangelical Christian law student who chooses to exercise her constitutional freedom to associate with other individuals who wish to live the same lifestyle. LSUC's decision is thereby unfair, and indeed, arbitrary and capricious.

12. The beneficial effects on the "public interest" on the other hand are negligible. The evidence demonstrates that graduates of TWU do not and would not discriminate in the practice of law against the LGBTQ community or anyone else. Unlike in the 2001 *Trinity Western University v. B.C. College of Teachers* case before the Supreme Court where there was a lack of evidence that TWU graduates would discriminate,[7] in the present case there is positive and uncontradicted evidence that TWU graduates would not discriminate.[8]

13. 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.[9] This, they argue, makes it less likely that these students will be admitted to the Ontario bar when compared

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[6] *Law Society of Upper Canada*, Proceedings at Convocation, April 24, 2014, submissions of Bencher Krishna, transcript of proceedings, pp. 182, Respondent's Record of Proceedings at pp. 3195. [Emphasis added]
[7] *Trinity Western University v. B.C. College of Teachers*, 2001 SCC 31 at para.35 [*"TWU 2001"*].
[8] Applicant's Factum at para. 145; Green Affidavit, Application Record, Tab 12, page 587; Hart Affidavit, Application Record, Tab 13, page 597.
[9] 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, Respondent's Record of Proceedings at p. 204. There are 2782 national universally available spots. See: LSUC's factum at para. 48. 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 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.

to a straight student willing to live by the code of conduct.

14. LSUC's claim ignores the evidence that TWU accepts LGBTQ students who are willing to live by the code of conduct, and demonstrates that some TWU students are LGBTQ and self-identify as Evangelical Christian. They, along with the other students, choose to live by the code of conduct.

15. Further, LSUC ignores the fact that these additional spaces are equally closed to all people who, for any number of reasons, are not willing to live by the code of conduct. The code of conduct discriminates against people who disagree with its demands.

16. LSUC has not demonstrated that the existence of a voluntary religious association, who live according to beliefs that many if not most Canadians disagree with, causes harm to the public interest. There is therefore no proportionality between LSUC's decision and the serious deleterious effects on the *Charter* rights of TWU students. It is therefore clear why one bencher described a vote against accreditation as "more symbolic than effective."[10]

PART III - ISSUES AND LAW

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[10] *Law Society of Upper Canada*, Proceedings at Convocation, April 24, 2014, submissions of Bencher McGrath, transcript of proceedings at p. 109, Respondent's Record of Proceedings at p.3122.

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A. The appropriate standard of review is correctness

17. In light of the very recent Supreme Court of Canada decision of *Mouvement laïque québécois v. Saguenay (City)*, the JCCF respectfully submits that the applicable standard of review applicable to the Law Society's decision is correctness.[11]

18. In *Saguenay*, Gascon J. explained that "reasonableness" is the presumptive standard of review when a tribunal "acts within its specialized area of expertise" or when "interpreting and applying its enabling statute." However, this presumption can be rebutted in certain situations, including "where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise." Sometimes, a question has such an impact on the administration of justice as a whole that a correctness review is necessary to "safeguard a basic consistence in the fundamental legal order of our country."[12]

19. The present case involves a question of interpreting the state's constitutional obligation not to infringe fundamental freedoms of religion and association. This is not within LSUC's area of expertise.[13] Furthermore, the question before this court has such an impact on the administration of justice that correctness is necessary to safeguard basic consistency in the fundamental legal order.[14] Finally, LSUC did not release reasons for their decision, and therefore

[11] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 ["*Saguenay*"], released April 15, 2015.
[12] *Saguenay* at paras. 46-49.
[13] For example, if the decision related to assessing the adequacy of curriculum, the professional and ethical competency of individual members, disciplining a member for unprofessional conduct, or establishing standards for the profession, their decision would be reviewable on a reasonableness standard.
[14] This would undermine the achievements of the NCA process and National Mobility Agreement whereby national standards are recognized which benefit lawyers across the nation. See footnote 46, infra. Both processes exist because LSUC and other law societies came to agreement.

there were no findings of fact. The record has been significantly amplified before this court on review with the consent of both parties. Deference in these circumstances is not required.

B. LSUC's decision deprives the individual applicants and TWU of their fundamental freedom of association

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

20. 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"[15] 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*."[16] 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, 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."[17]

21. 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.[18] 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

22. 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

[15] *Mounted Police Association of Ontario v. Canada (Attorney General),* 2015 SCC 1 [*"Mounted Police Association"*] at para. 47.
[16] *Mounted Police Association*, 2015 SCC 1 at para. 60. Violent associations, for example, are not *prima facie* protected by s. 2(d).
[17] *Mounted Police Association*, 2015 SCC 1 at para. 47.
[18] *Mounted Police Association*, 2015 SCC 1, at paras. 111, 72, 121

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*.

23. 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."[19] He then set forward several principles which inform the s. 2(d) analysis in this case.

24. First, freedom of association is closely related to and manifested by other constitutional rights including freedom of religion and educational rights.[20] 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."[21] 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.

25. Second, freedom of association protects the activities of the association, not just its existence.[22] Furthermore, it protects the activity of the association even when the activity in question is not an essential purpose of the association.[23] The evidence demonstrates that TWU's code of conduct is essential to its association.[24] Even if it were not, however, the *Charter* still protects their activity.

26. 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

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[19] *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.
[20] *Alberta Reference*, [1987] 1 S.C.R. 313 at para. 85.
[21] *Mounted Police Association* at para. 56.
[22] *Alberta Reference*, [1987] 1 S.C.R. 313 at para. 82.
[23] *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367 ["*PIPSC*"] at para. 73.
[24] Applicant's Factum at paras. 38-39; Report of Gerald Longjohn, Exhibit "C" to the Affidavit of Gerald Longjohn, sworn August 19, 2014, page 3, Application Record, Tab 9C, page 565; Affidavit of Robert Wood, sworn August 22, 2014, ¶30, Application Record, Tab 5, page 422.

determining and controlling the immediate circumstances of their lives, and the rules, mores and principles which govern the communities in which they live."[25] The code of conduct 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.

27. 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.[26] LSUC's decision to deny accreditation and thereby impede prospective TWU students in their work again 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

28. 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 *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."[27] In *TWU 2001*, the Supreme Court relied on this very test to overturn the refusal of the BCCT to accredit TWU.[28] It is still applicable today.

29. 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

[25] *Alberta Reference* at para. 86, quoted with approval in *Mounted Police Association* at para. 35.
[26] *Alberta Reference* at para. 91.
[27] *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 at paras. 94-95 [emphasis added]
[28] *TWU 2001* at para. 28.

an individual."[29] 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.

30. 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, since the NCA process does not admit students from non-accredited Canadian institutions. If the NCA process is altered (which would require the consent of LSUC – there is no suggestion that this is forthcoming – and the other law societies), TWU graduates will be forced to enter through this process. This would require an additional investment of time and expense on the part of those students. Either way, then, the decision constitutes a substantial interference, as it "limits alternative courses of conduct" available to TWU graduates.

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

> 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.[30]

[29] *Mounted Police Association* para. 36, quoting Dickson J. in the *Alberta Reference* at para. 172.
[30] *TWU 2001* at para. 32. [emphasis added]

There is no meaningful difference between this case and the situation in 2001.

32. LSUC's decision also has a chilling effect on religious minorities who hold counter-cultural views on sex and marriage and who wish to become or are lawyers in Ontario. This was recognized by the Supreme Court in *TWU 2001*, where it was held "if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church."[31]

33. An examination of the record in this case substantiates this concern. One bencher, after first noting that the first of TWU's six core values is "to obey the authority of scripture by embracing all that the Bible teaches regarding faith, ethical commitments and way of life, believing this to be the ultimate standard of truth," openly questioned: "Are there areas of public law, including human rights legislation, Charter of Rights jurisprudence, for example, that TWU would anticipate conflicting with the scriptural sources of ethical commitment among its students? How would these conflicts be resolved?"[32] The same question could be posed of an individual member of the bar who is Evangelical, Muslim, Orthodox-Jewish, or Catholic. The implications for personal freedom within the profession are disturbing.

34. Likewise, many who made written submissions called into question the ability of a religious school to teach law at all, as well as the ability of a person educated in such a school to practice law.[33] One member of the Bar wrote: "A legal education based upon the promotion of a

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[31] *TWU 2001* at para. 33

[32] Law Society of Upper Canada, *Proceedings at Convocation*, April 10, 2014, submissions of Bencher Leiper, transcript of proceedings, pp. 30-31, Respondent's Record of Proceedings at pp. 2864-2865.

[33] There are many examples of this in the record in addition to what follows. At a Schulich School of Law Town hall meeting "[a] number of straight people in attendance felt strongly that religion has no place in the teaching of law.": Respondent's Record of Proceedings at p. 109. One lawyer expressed the opinion that "Religious schools should teach religion; public law schools should teach public law.": Letter of Kyle C. Hyndman, Respondent's Record of Proceedings at p. 0553. Another person submitted "Religious educational institutions … abuse the entire purpose of a university.": Letter of Suneeta Millington, Respondent's Record of Proceedings at p. 0620. Still another: "It is not

partial, partisan and particular religious viewpoint is not consistent with the professional requirement of a basic commitment to an equal and impartial system of law."[34] She did not say whether she believed that an individual member who held a "particular religious viewpoint" could have a "basic commitment to an equal and impartial system of law." One chapter of the Outlaws wrote "We urge you to consider the potentially serious consequences of allowing the admission of graduates of a private religious institution to the Ontario Bar"[35] without addressing the fact that a good many members of the bar today are graduates of private religious institutions (e.g. in addition to law schools, various undergraduate and graduate programs).

35. Certain civil liberties groups including the JCCF expressed profound disagreement with this type of reasoning, and ultimately supported TWU's application for accreditation.[36]

C. LSUC did not properly balance the Charter rights of prospective TWU graduates as against its statutory mandate to act in the public interest

36. 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)."[37] 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 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 the evidence clearly demonstrates that these values do not translate into offensive, anti-

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appropriate that lawyers be educated at a religious school. It is most definitely not in the public interest that lawyers be trained in a law school that is explicitly Christian.": Letter of Kathleen Howes, Respondent's Record of Proceedings at p. 0655.

[34] Letter of Susan Ursel, Respondent's Record of Proceedings at p. 1266.

[35] Letter of the Thompson Rivers University Faculty of Law Outlaws and others, Respondent's Record of Proceedings at p. 1246.

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

[37] *Mounted Police Association* at para. 61.

social, discriminatory conduct by graduates of TWU.[38]

37. In *Doré v. Barreau du Québec*, Abella J. articulated how a reviewing court is to engage in the *Oakes*-type "reasonable limits" balancing required when dealing with administrative decisions.[39]

> If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.[40]

38. LSUC's stated objective is "to ensure that LGBTQ and other minorities excluded by the Community Covenant do not experience barriers to access to the legal (and judicial) professions."[41] The JCCF admits that this is a "pressing and substantial objective" within the s. 1 *Oakes* framework. However, LSUC has failed to properly balance the competing interests in this case in several crucial respects:

i. LSUC does not acknowledge that the freedom of association of individual prospective students of TWU are engaged at all;

ii. LSUC's decision is not rationally connected to its objective, as it is arbitrary, unfair, and based on irrational considerations;

iii. LSUC's decision does not minimally impair the rights of TWU graduates; and,

iv. The effect of the decision is not proportionate to the objective.

i. LSUC does not acknowledge that the associational rights of prospective TWU students or TWU itself are engaged

39. LSUC fails to acknowledge that TWU's *Charter* rights to religious liberty and freedom of association are engaged at all. LSUC fails to grasp the implications of TWU as a private,

[38] Applicant's Factum at paras. 18, 26, 31-34, 39 and associated footnotes.
[39] See *R. v. Oakes*, [1986] 1 S.C.R. 103 at paras. 69-71.
[40] *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 56-58. However, since the standard of review here is correctness, LSUC's decision is not entitled to deference, and the court can perform its own balancing. The JCCF submits that even if this Court accepts that the standard of review is reasonableness, LSUC's decision must still be quashed.
[41] Factum of the Law Society of Upper Canada, at para. 147

religious, association to which the *Charter* does not apply. Instead, LSUC focuses single-mindedly on TWU's code of conduct and the inability of a public actor to operate such a school.[42] This harkens back to comments made in *TWU 2001*, where the Court held "the continuing focus of the BCCT on the sectarian nature of TWU is disturbing."[43] Simply put, LSUC does not balance that which it does recognize.

ii. LSUC's decision is not rationally connected to its objective

40. LSUC admits graduates from TWU-like schools, and has done so for many years. The refusal to accredit TWU, in the face of the Federation of Law Societies of Canada's decision affirming the adequacy of TWU's law curriculum, and in the face of positive evidence that graduates of TWU will not discriminate, is arbitrary, unfair and irrational. To add a further element of arbitrariness, notwithstanding LSUC's refusal to accredit, it appears that TWU graduates who become members of one of the law societies that did accredit would be eligible to practice in Ontario for up to 180 days per year through the National Mobility Agreement.[44]

iii. LSUC decision does not minimally impair the rights of TWU students

41. In Nova Scotia, the Barristers' Society accredited TWU on condition that TWU modify its code of conduct. In contrast, LSUC decision refuses accreditation outright. LSUC has not merely taken a stand against the code of conduct, but against the very notion of an Evangelical Christian law school. LSUC decision does not therefore minimally impair the rights of prospective TWU students.[45]

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[42] Factum of the Law Society of Upper Canada, at paras. 63, 80, 95, 102, 104, 112.
[43] *TWU 2001* at para. 42
[44] "Inter-jurisdictional Mobility of Lawyers in Canada: Federation of Law Societies of Canada National Mobility Agreements", Law Society of Upper Canada (Background Information), at paras. 12-14, and pp. 2477-2478 of the Respondent's Record of Proceedings.
[45] The Barristers' Society's decision still fails under s. 1 for all the other reasons argued in this section.

iv. The effect of LSUC's decision is not proportionate to the objective

42. LSUC's decision will have negligible positive effects. At most, it is a strong denunciatory statement. The deleterious effects, however, are great. TWU graduates who are competent and ethical will either be prevented from ever becoming lawyers in Ontario, or forced through additional expensive, time-consuming, and unnecessary hurdles.

Conclusion

43. Canadians who hold unpopular opinions have the fundamental freedom to associate which each other without suffering state-imposed restrictions or penalties. LSUC has imposed severe restrictions and penalties on such Canadians. Their decision violates s. 2(d) of the *Charter*, and cannot be saved under s. 1, as it is arbitrary, overbroad, and disproportionate to its objective. It falls to this Court to uphold the fundamental *Charter* freedoms of this unpopular minority group.

PART IV – ORDER REQUESTED

44. The JCCF respectfully requests that this Court quash the decision of LSUC and order that TWU's application for accreditation be approved.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

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