

**COURT OF APPEAL FOR ONTARIO**

**B E T W E E N:**

**TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT**

**Applicants  
(Appellants)**

**- and -**

**LAW SOCIETY OF UPPER CANADA**

**Respondent  
(Respondent)**

**- and -**

**ATTORNEY GENERAL OF CANADA**

**Intervener  
(Respondent)**

**CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP 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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**FACTUM OF THE RESPONDENT,  
LAW SOCIETY OF UPPER CANADA**

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February 1, 2016

**BORDEN LADNER GERVAIS LLP**  
44<sup>th</sup> Floor - Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3Y4

**Guy J. Pratte** (LSUC #23846L)  
**Nadia Effendi** (LSUC #49004T)  
**Duncan Ault** (LSUC #53916R)

Tel: 416.367.6728  
Fax: 416.361.2721

Lawyers for the Respondent,  
Law Society of Upper Canada

**TO:**

**BENNETT JONES LLP**

One First Canadian Place

P.O. Box 130

Toronto, ON M5X 1A4

**Robert W. Staley**

Email: staleyr@bennettjones.com

**Derek J. Bell**

Email: belld@bennettjones.com

**Ranjan K. Agarwal**

Email: agarwalr@bennettjones.com

Telephone: (416) 863-1200

Facsimile: (416) 863-1716

**Lawyers for the Applicants (Appellants) Trinity Western University and  
Brayden Volkenant**

**AND TO:**

**DEPARTMENT OF JUSTICE LITIGATION BRANCH**

59 O'Connor Street, Suite 500

Ottawa, ON K1A 0H8

**Christopher Rupar**

Email: Christopher.Rupar@justice.gc.ca

Telephone: (416) 952-2946

**Lawyers for the Intervener, Attorney General of Canada**

**AND TO:**

**ROCHON GENOVA LLP**  
 121 Richmond St. W., Ste. 900  
 Toronto, ON M5H 2K1

**Peter R. Jervis**  
 Email: [pjervis@rochongenova.com](mailto:pjervis@rochongenova.com)

Telephone: (416) 363-1867  
 Facsimile: (416) 363-0263

**CHRISTIAN LEGAL FELLOWSHIP**  
 Crossroads Centre  
 1295 North Service Road  
 Burlington, Ontario

**Derek B.M. Ross**  
 Email: [execdir@christianlegalfellowship.org](mailto:execdir@christianlegalfellowship.org)

Telephone: (519) 208-9200  
 Facsimile: (519) 208-3600

**Lawyers for the Intervener, Christian Legal Fellowship**

**AND TO:**

**DOUCETTE SANTORO FURGIUELE**  
 1100-20 Dundas St. W.  
 Toronto, Ontario M5G 2G8

**Daniel C. Santoro**  
 Email: [santoro@dbsslitigation.com](mailto:santoro@dbsslitigation.com)

Telephone: (416) 922-7272  
 Facsimile: (416) 342-1766

**Lawyers for the Intervener, Justice Centre for Constitutional Freedoms**

**AND TO: VINCENT DAGENAIS GIBSON LLP/s.r.l.**  
 260 Dalhousie Street, Suite 400  
 Ottawa, ON K1N 7E4

**Albertos Polizogopoulos**  
 Email: albertos@vdg.ca

**Kristin Marie Barsoum Debs**  
 E-mail: kristin@debslaw.ca

Telephone: (613) 241-2701  
 Facsimile: (613) 241-2599

**Lawyers for the Intervener, Evangelical Fellowship of Canada and  
 Christian Higher Education Canada**

**AND TO: PAUL JONATHAN SAGUIL**  
 66 Wellington Street W.  
 Toronto, ON M5K 1A2

**Paul Jonathan Saguil**  
 Email: paul.jonathan.saguil@gmail.com

Telephone: (416) 308-1719

**GOLDBLATT PARTNERS**  
 20 Dundas Street West, Suite 1100  
 Toronto, ON M5G 2G8

**Marlys A. Edwardh**  
 Email: medwardh@goldblattpartners.com

Telephone: (416) 977-6070  
 Facsimile: (416) 591-7333

**Lawyers for the Interveners Out on Bay Street and OUTlaws**

**AND TO:** **MARTHA McCARTHY & CO LLP**  
146 Davenport Road  
Toronto, ON M5R 1J2

**Joanna Radbord**  
Email: joanna@mccarthyco.ca

Telephone: (416) 238-7916  
Facsimile: (416) 862-9001

**PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**  
Barristers and Solicitors  
155 Wellington Street West, 35th Floor  
Toronto, ON M5V 3H1

**Chris G. Paliare**  
Email: chris.paliare@paliareroland.com

Telephone: (416) 646-4318  
Facsimile: (416) 646-4301

**Lawyers for the Intervener, The Advocates' Society**

**AND TO:****JOHN NORRIS**

Simcoe Chambers  
116 Simcoe Street, Suite 100  
Toronto, ON M5G 2G8

**John Norris**

Email: john.norris@simcoechambers.com

Telephone: (416) 596-2960

Facsimile: (416) 596-2598

**BREESE DAVIES**

Barristers & Solicitor  
17 John Street, Suite 101  
Toronto, ON M5T 1X3

**Breese Davies**

Email: bdavies@bdlaw.ca

Telephone: (416) 649-5061

Facsimile: (416) 352-7733

**Lawyers for the Intervener, Criminal Lawyers' Association (Ontario)**

**AND TO:****ASSOCIATION FOR REFORMED POLITICAL ACTION CANADA**

Suite 2010-130 Albert Street  
Ottawa, ON K1P 5G4

**André Marshall Schutten**

Email: Andre@ARPACanada.ca

Telephone: (613) 297-5171

Facsimile: (613) 249-3238

**Lawyers for the Intervener, Association for Reformed Political Action  
Canada**

**AND TO: STIKEMAN ELLIOTT LLP**  
 5300 Commerce Court West  
 199 Bay Street  
 Toronto, ON M5L 1B9

**Alan D'Silva**  
 Email: adsilva@stikeman.com

**Alexandra Urbanski**  
 Email: aurbanski@stikeman.com

Telephone: (416) 869-5204  
 Facsimile: (416) 947-0866

**Lawyers for the Intervener, Canadian Civil Liberties Association**

**AND TO: FARRIS, VAUGHAN, WILLS &  
 MURPHY LLP**  
 700 W Georgia St #25,  
 Vancouver, BC V7Y 1B3

**Tim Dickson**  
 Email: tdickson@farris.com

Telephone: (604) 661-9341  
 Facsimile: (604) 661-9349

**Lawyers for the Intervener, Canadian Secular Alliance**

**AND TO: MAGRATH'S INTERNATIONAL LEGAL COUNSEL**  
 393 University Avenue  
 Suite 2000  
 Toronto, ON M5G 1E6

**Gavin Magrath**  
 Email: gavin@magraths.ca

Telephone: (416) 931-0463  
 Facsimile: 1-888-816-8861

**Lawyers for the Intervener, Lawyers' Rights Watch Canada**

**AND TO:** **URSEL PHILLIPS FELLOWS HOPKINSON LLP**  
555 Richmond Street West, Suite 1200  
Toronto, ON M5V 3B1

**Susan Ursel**  
Email: [sursel@upfhlaw.ca](mailto:sursel@upfhlaw.ca)

Telephone: (416) 968-3333  
Facsimile: (416) 968-0325

**AMY SAKALAUSKAS**  
Barrister and Solicitor  
1690 Hollis St., 8<sup>th</sup> Floor  
PO Box 7, Stn. Central  
Halifax, Nova Scotia B3J 2L6

**Amy Sakalauskas**  
Email: [amy.sakalauskas@outlook.com](mailto:amy.sakalauskas@outlook.com)

Telephone: (902) 424-2956  
Facsimile: (902) 424-7158

**IRVING MITCHELL KALICHMAN LLP**  
3500 De Maisonneuve Boulevard West  
Suite 1400  
Montreal, Quebec H3Z 3C1

**Audrey Boctor**  
Email: [aboctor@imk.ca](mailto:aboctor@imk.ca)

Telephone: (514) 934-7737  
Facsimile: (514) 935-2999

**Lawyers for the Intervener, The Canadian Bar Association**



**AND TO:** **MILLER THOMSON**  
700 - 9th Avenue S.W.  
Suite 3000  
Calgary, AB T2P 3V4

**Gerald Chipeur**  
Email: gchipeur@millerthomson.com

Telephone: (403) 298-2434  
Facsimile: (403) 262-0007

**Lawyers for the Intervener, The Seventh Day Adventist Church in  
Canada**

**AND TO:** **SAM GOLDSTEIN**  
318-100 Richmond Street West  
Toronto, ON M5H 3K6  
Tel: 416-927-1211

**Sam Goldstein**  
Email: sam@samgoldstein.ca

Telephone: (416) 927-1211  
Facsimile: (416) 862-7602

**Lawyers for the Intervener, Canadian Constitution Foundation**

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## PART I OVERVIEW

1. In a unanimous decision, the Divisional Court upheld the decision of the Law Society of Upper Canada (the “Law Society”) to refuse to accredit the law school proposed by Trinity Western University (“TWU”). In so finding, the Divisional Court correctly held that, throughout its history, the Law Society had clear jurisdiction, conferred by statute, to determine admission to the Bar in Ontario, including admission to the prerequisite legal education.

2. Indeed, until 1957, the Law Society exercised direct control over admission to the legal education necessary to obtain a license to practice law. Using this power, and well before it was legally and constitutionally required to do so, the Law Society acted to remove the discriminatory barriers that would restrict access to the legal education required for the Bar. This ensured not only that candidates for the Bar were properly trained, but also that the most meritorious had access to this education regardless of gender or religious belief, since the Law Society had determined that the competence of the Bar could be best achieved by ensuring that admission to the necessary legal education is based on merit alone.

3. As of 1957, through its power to accredit law schools, the Law Society retained its ultimate power over admission to requisite legal education. The Law Society has never approved a law school that denies equal access to legal education on discriminatory grounds.

4. The Law Society’s long standing approach to admission to prerequisite legal education is in harmony with its legal obligations as a state actor prohibiting it from sanctioning or implementing discriminatory practices, pursuant to the *Canadian Charter of Rights and Freedoms* (the “Charter”) and the *Ontario Human Rights Code* (the “Code”).

5. As the Divisional Court found, the Law Society has carried out its functions so that everyone who is qualified has an equal opportunity to legal education based on their competence.

Thus, no one is denied access to any of the 20 law schools accredited by the Law Society based on discriminatory grounds. This is particularly important given that there are far more qualified applicants for law school admission than there are places available.

6. The Law Society's decision does not infringe upon the Appellants' rights. To the contrary, it is in conformity with its obligation of state neutrality; respects all religious views equally; and ensures that access to an Ontario law license will continue to be based upon the competence of applicants and not on any discriminatory personal characteristic. Thus, like every other group, Evangelical Christians continue to have equal access to every accredited law school in Canada and there is no evidence that Evangelical Christians have greater difficulty gaining access to the Ontario Bar than any other group.

7. In contrast, the terms and requirements of the Community Covenant, which TWU students are compelled to sign as a condition of attendance, are discriminatory. The Community Covenant discriminates, for instance: (1) on the basis of sexual orientation and marital status, as it requires students to refrain from sexual activity outside of heterosexual marriage; (2) against women, because it rejects the rights of self-determination with regard to reproduction; and (3) against people who cannot sign the Community Covenant, because of their religious beliefs.

8. In those circumstances, the key issue in this appeal is whether the Law Society can be compelled to accredit TWU's law school and to permit TWU to set additional discriminatory terms and conditions for the obtaining of an Ontario law license.

9. To compel the Law Society to accredit a law school that engages in discriminatory practices would require the Law Society to do indirectly what it could not do directly. Accordingly, the Divisional Court correctly found that, whatever the extent of the Appellants' rights, they do not extend to compelling the Law Society, a public institution, to incorporate into

its licencing regime the institutional discrimination TWU practices. The Appellants are not entitled to compel the Law Society to abandon its policy of ensuring equal access to the legal profession, or to violate its obligations of equality under the *Charter* and the *Code*. If there is any conflict between the rights at stake, the Law Society's decision to ensure that everyone who is qualified, including Evangelical Christians, has an equal opportunity based on merit to obtain a law license is correct, if not reasonable.

10. The reasonableness of the Law Society's decision is not impugned by the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers* ("TWU 2001") which, as the Divisional Court found, does not require the Law Society to accredit TWU. Not only are the relevant statutory provisions and evidentiary records fundamentally different, but in this case, unlike in *TWU 2001*, the Law Society's decision is not premised on the conduct of TWU's proposed graduates in the future. Rather, the Law Society is concerned with the harm to the public that would flow from limiting access to a limited resource – a licence to practice law granted by a regulator operating in the public sphere – based on discriminatory grounds unrelated to merit, as well as ensuring that it respects its legal and constitutional duty not to discriminate.

## PART II      FACTS

### A. The Law Society has clear authority over admission to the legal profession, including admission to prerequisite legal education

11. The Law Society was created in 1797 to provide the province with a "learned and honourable body, to assist their fellow subjects as occasion may require, and to support and maintain the constitution of the said Province." From its formation, the Law Society has had exclusive jurisdiction, confirmed by statute, over the licencing process, including the admission of students-at-law into the licencing process. This authority has never been fettered by any

express limitation.<sup>1</sup>

12. Throughout its 218 year history, the Law Society has centred its requirements for admission into the profession on ensuring the academic and practical competence of its prospective licensees.<sup>2</sup> At least since 1893, the Law Society has not conditioned access to the profession, including prerequisite legal education, on discriminatory grounds that are irrelevant to the competence of a prospective lawyer.<sup>3</sup> In focussing on competence as the primary measure against which admission to the profession will be judged, the Law Society has not considered irrelevant personal characteristics including religion,<sup>4</sup> race,<sup>5</sup> and gender.<sup>6</sup>

13. In 1877, the Law Society was given the express statutory authority to improve legal education, including making rules with respect to the admission of students-at-law and conditions of study and admission to the practice of law. In 1912, it was given the authority to

<sup>1</sup> *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 at paras. 19 – 20 (Div. Ct.)[“Application Decision”], Respondent’s Compendium [“RC”], Tab 1, p. 7. See the Law Society’s original enabling statute, *An Act for the better regulating the Practice of Law*, 37<sup>th</sup> George III. A.D. 1797, c. XIII, s. I and V, Joint Book of Authorities [“JBOA”], Tab 27, which provided: “no person other than the present Practitioners... shall be permitted to practise at the bar...unless such person shall have been previously entered of and admitted into the said Society as a Student of the Laws.” See also, *An Act to amend the Law for the admission of Attorneys*, 20 Vict. 1857, Cap. 63, s. III, JBOA, Tab 28; *An Act respecting Barristers at Law*, 22 Vict. 1859, Cap. 34, s. 1, JBOA, Tab 29; *An Act respecting Attorneys at Law*, 22 Vict. 1859 Cap. 35, ss. 3 and 8, JBOA, Tab 30; *An Act respecting Barristers-at-Law*, R.S.O. 1877, c. 139, s. 1, JBOA, Tab 32; C.I. Kyer & J.E. Bickenback, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987) at 260 – 61 [“Kyer”], JBOA, Tab 42.

<sup>2</sup> R.E. Charney, “Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?”, (2015) 34:2 N.J.C.L. 173 at 174 – 75 [“Charney”], JBOA, Tab 43; Moore, C., *The Society of Upper Canada and Ontario’s Lawyers 1797-1997*, pp. 165 – 167, 169 [“Moore”], Exhibit B to the Affidavit of Josée Bouchard, sworn October 23, 2014 [“Bouchard Affidavit”], RC, Tab 2, pp. 43 – 46.

<sup>3</sup> Application Decision, *supra*, at para. 97, RC, Tab 1, p. 28; Moore, *supra*, p. 200, RC, Tab 2, p. 55.

<sup>4</sup> In 1833, the legislature of Upper Canada abolished the requirement that persons called to the Bar take a religious oath as a qualification for admission to the Bar (Application Decision, *supra*, at para. 22, RC, Tab 1, p. 8; Charney, *supra*, p. 174 – 75, JBOA, Tab 43). Further, the Law Society did not have anti-Jewish quotas, in contrast to some Upper Canada Universities in the latter part of the nineteenth century (Moore, *supra*, p. 200, RC, Tab 2, p. 55).

<sup>5</sup> In 1855, a black Ontarian was called to the Bar without any mention of his race having been made in Law Society records (Application Decision, *supra*, at para. 23, RC, Tab 1, p. 8; Moore, *supra*, p. 177, RC, Tab 2, p. 49).

<sup>6</sup> Clara Brett Martin was entered on the books as a student-at-law on June 26, 1893. Two years earlier, she had been turned down by the Law Society on the basis of a long tradition of English and American jurisprudence declaring that legislation referring to “persons” did not include women. Clara Brett Martin became the first woman barrister in the British Commonwealth – decades before women were recognized as “persons” in Canadian constitutional law (Application Decision, at para. 24, RC, Tab 1, p. 8; Moore, *supra*, pp. 176, 180-183, RC, Tab 2, pp. 48, 50 – 53).

establish and maintain a law school, including the control over admissions to the law school. Consistent with these powers, the Law Society continued to control the admission of students-at-law into the licensing process.<sup>7</sup>

14. In 1957, following discussions between the Law Society and universities, the Law Society agreed to allow Ontario universities to develop an LLB program (with a pre-requisite of two undergraduate years). For the first time, the Law Society recognized degrees from law schools other than its own as satisfying a core licensing requirement. Until that point, the Law Society had maintained a monopoly on legal studies that led to being admitted to the Bar.<sup>8</sup>

15. The inclusion of university-based law schools as providers of requisite legal education did not diminish or otherwise impact the Law Society's control over admission to the components of legal education necessary to obtain a law license in Ontario.<sup>9</sup> The Law Society maintained its role as gatekeeper to the profession. Pursuant to the Law Society's relevant regulations, applicants for admission as students-at-law were required to have graduated from a law school "approved" by the Law Society.<sup>10</sup> The Law Society set out clear requirements to be met by a law school in order to be "approved", including admission criteria.<sup>11</sup>

<sup>7</sup> *An Act respecting the Law Society of Upper Canada*, R.S.O. 1877, c. 138, ss. 36-39, 41, JBOA, Tab 31; *The Law Society Act*, S.O. 1912, c. 26, s. 42, JBOA, Tab 33. See, e.g., *Rules of the Law Society of Upper Canada* (published in 1941), rules 85-111, JBOA, Tab 34.

<sup>8</sup> Application Decision, *supra*, at para. 25, RC, Tab 1, p. 8; Moore, *supra*, pp. 250 – 262, RC, Tab 2, pp. 56 – 68; Kyer, *supra*, at 260 – 61, JBOA, Tab 42.

<sup>9</sup> Application Decision, *supra*, at paras. 95-97, RC, Tab 1, pp. 28.

<sup>10</sup> See *Rules and Regulations of the Law Society (adopted in 1957)*, *Rules of the Society*, Rule 3 (p. viii), Rule 10 (p. xv), JBOA, Tab 35; *Bar Admission Regulations (Regulations of the Legal Education Committee – Part II, s. 2 (p. xx))*, JBOA, Tab 36; *The Rules of the Law Society of Upper Canada (1964)*, pp. 12-22, JBOA, Tab 37; *The Law Society Act*, R.S.O. 1970, c. 238, s. 27, 52, 54 – 55, JBOA, Tab 38; O.Reg. 419/70, JBOA, Tab 39, a Regulation Made Under the *Law Society Act*, 1970, s. 26, JBOA, Tab 38; O.Reg. 135/80, JBOA, Tab 40; O.Reg. 708, R.R.O. 1990, s. 23, JBOA, Tab 41. Those regulations were revoked in 1999 and replaced with by-laws of the Law Society enacted pursuant to its powers under the *Law Society Act*, R.S.O. 1990, c. L-8 [*"Law Society Act"*], Schedule "B" to this Factum (see, e.g. O.Reg. 32/99).

<sup>11</sup> Such as the requirement that an applicant have at least two years of undergraduate studies: Kyer, *supra*, at pp. 260 – 61, JBOA, Tab 42. This requirement continues today (see Federation of Law Societies of Canada – Canadian

16. Since then, the Law Society has continuously retained statutory authority over admission to the profession, including exclusive authority to establish the requisite classes of licence to practice law. It further has jurisdiction to prescribe the qualifications and requirements to obtain such a licence, including the “terms, conditions, limitations or restrictions imposed on each class of licence” and “the qualifications and other requirements for the various classes of licence and governing applications for a licence”. Furthermore, the Law Society has the authority to make by-laws “governing degrees in law” and “respecting legal education, including programs of pre-licensing education or training”.<sup>12</sup>

17. Pursuant to its by-law making powers, the Law Society introduced accreditation of law schools as part of its licensing process. By-Law 4 prescribes that one of the requirement for an L1 licence is, *inter alia*, a degree from “an accredited law school” An “accredited law school” is defined as a “law school in Canada that is accredited by the Law Society”.<sup>13</sup>

18. Currently, the *Law Society Act* also codifies the Law Society’s obligation to do what it has always done in determining access to the legal profession namely, act in the public interest. Section 4.2 of the *Law Society Act* defines the Law Society’s public interest mandate, and provides, *inter alia*:

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

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Common Law Program Approval Committee, Report on Trinity Western University’s Proposed School of Law Program (December 2013), Appendix “B”, criterion “C”, “Approved Canadian Law Degree”, RC, Tab 3, p. 72).

<sup>12</sup> *Law Society Act*, *supra*, ss. 4.1, 26.1(1), 27(1)-(3), 62(0.1) 4, 4.1, 21, 23, 26.

<sup>13</sup> Law Society of Upper Canada, By-Law 4, s. 7 and 9(1) [“By-Law 4”], Schedule “B” to this Factum. The By-Law provides that a graduate of an accredited law school is entitled to be licenced to practice law if they complete the licensing examinations, complete an articling/law practice program and show good character.



for the people of Ontario.

3. The Society has a duty to protect the public interest ...<sup>14</sup>

19. The Law Society has determined that it is in the public interest not only to have equal access to the profession, but also to have a profession that is diverse and reflective of the population of Ontario. Hence, the Law Society has adopted policies that promote equity and diversity and combat discrimination on any basis, including religion, marital or family status, and sexual orientation.<sup>15</sup>

20. In addition to recognizing the unique obligation it holds in promoting equality and diversity to advance the rule of law and justice, the Law Society has imposed on its members an obligation to promote equality, to protect individuals' dignity and to respect Ontario human rights laws. The Law Society also provides a range of services and programs to lawyers, law firms and students-at-law to promote equity and diversity in the legal profession.<sup>16</sup>

21. Ensuring that access to legal education is based upon merit alone is especially important given that there is far greater demand for a legal education than there are law school spaces available. In 2013, there were approximately 9,000 law school applicants in Canada and only 2,782 places. In Ontario, the number of applicants was 4,758 for 1,502 positions.<sup>17</sup> It is a reality that many qualified students aspiring to become lawyers are denied admissions. Consequently, as

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<sup>14</sup> *Law Society Act*, *supra*, s. 4.2.

<sup>15</sup> Application Decision, *supra*, at para. 26, RC, Tab 1, p. 8. These include a 1991 Statement of Policy that affirmed every member has the right to equal treatment with respect to conditions of employment without discrimination; a 1995 Statement of Values adopted by Convocation that recognize the full participation of men and women in our profession regardless personal characteristics; and the 1997 Bicentennial Report and Recommendations on Equity Issues in the Legal Profession: Bouchard Affidavit, *supra*, at paras. 9 – 13, RC, Tab 4, pp. 73 – 74; a 2013 report entitled “Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment, A Guide for Law Firms and Other Organizations”, p. 3, RC, Tab 6.

<sup>16</sup> Law Society of Upper Canada, *Rules of Professional Conduct* (Toronto: Law Society of Upper Canada, 2014), r. 6.3.1-1, Commentary [“*Rules of Professional Conduct*”], Schedule “B” to this Factum; Bouchard Affidavit, *supra*, at paras. 15, 19, RC, Tab 4, p. 75 – 76.

<sup>17</sup> Application Decision, *supra*, at para. 67, RC, Tab 1, pp. 20 – 21; Affidavit of Benjamin Alarie, sworn on October 24, 2014, at paras. 50-51 [“Alarie Affidavit”], RC, Tab 7, pp. 82 – 83.

found by the Divisional Court, it is clear that, in this case, being eliminated from TWU as a place to attend law school means, for many persons, that their likelihood of gaining acceptance to any law school is decreased. In contrast, individuals who are willing to sign the Community Covenant, and attend TWU, will have greater access to the legal profession.<sup>18</sup>

### **B. Trinity Western University's Community Covenant is discriminatory**

22. Consistent with its current policy for the other programs it offers, TWU will require all prospective students, faculty and staff of its proposed law school to sign and abide by the Community Covenant. The Community Covenant is a contract that constitutes a condition precedent to admission to TWU's proposed law school. Breaching this contract can also lead to disciplinary action, including expulsion.<sup>19</sup>

23. The Community Covenant is a code of conduct that, TWU states, embodies its Evangelical religious values. According to TWU, it is a significant means of ensuring that TWU maintains its religious character, achieves its mission and continues to attract students, faculty and staff that share its Evangelical religious beliefs.<sup>20</sup>

24. The Community Covenant provides, *inter alia*:

The University's mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible...

The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another .... It is vital that each person who accepts the invitation to become a member of the TWU community carefully

<sup>18</sup> Application Decision, *supra*, at para. 67.

<sup>19</sup> Application Decision, *supra*, at para. 106; TWU Student Handbook, Student Accountability Policy, Exhibit "M" to the Affidavit of Robert Wood, sworn August 22, 2014 ["Wood Affidavit"], RC, Tab 8, pp. 87 – 89.

<sup>20</sup> See also Wood Affidavit, at paras. 15, 29 – 33, 35, 42 – 43, RC, Tab 9; Affidavit of Jeffrey Greenman, sworn August 26, 2014, at paras. 43, 44 – 45, 47 – 48, RC, Tab 12; Report of Gerald Longjohn, pp. 8 – 9, RC, Tab 13; Affidavit of Iain Cook, sworn August 19, 2014, at paras. 8, 19, Exhibit A, RC, Tab 14; Affidavit of Arend Strikwerda, sworn August 20, 2014, at paras. 3, 10, 15, 34 – 35, RC, Tab 15.

considers and sincerely embraces this community covenant...

Members of the TWU community, therefore, commit themselves to:

...uphold their God-given worth from conception to death...

...observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and within marriage take every reasonable step to resolve conflict and avoid divorce...

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

sexual intimacy that violates the sacredness of marriage between a man and a woman...

...according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation...<sup>21</sup>

25. As the Divisional Court found,<sup>22</sup> the Community Covenant imposes discriminatory burdens on many individuals and groups for reasons of sexual orientation, marital status, gender, and religion.<sup>23</sup> It discriminates against:

- (a) married lesbian, gay, bisexual, trans-gender and queer ("LGBTQ") persons because, unlike heterosexuals, in order to abide by the Community Covenant they cannot be sexually intimate, even if they are lawfully married;
- (b) LGBTQ individuals who could not sign the Community Covenant and continue to

<sup>21</sup> TWU Community Covenant, Exhibit C to the Wood Affidavit ["Community Covenant"], *supra*, RC, Tab 20.

<sup>22</sup> Application Decision, *supra*, at paras. 112 – 113, 116 – 117, RC, Tab 1, pp. 32 – 34; *Egan v. Canada* [1995] 2 S.C.R. 513, JBOA, Tab 44; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 315, JBOA, Tab 45; *Miron v. Trudel*, [1995] 2 S.C.R. 418, JBOA, Tab 46; *Charter of Rights and Freedoms*, Part I to the *Constitution Act, 1982* being Schedule A to the *Canada Act, 1982* (U.K.), 1982, c. 11, s. 15 ["Charter"]; *Quebec (Attorney General) v. A*, 2013 SCC 5 at para. 325, JBOA, Tab 47.

<sup>23</sup> Application Decision, *supra*, at paras. 112 – 113, 116 – 117, RC, Tab 1, pp. 32 – 34; Report of Pamela Klassen ["Klassen Report"], Exhibit "B" to the Affidavit of Pamela Klassen, sworn October 23, 2014 ["Klassen Affidavit"], RC, Tab 17, pp. 125 – 130.; Affidavit of Helen Kennedy, sworn October 24, 2014, at paras. 18 – 21 ["Kennedy Affidavit"], RC, Tab 18, p. 135.

express their identity;<sup>24</sup>

- (c) individuals in common-law relationships, whether heterosexual or LGBTQ individuals, as a result of its pledge of abstinence outside of heterosexual marriage;<sup>25</sup>
- (d) unmarried individuals, whether heterosexual or LGBTQ persons;
- (e) women because it requires the signatory to commit to upholding the “God-given worth from conception to death” and amounts to a rejection of a woman’s right to abortion services, and women’s self-determination with regard to reproduction would therefore be negated;<sup>26</sup> and
- (f) individuals who do not share a thoroughly Evangelical Christian worldview, including religious minorities such as Jews, Muslims, Buddhists, Atheists and Agnostics<sup>27</sup> as it repeatedly refers to TWU as a “distinctly Christian” environment.

26. The Community Covenant requires each of its members to become an “ambassador” of the TWU community. TWU also requires students and staff to report any conduct by others contrary to the Community Covenant. There can be no doubt that the Covenant will close the door of the proposed law school to otherwise meritorious applicants.<sup>28</sup>

<sup>24</sup> Application Decision, *supra*, at para. 113, RC, Tab 1, p. 32 – 33; Kennedy Affidavit, *supra*, at paras. 20 – 21, RC, Tab 18, p. 135.

<sup>25</sup> Application Decision, *supra*, at para. 104, RC, Tab 1, p. 30; Klassen Report, *supra*, at pp. 5 – 6, RC, Tab 17, pp. 126 – 127.

<sup>26</sup> Klassen Report, *supra*, at pp. 5 – 6, RC, Tab 17, pp. 126 – 127.

<sup>27</sup> Application Decision, *supra*, at para. 112, RC, Tab 1, p. 32; Klassen Report, *supra*, at pp. 6, 10, RC, Tab 17, pp. 127, 130.

<sup>28</sup> Application Decision, *supra*, at paras. 64-65, 67, RC, Tab 1, pp. 19 – 21; Community Covenant, *supra*, RC, Tab 16; TWU Student Handbook, Exhibit “M” to the Wood Affidavit, RC, Tab 8.

### C. The Law Society's decision not to accredit TWU's proposed law school

27. In January 2014, TWU asked the Law Society to accredit its proposed law school, a public benefit which only the Law Society can confer under the *Law Society Act*.<sup>29</sup>

28. At the February 2014 Convocation, the then-Treasurer of the Law Society outlined the process that the Law Society intended to follow to determine whether to accredit TWU's proposed law school. He noted that the process must: (i) preserve the impartiality of members of Convocation as decision-makers; (ii) provide appropriate information to Convocation upon which the decision can be made; (iii) provide appropriate procedural fairness; and (iv) comply with legal requirements including the *Charter*, *Code*, common law, *Law Society Act* and Law Society by-laws, rules and policies.<sup>30</sup>

29. The Law Society's decision making process comprised four steps:<sup>31</sup>

- (a) TWU was invited to provide written submissions, which it did on April 2, 2014.<sup>32</sup>  
The public and the profession were also invited to provide written submissions.<sup>33</sup>  
The Law Society considered these submissions, along with relevant reports of the Federation of Law Societies and various memoranda on pertinent legal issues;<sup>34</sup>
- (b) At the Convocation on April 10, 2014, members discussed the TWU application and raised questions so that TWU would have the opportunity to respond. No vote

<sup>29</sup> Letter from B. Kuhn to Law Society Treasurer, January 6, 2014, RC, Tab 19.

<sup>30</sup> Treasurer's Statement, February 27, 2014, RC, Tab 24.

<sup>31</sup> Application Decision, *supra*, at paras. 31 – 32, RC, Tab 1, pp. 10 – 11.

<sup>32</sup> Written Submission for the Consideration of Convocation in Relation to the Matter of the Accreditation of the TWU School of Law, Exhibit Book ["EB"], Vol. 4, Tab 18(L).

<sup>33</sup> Index of the Record of Proceedings before the Law Society, RC, Tab 25.

<sup>34</sup> Federation of Law Societies of Canada – Canadian Common Law Program Approval Committee, Report on Trinity Western University's Proposed School of Law Program, EB, Vol 3, Tab 18D; Federation of Law Societies of Canada – Special Advisory Committee on Trinity Western's Proposed School of Law, Final Report, EB, Vol 3, Tab 18E; TWU Accreditation Decision – Discretion and Public Interest Opinion (Cavalluzzo) ["Cavalluzzo Opinion"], EB, Vol 4, Tab 18I; The *Charter* and the Law Society's Accreditation Decision – Human Rights Legal Opinion (Osler Hoskin & Harcourt LLP), EB, Vol. 4, Tab 18J; TWU Law School Accreditation Decision – Human Rights Legal Opinion (Pinto Wray James LLP), EB, Vol. 4, Tab 18K.

was taken at this meeting;<sup>35</sup>

- (c) On April 22, 2014, TWU provided written reply submissions to some of the issues raised at the April 10 Convocation;<sup>36</sup>
- (d) At the Convocation on April 24, 2014, TWU made oral reply submissions responding to the Benchers' questions from the Convocation on April 10 and the written comments the Law Society received on this matter. After the Benchers made numerous and thoughtful representations, Convocation voted to reject TWU's application for accreditation by a vote of 28 to 21 with one abstention.<sup>37</sup>

30. The entire record of proceedings is extensive representing over 3,000 pages. The Benchers' consideration and deliberations alone comprised 389 pages of transcript.

### PART III ISSUES AND ARGUMENT

#### A. Issues raised by the Appellants

31. The Law Society submits that the Divisional Court did not err in dismissing TWU's application. In particular:

- (a) The Law Society's decision should be reviewed on a reasonableness standard;
- (b) The Law Society's decision is reasonable because:
  - (i) The Law Society reasonably considered its statutory mandate and its obligations under the *Charter* and the *Code* in concluding that it has jurisdiction to set the conditions for admission to the Ontario Bar, including to prerequisite legal education;
  - (ii) The Law Society cannot discriminate directly or indirectly;

<sup>35</sup> Convocation Transcript, April 10, 2014, p. 23, RC, Tab 26.

<sup>36</sup> TWU Written Reply Submission, dated April 22, 2014, RC, Tab 27.

<sup>37</sup> Convocation Transcript, April 24, 2014, p. 212, RC, Tab 28.

- (iii) The *TWU 2001* decision does not dictate that the TWU law school must be accredited;
- (iv) The Law Society's decision does not infringe the Appellants' rights; and
- (v) Even if the Law Society's decision infringed the Appellants' rights, the Law Society reasonably and proportionally balanced the competing rights in issue.

**B. The standard of review is reasonableness: no question of central importance involved**

32. The Divisional Court correctly found that the Law Society's decision should be reviewed on the reasonableness standard.<sup>38</sup> As the Appellants concede,<sup>39</sup> there is a presumption that reasonableness will apply to an administrative decision-maker's discretionary decision involving *Charter* issues and the interpretation of its home statute.<sup>40</sup>

33. Nonetheless, the Appellants argue that the standard of correctness applies to the review of the Law Society's decision for three reasons: (1) *TWU 2001* established the standard of review as correctness and is determinative; (2) the *Dunsmuir* contextual factors support the standard of correctness; and (3) the lack of reasons by the Law Society militates in favour of a correctness standard. The Law Society disagrees.

34. First, contrary to the Appellants' assertion,<sup>41</sup> this Court is not bound by the standard of review applied in *TWU 2001* which was subsequently modified by the Supreme Court of Canada

<sup>38</sup> The Law Society agrees that this Court must apply the standard of correctness in determining the preliminary issue of whether the Divisional Court applied the appropriate standard of review of the Law Society's decision: *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para. 45 [*"Agraria"*], JBOA, Tab 2; *Taylor-Baptiste v. OPSEU*, 2015 ONCA 495 at para. 39 [*"Taylor-Baptiste"*], JBOA, Tab 48.

<sup>39</sup> Appellants' factum at para. 43.

<sup>40</sup> *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 30, 43 – 46 [*"Doré"*], JBOA, Tab 10; *Loyola High School v. Québec*, 2015 SCC 12 at paras. 37 – 40 [*"Loyola"*], JBOA, Tab 49; *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 paras. 46, 50 [*"Saguenay"*], JBOA, Tab 3; *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54 [*"Dunsmuir"*], JBOA, Tab 8; *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40 at paras. 55 – 56, JBOA, Tab 50.

<sup>41</sup> Appellants' factum at para. 44.

in *Dunsmuir*, and, in any event, *TWU 2001* is distinguishable on many other grounds.<sup>42</sup>

35. Second, the *Dunsmuir* factors militate in favor of the reasonableness standard. Specifically, the Law Society's decision falls squarely within its unique expertise, and involves the interpretation of its home statute, rather than questions of law that are of general importance to the legal system.<sup>43</sup>

36. Furthermore, courts must respect the democratic choice of the legislature whose decision it was to delegate the regulation of the profession to the Law Society. Where the Legislature has given an administrative tribunal with specialized experience wide discretion to make a decision in the public interest, as is the case here, the Court should give it deference.<sup>44</sup> The Law Society's composition, qualifications and standing make it uniquely situated to consider the accreditation of a law school.<sup>45</sup> The Divisional Court correctly held that the Law Society is especially qualified to decide whether accrediting TWU's proposed law school would be in the public interest:

The reality is that the analysis required for the decision involves a weighing of competing interests in the overall context of the impact of any decision on the legal profession in Ontario and the obligation of that profession to serve the public interest. The respondent has special expertise, developed over two centuries, **in legal education and the licencing of lawyers**. The respondent is uniquely qualified to consider those interests in the context of the competing *Charter* rights, as they arose in this case.<sup>46</sup> [emphasis added]

37. The Appellants point to three issues of alleged general importance, which they claim warrant a correctness standard: (1) whether the Law Society has jurisdiction in this case; (2) whether the Law Society breached its obligation of state neutrality; and (3) whether the

<sup>42</sup> See below, at paras. 63 – 67.

<sup>43</sup> Application Decision, *supra*, at para. 38, RC, Tab 1, p. 12; *Saguenay*, *supra*, at para. 47, JBOA, Tab 3.

<sup>44</sup> *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 49, JBOA, Tab 22.

<sup>45</sup> Further, there is no basis to diminish the deference owed to the Law Society merely because it sought external legal advice. The Divisional Court found that tribunals routinely seek legal opinions and that “it is difficult to give much credence” to the Appellants’ argument that seeking such an opinion was an acknowledgement by the Law Society that it lacks expertise: Application Decision, *supra*, at para. 43, RC, Tab 1, p. 14.

<sup>46</sup> Application Decision, *supra*, at para. 42, RC, Tab 1, pp. 13 – 14.



Community Covenant is discriminatory.

38. As the Divisional Court correctly found, none of these issues, however relevant, transform the ultimate issue of accreditation into one of general importance to the legal system.<sup>47</sup>

The Supreme Court in *Saguenay* expressly warned against applying the standard of correctness too broadly, including to issues involving the application of the *Charter* by an administrative tribunal.<sup>48</sup> In order for a question to constitute a question of general importance to the legal system, it must engage the “basic consistency in the fundamental legal order of our country”.<sup>49</sup>

39. Though important to the parties, the question before the Law Society was not a question of general importance to the legal system. Rather, it involved consideration and determination of highly contextual and policy-based questions that required the Law Society to consider its role as the regulator of a self-governing profession pursuant to its statutory mandate and the legal/constitutional prohibitions against discrimination.

40. Third, the Divisional Court correctly held that the lack of formal reasons is not sufficient to rebut the presumption of deference, finding that the Law Society was akin to a legislative body.<sup>50</sup> Indeed, the Law Society is governed by Benchers who are either elected or appointed. Like most of its decisions, decisions on accreditations are made by Benchers sitting in Convocation where, as with other elected bodies, a decision of the majority is binding.

41. In such context, the reviewing court must look to the record that was before the decision-maker to assess the reasonableness of the outcome.<sup>51</sup> As the Supreme Court held:

To demand that councillors who have just emerged from a heated debate on the

<sup>47</sup> Application Decision, *supra*, at paras. 36 – 42, RC, Tab 1, pp. 11 – 14.

<sup>48</sup> *Saguenay*, *supra*, at para. 48, JBOA, Tab 3; *Doré*, *supra*, at para. 47, JBOA, Tab 10.

<sup>49</sup> *Saguenay*, *supra*, at para. 47, JBOA, Tab 3.

<sup>50</sup> Application Decision, *supra*, at paras. 45 – 50, RC, Tab 1, pp. 14 – 16.

<sup>51</sup> *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62 at para. 15, JBOA, Tab 14.

merits of a bylaw get together to produce a coherent set of reasons is to misconceive the nature of the democratic process that prevails in the council chamber. The reasons for a municipal bylaw are traditionally deduced from the debate, deliberations and statements of policy that give rise to the bylaw.<sup>52</sup>

42. It follows that the standard to be applied to the Law Society's decision is reasonableness.

### **C. The Law Society's decision is reasonable**

43. Pursuant to *Doré*, in assessing the reasonableness of the Law Society's decision, the Court must consider the Law Society's decision in the context of (i) the statutory objectives of the legislative regime; (ii) the Appellants' *Charter* values at issue; and (iii) whether the Law Society balanced the statutory objectives with protecting the *Charter* and *Code* values at stake.<sup>53</sup>

#### **1. The Law Society considered its statutory mandate and obligations**

##### **a) The Law Society has jurisdiction to set the conditions for admission to the Ontario Bar**

44. The Law Society was first required to consider the statutory purpose of relevant legislation (including the *Law Society Act* and the Law Society by-laws) in deciding whether to accredit TWU's law school and to take account of its legal obligations under the *Code* and the *Charter*. The Law Society's decision fulfills its mandate as a public interest regulator in respect of the licensing process and gives effect to the relevant statutory objectives and legal constraints.

45. As described above, and as the Divisional Court found, the Law Society has at all times had the exclusive statutory authority in determining access to the Ontario Bar, including the legal education that is required therefor.<sup>54</sup> As the Divisional Court further found, the Law Society has carried out its statutory mandate in respect of admission to legal education by acting to remove

<sup>52</sup> *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2 at para. 29, JBOA, Tab 15.

<sup>53</sup> *Doré*, *supra*, at paras. 55 – 58, JBOA, Tab 10.

<sup>54</sup> Application Decision, *supra*, at para. 95, RC, Tab 1, p. 28.

obstacles based on considerations other than merit.<sup>55</sup>

46. As demonstrated by its policies for over 200 years, the Law Society has determined that a competent Bar can be best achieved by ensuring that admission to the necessary legal education is based on merit alone. In this way, equal access is an essential component of the Law Society's competence function. As the Divisional Court stated, "if the legal profession is open to everyone then, perforce, it is open to the 'the best and the brightest'".<sup>56</sup>

47. Contrary to the Appellants' submissions, the Law Society's competence function logically and appropriately extends to ensuring that accredited law schools do not discriminate in their admissions practices because this would incorporate discrimination into the Law Society's function of admitting licensees into the profession. Competence of the profession is necessarily enhanced where the population of prospective candidates to the Bar is composed of persons selected strictly on merit, rather than artificially limited on discriminatory grounds.

48. The Law Society's mandate cannot be limited to mere assessments of competence of a cohort that results from discrimination. Personal characteristics cannot "be used inappropriately to permit the exclusion of people from activities for which, in terms of personal merit, they were qualified."<sup>57</sup>

49. The Law Society is required to consider the public interest in carrying out its functions. As it relates to the profession's competence and the Law Society's role in accrediting law schools, the Law Society has reasonably determined that equal access to legal education is in the public interest. Indeed, the strength, integrity and culture of the profession begin at law school. Former Chief Justice Brian Dickson wrote:

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<sup>55</sup> Application Decision, *supra*, at para. 96, RC, Tab 1, p. 28.

<sup>56</sup> Application Decision, *supra*, at para. 98, RC, Tab 1, pp. 28 – 29.

<sup>57</sup> *Miron*, *supra*, at para. 159, JBOA, Tab 46.

I want to say a few words about the gatekeepers to legal education, namely those involved in the admission process. Those who fulfill this role are, in a real sense, the gatekeepers of the legal profession... the ethos of the profession is determined by the selection process at the law schools. In order to ensure that our legal system continues to fulfil its important role in Canadian society, it is necessary that the best candidates be chosen for admission to law schools... it is incumbent upon those involved in the admission process to ensure equality of admissions.<sup>58</sup>

That is why, in carrying out its functions in the public interest, the Law Society cannot be precluded from considering policies directly related to the admission of its prospective licensees. The Law Society cannot legitimately maintain its commitment to equality and diversity at the same time as it denies equal access to the profession.

50. Consequently, the Law Society must consider a law school's discriminatory admissions policy in deciding whether to accredit, which is a decision that must be made in the public interest.<sup>59</sup> This duty is consistent with the Supreme Court's conclusion in *TWU 2001* to the effect that a public regulator acting in the public interest must consider "all features of the education program at [the university]", including the institution's admission policy.<sup>60</sup>

51. Further, courts have held that the scope of the phrase "public interest" must be "interpreted in the light of the legislative history of the particular provision in which it appears and the legislative and social context in which it is used".<sup>61</sup> The Supreme Court of Canada has recognized that equality, diversity and human rights values properly form part of the determination of what constitutes the public interest.<sup>62</sup>

<sup>58</sup> B. Dickson, "Legal Education" (1986) 64:2 Can. Bar Rev. 374 at 377 ["Dickson"], JBOA, Tab 51.

<sup>59</sup> See By-Law 4 and s. 4.1 of the Act. Section 4.1 of the *Law Society Act* provides that "a" function of the Law Society is to ensure its members are competent. The French version indicates that this is "l'une des fonctions du Barreau", or "one of" the Law Society's functions.

<sup>60</sup> *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at paras. 13, 32 ["*TWU 2001*"], JBOA, Tab 9.

<sup>61</sup> *Stewart v. Canadian Broadcasting Corp* (1997), 150 D.L.R. (4th) 24, 1997 CarswellOnt 2491 at para. 198 (Sup. Ct.), JBOA, Tab 52; *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23 at paras. 50, 53, JBOA, Tab 53.

<sup>62</sup> See, for example, *TWU 2001*, *supra*, at para. 26, JBOA, Tab 9.

52. The Divisional Court correctly found that the Law Society had the ability to consider the discriminatory aspects of the Community Covenant when coming to its decision on accreditation. The Court correctly held that the requirement in section 4.2 of the *Law Society Act* allows the Law Society to engage in:

a much **broad**er spectrum of considerations [than TWU argued] with respect to the public interest when they are exercising their functions, duties and powers, including whether or not to accredit a law school.<sup>63</sup> [emphasis added]

53. Accordingly, the Appellants' assertion that the Law Society acted outside its jurisdiction because it attempted to regulate TWU's beliefs is incorrect.<sup>64</sup> The Law Society's refusal to accredit TWU was within its jurisdiction to regulate the legal profession in the public interest.

**b) The Law Society considered its legal and constitutional obligations**

54. The Law Society reasonably concluded that accrediting TWU would contravene its statutory purpose of promoting competence in the public interest by incorporating discriminatory selection criteria for admission to the prerequisite legal education program. The Law Society reasonably denied accreditation to TWU to ensure equal access to the legal profession based on merit, thereby properly carrying out its statutory functions. Accrediting TWU would violate the Law Society's core commitment to equality of individuals and groups of diverse beliefs and backgrounds, and would discriminate against individuals based on sexual orientation, gender, marital status and religion.

55. The Law Society was required to apply human rights legislation and abide by its

<sup>63</sup> Application Decision, *supra*, at para. 58, RC, Tab 1, p. 18. See also *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 2326 at para. 108 ["LSBC"], JBOA, Tab 54. The Divisional Court correctly found, and the British Columbia Supreme Court agreed, that this is a key distinguishing factor from the decision in *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25 ["NSBS"], JBOA, Tab 1. See Application Decision, *supra*, at para. 129, RC, Tab 1, p. 37; *LSBC*, *supra*, at paras. 103 – 108, JBOA, Tab 54.

<sup>64</sup> Application Decision, *supra*, at para. 115, RC, Tab 1, p. 33.

obligations under s. 6 of the *Code*.<sup>65</sup> Human rights legislation, as a declaration of “public policy regarding matters of general concern”, is a necessary consideration for a tribunal interpreting its home statute, especially when human rights issues arise.<sup>66</sup> As the Supreme Court of Canada stated, “human rights legislation must be offered accessible application to further the purposes of the Code by fostering ‘a general culture of respect for human rights in the administrative system’”.<sup>67</sup>

56. Section 6 of the *Code* requires equal access to self-governing professions, and prohibits discrimination based on, *inter alia*, creed, sex, sexual orientation, gender identity, gender expression or marital status.<sup>68</sup> There is no exception under the *Code* from the guarantee of equal access to self-governing professions set out in section 6 – not even for religious or educational institutions. In contrast, there are exceptions, such as under section 18 of the *Code*, available to private service providers that are not available under section 6.<sup>69</sup>

57. TWU’s private status cannot dictate the Law Society’s decision. As a public body, the Law Society must act in accordance with the *Charter*, including section 15, which enshrines a constitutional guarantee of equality. The Supreme Court of Canada has held the equality guarantee is,

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<sup>65</sup> *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86 at para. 11 [“*Chamberlain*”], JBOA, Tab 55. *TWU 2001*, *supra*, JBOA, Tab 9.

<sup>66</sup> *Council of Canadians with Disabilities v. VIA Rail*, 2007 SCC 15 at para. 114 [“*VIA Rail*”], JBOA, Tab 56, citing *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150 at 156, JBOA, Tab 57 and *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14 at paras. 13 – 14, 26, 33 [“*Tranchemontagne*”], JBOA, Tab 58.

<sup>67</sup> *British Columbia (Workers’ Compensation Board) v. Figliola*, 2011 SCC 52 at para. 53, JBOA, Tab 59; *Tranchemontagne*, *supra* at paras. 33, 39, JBOA, Tab 58; *VIA Rail*, *supra*, JBOA, Tab 56.

<sup>68</sup> *Human Rights Code*, R.S.O. 1990, c. H.19, s. 6 [“*Code*”].

<sup>69</sup> Section 18 of the *Code* provides that equal treatment with respect to “services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.” However, this exemption does not apply to the guarantee of equal access to vocational associations set out in section 6 of the *Code*.

...the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.<sup>70</sup>

**c) The Law Society cannot discriminate directly or indirectly**

58. The fact that TWU is exempt from provincial human rights statutes and the *Charter* is irrelevant. As the Divisional Court held, “discrimination is still discrimination, regardless of whether it is unlawful”.<sup>71</sup> The operation of the very exemption on which TWU relies indicates that the Court’s analysis was correct. TWU may be allowed to discriminate, but that does not mean the Law Society is permitted to do so, let alone obliged to do so.

59. The Law Society, as a public actor and gatekeeper, cannot exercise its statutory licensing power, including educational requirements, in a discriminatory manner. It cannot deny access to a licence based on prohibited grounds. In particular, to the extent that the Law Society prescribes or recognizes certain academic requirements as pre-requisites for licensing, it cannot condition or limit access for satisfying such requirements on discriminatory grounds. While religious groups like TWU, within the private sphere, may be allowed to discriminate pursuant to the freedom of religion protected by section 2(a) of the *Charter* or pursuant to an exemption like section 41 of the British Columbia *Human Rights Code*, the Law Society, as a public actor, cannot.<sup>72</sup> That the *Charter* does not apply to TWU is irrelevant, because it does apply to the Law Society. The Divisional Court recognized the importance of this distinction:

The decision of the respondent did not purport to interfere with the right of TWU to create its law school in the fashion that it proposes, exercising its rights to freedom of religion. That right does not carry with it, however, a concomitant right in TWU to compel the respondent to accredit it, and thus lend its tacit

<sup>70</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para 67 [“*Vriend*”], JBOA, Tab 60.

<sup>71</sup> Application Decision, *supra*, at para. 108, RC, Tab 1, p. 31.

<sup>72</sup> Similarly, had the *Charter* been in force when the Law Society administered legal education at Osgoode Hall, it of course would not have been able to impose the conditions of the Community Covenant on its students.

approval to the institutional discrimination that is inherent in the manner in which TWU is choosing to operate its law school. To reach a conclusion by which TWU could compel the respondent, directly or indirectly, to adopt the world view that TWU espouses would not represent a balancing of the competing Charter rights. Rather, such a conclusion would reflect a result where the applicants' rights to freedom of religion would have been given unrestricted sway.<sup>73</sup>

60. Accrediting TWU would create differential access to a limited public benefit – a license to practice law in Ontario – based on prohibited grounds. Individuals who are willing to sign the Community Covenant will have greater access to the legal profession to the detriment of those unwilling to sign it. By contrast, all applicants to currently accredited law schools are treated equally.<sup>74</sup>

61. Moreover, quite apart from the specific constitutional and statutory prohibitions against discrimination that bind it, the Law Society had to consider the effect on public confidence in the legal profession. The integrity of the legal profession is essential to the well-being of a free and democratic society.<sup>75</sup>

62. The legal profession's integrity depends upon the trust it can command in society. The Law Society's determination that adopting TWU's discriminatory admissions policy into the process to obtain an Ontario law license would be contrary to its statutory mandate and irreconcilable with its public interest mandate is, accordingly, reasonable.

## **2. The TWU 2001 decision does not dictate that TWU law school must be accredited**

63. As the Divisional Court concluded, the *TWU 2001* decision is distinguishable for the following reasons: (i) the statutory regime governing the B.C. College of Teachers ("BCCT") is

<sup>73</sup> Application Decision, *supra*, at para. 115, RC, Tab 1, p. 33. Similarly, in *Vriend*, *supra*, at para. 66, JBOA, Tab 60, the Supreme Court held, in response to the submission that applying the *Charter* to the impugned human rights legislation would amount to the regulation of private activity: "The respondents' submission has failed to distinguish between 'private activity' and 'laws that regulate private activity'. The former is not subject to the *Charter*, while the latter obviously is. It is the latter which is at issue in this appeal."

<sup>74</sup> Application Decision, *supra*, at para. 99, RC, Tab 1, p. 29; Charney, *supra*, p. 191, JBOA, Tab 43.

<sup>75</sup> Law Society of Upper Canada, Role Statement, Oct. 27, 1994 as cited in the Cavalluzzo Opinion, RC, Tab 29.



different than that governing the Law Society; (ii) the evidentiary record was materially different; (iii) the Court in *TWU 2001* did not engage in a human rights analysis; and (iv) Canadian discrimination law no longer distinguishes between identity and conduct.<sup>76</sup>

64. First, unlike the Law Society, the BCCT did not claim statutory authority over admission to the specific prerequisite educational component to enter the teaching profession in B.C. Instead, the BCCT merely contended that the effect of TWU's teaching would likely lead its graduates to potentially discriminate in the public school system. That has nothing to do with the Law Society's position in the case at bar.<sup>77</sup>

65. Second, in *TWU 2001* there was no evidence that anyone had been denied admission to TWU's teachers program because of a refusal to sign the Community Covenant.<sup>78</sup> In the case at bar, the uncontradicted evidence before this Court is that the Community Covenant excludes identifiable groups since, as the Divisional Court found, no one can become a student of TWU unless they sign the Community Covenant.<sup>79</sup> The distinction between these cases becomes particularly stark when one considers that in the present case there is a lack of available space in law schools.

66. Third, the application of human rights legislation is different here than in *TWU 2001*. In *TWU 2001*, the Court noted that TWU was exempt from provincial human rights legislation but did not consider BCCT's obligations under the applicable legislation. In this case, the Divisional Court correctly held that the Law Society is required to comply with the requirements of the

<sup>76</sup> This finding is consistent with the Nova Scotia court's decision: *NSBS*, *supra*, at paras. 194, 197, 208, JBOA, Tab 1. The British Columbia Supreme Court incorrectly focused only on whether the law and social circumstances had changed, and did not consider that the case there, as in Ontario, is clearly distinguishable on the facts from *TWU 2001*: *LSBC*, *supra*, at paras. 77 – 78, JBOA, Tab 54.

<sup>77</sup> *TWU 2001*, *supra*, at paras. 11, 13, 20, 27, 28, 119, JBOA, Tab 9.

<sup>78</sup> *TWU 2001*, *supra*, at para. 22, JBOA, Tab 9.

<sup>79</sup> Application Decision, *supra*, at para. 62, RC, Tab 1, p. 19. See also *TWU 2001*, *supra*, at para. 43, JBOA, Tab 9; TWU Student Handbook, Student Accountability Process and Policy, Exhibit "M" to the Wood Affidavit, RC, Tab 8, p. 86.

*Code* in reaching its decision, namely, it is prohibited, as a self-governing professional body, from denying equal access to its membership on the basis of discrimination.<sup>80</sup>

67. Fourth, the Divisional Court correctly found that, since the decision in *TWU 2001*, human rights law and jurisprudence has evolved.<sup>81</sup> Thus, in *TWU 2001*, the Court distinguished between one's identity and one's conduct as it related to one's sexual orientation, a distinction the Court eliminated in *Whatcott*.<sup>82</sup>

### **3. The Law Society's decision does not infringe the Appellants' rights**

#### **a) Rights and freedoms are not absolute**

68. In determining whether any of TWU's rights and freedoms are engaged, and their respective scope, the Court must bear in mind that no right or freedom is absolute.<sup>83</sup> Freedoms, such as freedom of religion, are "inherently limited by a number of considerations, including the rights and freedoms of others."<sup>84</sup> The *Charter* places no restraints on religious beliefs, but the state may constrain practices where they affect others' rights and freedoms. Canadian courts will not allow individuals to do absolutely anything in the name of freedom of religion.<sup>85</sup>

#### **b) Freedom of religion is not engaged in this case**

69. A decision infringes freedom of religion under section 2(a) of the *Charter* where: (1) the

<sup>80</sup> *Code*, *supra*, s. 6.

<sup>81</sup> Application Decision, *supra*, at paras. 70 – 72, RC, Tab 1, pp. 21 – 22. The two reasons to depart from *stare decisis* are "(1) where a new legal issue is raised; and (2) where there is a change in the circumstances or evidence that "fundamentally shifts the parameters of the debate": *Carter v. Canada (Attorney General)*, 2015 SCC 5 at para. 44, JBOA, Tab 13, citing *Canada (Attorney General) v. Bedford*, 2013 SCC 72 at para. 42.

<sup>82</sup> *TWU 2001*, *supra*, at paras. 22, 69-73, JBOA, Tab 9; *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11 at paras. 123-24 [*"Whatcott"*], JBOA, Tab 61. This shift in the law in *Whatcott* is indicative of a broader shift in attitudes toward the LGBTQ community, also evidenced by other shifts in the law since 2001. Most notably, same-sex marriage was still illegal in Canada in 2001, two years before Ontario became the first jurisdiction in North America to recognize same sex marriage, in 2003 (*Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.), JBOA, Tab 62), and three years before the Supreme Court did so, in 2004 (*Reference re Same-Sex Marriage*, 2004 SCC 79, JBOA, Tab 63).

<sup>83</sup> *Syndicat Northcrest v. Amselem*, 2004 SCC 47 at para. 61 [*"Amselem"*], JBOA, Tab 64.

<sup>84</sup> *Young v. Young*, [1993] 4 S.C.R. 3 at 94, JBOA, Tab 65.

<sup>85</sup> *Amselem*, *supra* at para. 62, JBOA, Tab 64; *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315 [*"Children's Aid Society"*], JBOA, Tab 66.

claimant sincerely holds a belief or believes in a practice that has a nexus with religion (the subjective component); and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs (the objective component).<sup>86</sup>

70. With respect to the first element, the Appellants must demonstrate that they sincerely believe that they must exclude others who do not share their beliefs from the proposed TWU law school and that they view attending law school with other Evangelical Christians to be a "personal religious obligation".<sup>87</sup> They have failed, and instead have merely demonstrated a preference for doing so.<sup>88</sup> Indeed, TWU graduates have attended other accredited law schools and Mr. Volkenant is currently attending the University of Alberta Law School.

71. Second, even assuming that the Appellants' preference to attend an Evangelical Christian law school meets the first criterion, it cannot be said that the Law Society's decision not to accredit such a school more than trivially or insubstantially interferes with their religious freedom. "Trivial or insubstantial" interference does not threaten actual religious beliefs or conduct.<sup>89</sup> The Appellants have not adduced evidence that attending an accredited law school substantially interferes with acting in accordance with religious beliefs.<sup>90</sup> In this case, there is no

<sup>86</sup> *Whatcott, supra*, at para. 155, JBOA, Tab 61.

<sup>87</sup> *Amselem, supra*, at para. 54, JBOA, Tab 64.

<sup>88</sup> Application Decision, *supra*, at para. 78, RC, Tab 1, p. 24. In addition, freedom of religion cannot be used as a mechanism to compel state support: Application Decision, *supra*, at para. 120, RC, Tab 1, pp. 34 – 35; *Adler v. Ontario*, [1994] 3 S.C.R. 609 at para. 35, JBOA, Tab 67.

<sup>89</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37 at para. 32 [*"Hutterian Brethren"*], JBOA, Tab 68; *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 at para. 24 [*"S.L."*], JBOA, Tab 69.

<sup>90</sup> Evangelical Christians have attended secular schools without discrimination based on their religious beliefs, as described in the Affidavit of Kelly Hart, sworn August 20, 2014, at paras. 5, 8 – 9, RC, Tab 30. In the Legaree Affidavit, a student anecdotally described an allegedly unpleasant experience at the University of Toronto Law School. There is no evidence that amounts to objectively establishing an interference with religion (Affidavit of Jessie Legaree, sworn August 18, 2014, at paras. 19 – 24, RC, Tab 11, pp. 100 – 102). See also Charney, *supra*, pp. 190 – 93, JBOA, Tab 43. In contrast, in *Loyola, supra*, at para. 71, JBOA, Tab 49, the Supreme Court held, "it is not a breach of anyone's freedom of religion to be required to learn (or teach) the doctrines and ethics of other world religions in a neutral and respectful way". Similarly, it would not be a breach of the Appellants' freedom of religion for them to learn law in a secular environment, as it is even farther removed from their faith. See, e.g., University of Toronto Statement of Institutional Purpose, p. 3, RC, Tab 31; Statement on Human Rights, RC, Tab 32; Statement on Equality and Diversity, pp. 2 – 3, RC, Tab 33.

substantial interference on prospective students' ability to act in accordance with their religious beliefs.<sup>91</sup>

**c) No breach of the Appellants' freedoms of association or expression**

72. The Law Society has not infringed the Appellants' freedom of association. The Appellants have not clearly articulated any associational activity, or any shared goal, that the Law Society's decision infringes. The Law Society's decision does not impact Evangelical Christians' right to join together either at TWU or as a group in accredited law schools. The Appellants do not belong to a vulnerable group that is in jeopardy of not being able to access legal education.<sup>92</sup>

73. Similarly, the Appellants are free to express the beliefs embodied in the Community Covenant while attending any law school currently accredited by the Law Society. There is no evidence to the contrary.<sup>93</sup> However, this freedom does not extend to demanding that the Law Society, a public actor, sanction their religious beliefs and act on those beliefs by denying equal access to the legal profession. Religious belief and expression may be virtually unconstrained, but practice that affects the rights of others is not.<sup>94</sup>

**d) No breach of the Appellants' equality rights**

74. In this case, the Appellants are seeking, under the guise of section 15, protection for a right to discriminate on the basis of religion with respect to who can attend the TWU law school. TWU is not seeking to be treated like the other accredited law schools, but rather to be treated

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<sup>91</sup> It is irrelevant the Law Society did not cross-appeal on this issue, contrary to the Appellants' submission: Appellants' Factum, at para. 53. The *Rules of Civil Procedure*, O. Reg 194, at Rule 61.07(1) only provides for cross-appeals on an order, not on reasons for a decision. To suggest the lack of a cross-appeal precludes the Law Society from disagreeing with elements of the Divisional Court's reasons misstates the nature of cross-appeals.

<sup>92</sup> Appellants' Factum, at para. 55(b); *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1 at paras. 35, 59, JBOA, Tab 70.

<sup>93</sup> Alarie Affidavit, *supra*, at paras. 21 – 23, RC, Tab 7, p. 81.

<sup>94</sup> *Amselem*, *supra* at para. 62, JBOA, Tab 64; *Children's Aid Society*, *supra*, at para. 226, JBOA, Tab 66.

differently, so as to be able to discriminate in a manner that other law schools cannot.

75. Further, even assuming that the Law Society's decision not to accredit TWU creates a distinction on the ground of religion, it arises not from any demeaning stereotype but from a neutral and defensible policy choice (mandated by its obligation under section 15 of the *Charter* and section 6 of the *Code*) the Law Society made in accordance with its public interest role. Mr. Volkenant's claim is to the unfettered ability to attend an educational institution that teaches his religion, not to be free from religious discrimination.<sup>95</sup> He has and retains that right but he cannot extend it to force a public actor to adopt his discriminatory beliefs.

76. The students who may wish to attend TWU will choose to attend a faith-based university that discriminates against several minority groups. They could apply to attend any other law school in the country, where they could not be denied entry on the basis of religion or any other prohibited ground. They are not denied any benefit available to other students.<sup>96</sup>

#### **4. The Law Society reasonably and proportionally balanced *Charter* rights**

77. The Divisional Court correctly found that the Law Society's decision reasonably and proportionally balanced all the applicable rights with the Law Society's statutory objectives, and the Law Society's decision therefore cannot be found to be unreasonable.<sup>97</sup>

78. The Divisional Court correctly looked at the totality of the record, considering "the speeches given at Convocation by the Benchers as a whole – not in isolation, one from the other".<sup>98</sup> As this Court has held, it is appropriate to examine the record as a whole, rather than

<sup>95</sup> These are analogous to findings of the Supreme Court of Canada in *Hutterian Brethren*, *supra*, at paras. 107 – 108, JBOA, Tab 68.

<sup>96</sup> Application Decision, *supra*, at para. 99, RC, Tab 1, p. 29.

<sup>97</sup> Application Decision, *supra*, at para. 124, RC, Tab 1, p. 36.

<sup>98</sup> *Doré*, *supra*, at para. 57, JBOA, Tab 10.

parsing it.<sup>99</sup> Although the Appellants assert that the Benchers ignored their obligation to balance the rights engaged, this argument “does not withstand even a cursory examination” as evidenced by the transcript of Convocations.<sup>100</sup>

79. In this case, even assuming that any of the Appellants’ rights were infringed, the Law Society’s decision reflects a proportional balancing of the rights and obligation in issue.

80. Any deleterious effects of the Law Society’s decision on the Appellants’ preferences are reasonable costs of exercising their rights in the circumstances. The Law Society’s decision does not preclude prospective TWU law students from attending law school<sup>101</sup> or practicing law in Ontario.

81. As the Divisional Court concluded, if there is any non-trivial or substantial interference with the Appellants’ *Charter* rights, that interference is but a reasonable burden imposed in exchange for TWU’s choice to venture into the public domain of providing a legal education for the purposes of accreditation by the Law Society and obtaining a public licence to practice law in Ontario.<sup>102</sup>

82. In the public sphere, the exercise of fundamental freedoms must be constrained where it is necessary to protect others’ freedoms and equality. An individual’s religious freedom is limited where it could promote discrimination against a minority group.<sup>103</sup> *A fortiori*, this must be so where one is seeking, not freedom from constraint, but rather a public benefit from a public

<sup>99</sup> *Taylor-Baptiste, supra*, at para. 43, JBOA, Tab 48.

<sup>100</sup> Application Decision, *supra*, at para. 103, RC, Tab 1, p. 30. See, e.g., April 10 Convocation Transcript, pp. 28 – 29, 36, 38, 48 – 51, 60 – 61, 64 – 65, 68 – 69, 77, 80, 83, 94 – 97, 99, 106, 134, 152 – 154, RC, Tab 34; April 24 Convocation Transcript, pp. 71 – 73, 96 – 97, 143, 147 – 48 RC, Tab 35.

<sup>101</sup> Mr. Volkenant is currently attending the University of Alberta’s Faculty of Law: Appellants’ factum, para. 17.

<sup>102</sup> Application Decision, *supra*, at paras. 102 and 115, RC, Tab 1, p. 33.

<sup>103</sup> See *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, JBOA, Tab 71; See also *Chamberlain, supra*, at paras. 10 – 11, JBOA, Tab 55, where the Court held that the religious views of one part of the community cannot exclude from consideration the values of equality and respect for other members of the community. Different groups must be given recognition.

regulator. Here, the Appellants' assertion of their freedom to exclude others while seeking a public benefit directly interferes with the equality rights of those excluded by the Community Covenant. As the Divisional Court stated, "it is at that point that the right to freedom of religion must yield."<sup>104</sup>

83. The Supreme Court of Canada articulated the limits of fundamental freedoms in the public sphere in *S.L.* There, the appellants opposed the mandatory teaching of all religions from a neutral prospective in public schools. The Court held that since the state had taken a position of neutrality with respect to all religions, it could not exempt – thereby favouring – any one group from the policy of neutrality. The Court wrote:

Religious neutrality is ... a legitimate means of creating a free space in which citizens of various beliefs can exercise their individual rights. ...

state neutrality is assured when the state neither favours nor hinders any particular religious belief, that is, when it shows respect for all postures towards religion, including that of having no religious beliefs whatsoever, while taking into account the competing constitutional rights of the individuals affected. ...

The suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.<sup>105</sup>

84. The Law Society is consequently obligated to provide the right to equal protection without discrimination in all its functions, including the accreditation of law schools. Specifically, the Law Society was obligated to ensure that that all persons have equal access to the legal (and judicial) professions in Ontario and that no one experiences barriers on the basis of religion, marital status, gender and sexual orientation (as created by the Community Covenant). This is particularly important given the limited number of spaces in law schools. Therefore,

<sup>104</sup> Application Decision, *supra* at para. 117, RC, Tab 1, p. 34.

<sup>105</sup> *S.L.*, *supra*, at paras. 10, 32 and 40, JBOA, Tab 69. See also *Whitcott*, *supra*, at para. 162, JBOA, Tab 61.

individuals who would be willing to sign the Community Covenant would have greater access to the exclusion of those unable to sign it. Evangelical Christians would have greater opportunity to obtain a licence to practice law in Ontario than would others.

85. The salutary effect of the Law Society's refusal to accredit TWU is very significant. Not only does it preserve equal access to the profession, but the Law Society also reaffirms its commitment to recognize and promote the equality of all persons regardless of religion, marital status, gender and sexual orientation.

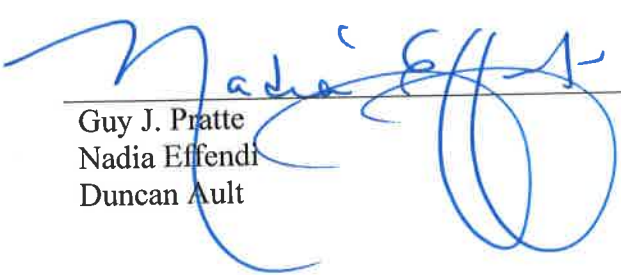
86. Evangelical Christians have a right to and do attend any accredited law school. While some might prefer to attend TWU, any interference with that preference cannot reasonably outweigh the discriminatory effect of the Community Covenant.

87. The Law Society's decision not to give its imprimatur to the TWU's discrimination practices and refuse to accredit TWU's proposed law school is not only justified and reasonable, but also correct.

#### **PART IV ORDER REQUESTED**

88. The Law Society requests that the appeal be dismissed with costs.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of February 2016.



Guy J. Pratte  
Nadia Effendi  
Duncan Ault




**CERTIFICATE**

I certify that an order under subrule 61.09(2) is not required.

I estimate that 4 hours will be needed for my oral argument of the appeal.

DATED AT Toronto, Ontario this 1<sup>st</sup> day of February, 2016.

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**BORDEN LADNER GERVAIS LLP**  
44<sup>th</sup> Floor - Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3Y4



**Guy J. Pratte** (LSUC #23846L)

Tel: 416.367.6728

Fax: 416.361.2721

Lawyers for the Respondent,  
the Law Society of Upper Canada

### SCHEDULE "A" – AUTHORITIES CITED

1. C.I. Kyer & J.E. Bickenback, *The Fiercest Debate: Cecil A. Wright, the Benchers, and Legal Education in Ontario 1923-1957* (Toronto: The Osgoode Society, 1987).
2. 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.
3. *Egan v. Canada* [1995] 2 S.C.R. 513.
4. *M. v. H.*, [1999] 2 S.C.R. 3.
5. *Miron v. Trudel*, [1995] 2 S.C.R. 418.
6. *Quebec (Attorney General) v. A*, 2013 SCC 5.
7. *Agraira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 SCC 36.
8. *Taylor-Baptiste v. OPSEU*, 2015 ONCA 495.
9. *Doré v. Barreau du Québec*, 2012 SCC 12.
10. *Loyola High School v. Québec*, 2015 SCC 12.
11. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16.
12. *Dunsmuir v. New Brunswick*, 2008 SCC 9.
13. *Canadian National Railway v. Canada (Attorney General)*, 2014 SCC 40.
14. *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37.
15. *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62.
16. *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2.
17. B. Dickson, "Legal Education" (1986) 64:2 *Can. Bar Rev.* 374.
18. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31.
19. *Stewart v. Canadian Broadcasting Corp* (1997), 150 D.L.R. (4th) 24, 1997 CarswellOnt 2491 (Sup. Ct.).
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23. *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86.
24. *Council of Canadians with Disabilities v. VIA Rail*, 2007 SCC 15.
25. *Winnipeg School Division No. 1 v. Craton*, [1985] 2 S.C.R. 150.
26. *Tranchemontagne v. Ontario (Director, Disability Support Program)*, 2006 SCC 14.
27. *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52.
28. *Vriend v. Alberta*, [1998] 1 S.C.R. 493.
29. *Carter v. Canada (Attorney General)*, 2015 SCC 5.
30. *Whatcott v. Saskatchewan Human Rights Tribunal*, 2013 SCC 11.
31. *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).
32. *Reference re Same-Sex Marriage*, 2004 SCC 79.
33. *Syndicat Northcrest v. Amselem*, 2004 SCC 47.
34. *Young v. Young*, [1993] 4 S.C.R. 3.
35. *B. (R.) v. Children's Aid Society of Metropolitan Toronto*, [1995] 1 S.C.R. 315.
36. *Adler v. Ontario*, [1994] 3 S.C.R. 609.
37. *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37.
38. *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7.
39. *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 1.
40. *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825.

## SCHEDULE "B" – LEGISLATION, REGULATIONS, RULES AND BYLAWS CITED

<i>Law Society Act, R.S.O. 1990, c. L-8.</i>	
<p>4.1. It is a function of the Society to ensure that,</p> <p>(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</p> <p>(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. 2006, c. 21, Sched. C, s. 7.</p>	<p>4.1. L'une des fonctions du Barreau est de veiller à ce que :</p> <p>a) d'une part, toutes les personnes qui pratiquent le droit en Ontario ou fournissent des services juridiques en Ontario respectent les normes de formation, de compétence professionnelle et de déontologie qui sont appropriées dans le cas des services juridiques qu'elles fournissent;</p> <p>b) d'autre part, les normes de formation, de compétence professionnelle et de déontologie relatives à la prestation d'un service juridique particulier dans un domaine particulier du droit s'appliquent également aux personnes qui pratiquent le droit en Ontario et à celles qui fournissent des services juridiques en Ontario. 2006, chap. 21, annexe C, art. 7.</p>
<p>4.2. In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:</p> <p>1. The Society has a duty to maintain and advance the cause of justice and the rule of law.</p> <p>2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.</p> <p>3. The Society has a duty to protect the public interest.</p> <p>4. The Society has a duty to act in a timely, open and efficient manner.</p> <p>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.</p>	<p>4.2. Lorsqu'il exerce ses fonctions, obligations et pouvoirs en application de la présente loi, le Barreau tient compte des principes suivants :</p> <p>1. Le Barreau a l'obligation de maintenir et de faire avancer la cause de la justice et la primauté du droit.</p> <p>2. Le Barreau a l'obligation d'agir de façon à faciliter l'accès à la justice pour la population ontarienne.</p> <p>3. Le Barreau a l'obligation de protéger l'intérêt public.</p> <p>4. Le Barreau a l'obligation d'agir de façon opportune, ouverte et efficiente.</p> <p>5. Les normes de formation, de compétence professionnelle et de déontologie applicables aux titulaires de permis ainsi que les restrictions quant aux personnes qui peuvent fournir des services juridiques donnés devraient être fonction de l'importance des</p>

2006, c. 21, Sched. C, s. 7.	objectifs réglementaires visés. 2006, chap. 21, annexe C, art. 7.
26.1(1). Subject to subsection (5), no person, other than a licensee whose licence is not suspended, shall practise law in Ontario or provide legal services in Ontario. 2006, c. 21, Sched. C, s. 22.	26.1 (1) Sous réserve du paragraphe (5), nul, à l'exception d'un titulaire de permis dont le permis n'est pas suspendu, ne doit pratiquer le droit en Ontario ou fournir des services juridiques en Ontario. 2006, chap. 21, annexe C, art. 22.
<p>27(1). The classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and any terms, conditions, limitations or restrictions imposed on each class of licence shall be as set out in the by-laws. 2006, c. 21, Sched. C, s. 23 (1).</p> <p>(2) It is a requirement for the issuance of every licence under this Act that the applicant be of good character. 2006, c. 21, Sched. C, s. 23 (1).</p> <p>(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. 2006, c. 21, Sched. C, s. 23 (1).</p>	<p>27. (1) Les catégories de permis prévues par la présente loi, le champ des activités autorisées aux termes de chaque catégorie de permis ainsi que les conditions, limites ou restrictions qui sont imposées à l'égard de chaque catégorie de permis, sont énoncées dans les règlements administratifs. 2006, chap. 21, annexe C, par. 23 (1).</p> <p>(2) L'auteur d'une demande de permis visé par la présente loi doit être de bonnes moeurs pour avoir droit à la délivrance du permis. 2006, chap. 21, annexe C, par. 23 (1).</p> <p>(3) Si la personne qui présente au Barreau une demande de permis d'une catégorie conformément aux règlements administratifs possède les qualités et satisfait aux autres exigences prévues par la présente loi et les règlements administratifs pour la délivrance d'un permis de cette catégorie, le Barreau lui délivre un permis de cette catégorie. 2006, chap. 21, annexe C, par. 23 (1).</p>
<p>62 (0.1) Convocation may make by-laws, ...</p> <p>4. prescribing the classes of licence that may be issued under this Act, the scope of activities authorized under each class of licence and the terms, conditions, limitations or restrictions imposed on each class of licence;</p> <p>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</p>	<p>62. (0.1) Le Conseil peut, par règlement administratif :</p> <p>...</p> <p>4. prescrire les catégories de permis prévues par la présente loi, le champ des activités autorisées aux termes de chaque catégorie de permis ainsi que les conditions, limites ou restrictions qui sont imposées à l'égard de chaque catégorie de permis;</p> <p>4.1 régir les permis dont doivent être titulaires les personnes qui pratiquent le droit en Ontario</p>

<p>prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence; ...</p> <p>21. governing degrees in law; ...</p> <p>23. respecting legal education, including programs of pre-licensing education or training; ...</p> <p>26. prescribing oaths and affirmations for applicants for a licence or any class of applicants for a licence;</p>	<p>en qualité d'avocat et les personnes qui fournissent des services juridiques en Ontario, y compris prescrire les qualités requises et autres exigences pour les diverses catégories de permis et régir les demandes de permis; ...</p> <p>21. régir les diplômes en droit; ...</p> <p>23. traiter de la formation juridique, y compris les programmes d'enseignement ou de formation préalable à l'obtention d'un permis; ...</p> <p>26. prescrire les serments que doivent prêter et les affirmations solennelles que doivent faire les auteurs d'une demande de permis ou toute catégorie d'auteurs d'une demande de permis;</p>
<p><b><i>Charter of Rights and Freedoms, Part I to the Constitution Act, 1982 being Schedule A to the Canada Act, 1982 (U.K.), 1982.</i></b></p>	
<p>2. Everyone has the following fundamental freedoms:</p> <p>(a) freedom of conscience and religion;</p> <p>(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;</p> <p>(c) freedom of peaceful assembly; and</p> <p>(d) freedom of association.</p>	<p>2. Chacun a les libertés fondamentales suivantes :</p> <p>a) liberté de conscience et de religion;</p> <p>b) liberté de pensée, de croyance, d'opinion et d'expression, y compris la liberté de la presse et des autres moyens de communication;</p> <p>c) liberté de réunion pacifique;</p> <p>d) liberté d'association.</p>
<p>15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or</p>	<p>15. (1) La loi ne fait acception de personne et s'applique également à tous, et tous ont droit à la même protection et au même bénéfice de la loi, indépendamment de toute discrimination, notamment des discriminations fondées sur la race, l'origine nationale ou ethnique, la couleur,</p>

<p>physical disability.</p> <p>(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability</p>	<p>la religion, le sexe, l'âge ou les déficiences mentales ou physiques.</p> <p>(2) Le paragraphe (1) n'a pas pour effet d'interdire les lois, programmes ou activités destinés à améliorer la situation d'individus ou de groupes défavorisés, notamment du fait de leur race, de leur origine nationale ou ethnique, de leur couleur, de leur religion, de leur sexe, de leur âge ou de leurs déficiences mentales ou physiques.</p>
<p><b>Human Rights Code, R.S.O. 1990, c. H.19</b></p>	
<p>6. Every person has a right to equal treatment with respect to membership in any trade union, trade or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability. R.S.O. 1990, c. H.19, s. 6; 1999, c. 6, s. 28 (7); 2001, c. 32, s. 27 (1); 2005, c. 5, s. 32 (7); 2012, c. 7, s. 5.</p>	<p>6. Toute personne a droit à un traitement égal en matière d'adhésion à un syndicat ou à une association commerciale ou professionnelle ou en matière d'inscription à l'exercice d'une profession autonome, sans discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'état matrimonial, l'état familial ou un handicap. <u>L.R.O. 1990, chap. H.19, art. 6</u>; 1999, chap. 6, par. 28 (7); 2001, chap. 32, par. 27 (1); 2005, chap. 5, par. 32 (7); 2012, chap. 7, art. 5.</p>
<p><b>Rules of Civil Procedure, O. Reg 194</b></p>	
<p>61.07 (1) A respondent who,</p> <p>(a) seeks to set aside or vary the order appealed from; or</p> <p>(b) will seek, if the appeal is allowed in whole or in part, other relief or a different disposition than the order appealed from,</p> <p>shall, within fifteen days after service of the notice of appeal, serve a notice of cross-appeal (Form 61E) on all parties whose interests may be affected by the cross-appeal and on any person entitled by statute to be heard on the appeal, stating the relief sought and the</p>	<p>61.07 (1) L'intimé qui :</p> <p>a) désire faire annuler ou modifier l'ordonnance portée en appel;</p> <p>b) entend demander, si l'appel est accueilli en tout ou en partie, une autre mesure de redressement ou un jugement différent de l'ordonnance portée en appel,</p> <p>signifie, dans les quinze jours qui suivent la signification de l'avis d'appel, un avis d'appel incident (formule 61E) à toutes les parties sur les intérêts desquelles l'appel incident est susceptible d'avoir une incidence ainsi qu'aux</p>

grounds of the cross-appeal. R.R.O. 1990, Reg. 194, r. 61.07 (1).	personnes auxquelles une loi confère le droit d'être entendues dans l'appel. L'avis indique la mesure de redressement demandée et les moyens de l'appel incident. R.R.O. 1990, Règl. 194, par. 61.07 (1).
<b>Law Society of Upper Canada, By-Law 4</b>	
7. In this Part,  “accredited law school” means a law school in Canada that is accredited by the Society;	7. Dans la présente partie :  « faculté de droit agréée » S'entend d'une faculté de droit au Canada agréée par le Barreau.
9. (1) The following are the requirements for the issuance of a Class L1 licence:  1. The applicant must have one of the following:  i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school.  ii. A certificate of qualification issued by the National Committee on Accreditation appointed by the Federation of Law Societies of Canada and the Council of Law Deans	9. (1) Les exigences suivantes s'appliquent à la délivrance d'un permis de catégorie L1 :  1. Le requérant ou la requérante doit détenir soit :  i. Un baccalauréat ou un doctorat en droit d'une faculté de droit au Canada qui était, au moment où elle lui a conféré ce diplôme, une faculté de droit agréée.  ii. Un certificat de qualification professionnelle émis par le Comité national sur les équivalences des diplômes de droit nommé par la Fédération des ordres professionnels de juristes du Canada et le Conseil des doyens et des doyennes des facultés de droit du Canada.
<b>Law Society of Upper Canada, Rules of Professional Conduct (Toronto: Law Society of Upper Canada, 2014)</b>	
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	6.3.1-1. L'avocat a une responsabilité particulière quant au respect des lois portant sur les droits de la personne en vigueur en Ontario et, plus précisément, quant au devoir d'éviter la discrimination fondée sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle,



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.

### **Commentary**

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

[3] Rule 6.3.1 will be interpreted according to the provisions of the Human Rights Code (Ontario) and related case law.

[4] The Human Rights Code (Ontario) defines a number of grounds of discrimination listed in rule 6.3.1. For example,

[5] Age is defined as an age that is eighteen years or more. [Amended - January 2009]

[6] Disability is broadly defined in s. 10 of the Human Rights Code (Ontario) to include both physical and mental disabilities. [Amended - January 2009]

[7] Family status is defined as the status of being in a parent-and-child relationship.

[8] Marital status is defined as the status of being married, single, widowed, divorced, or separated and includes the status of living with a person in a conjugal relationship outside marriage. [Amended - January 2009]

[9] Record of offences is defined such that a prospective employer may not discriminate on the basis of a pardoned criminal offence (a pardon must have been granted under the

l'âge, l'existence d'un casier judiciaire (au sens du Code des droits de la personne de l'Ontario), l'état matrimonial, l'état familial ou un handicap, dans le contexte de l'emploi d'avocats, de stagiaires ou de toute autre personne et dans ses relations professionnelles avec d'autres titulaires de permis ou toute autre personne.

### **Commentaire**

[1] Le Barreau reconnaît la diversité de la population ontarienne desservie par les avocats et il s'attend que ces derniers respectent la dignité et la valeur de toutes les personnes et leur assurent un traitement égal, sans discrimination.

[2] La présente règle expose le rôle particulier qui revient à la profession juridique dans la protection de la dignité de la personne et la reconnaissance de la diversité de la population ontarienne.

[3] La Règle 6.3.1 s'interprète conformément aux dispositions du Code des droits de la personne de l'Ontario et à la jurisprudence connexe.

[4] Le Code des droits de la personne de l'Ontario définit un certain nombre de motifs de discrimination énumérés à la règle 6.3.1.

[5] « Âge » s'entend de dix-huit ans ou plus. [Modifié - janvier 2009]

[6] Le terme « handicap », qui reçoit une définition large à l'article 10 du Code, recouvre toute incapacité physique ou mentale. [Modifié - janvier 2009]

[7] L'état familial est défini comme le fait de se trouver dans une relation parent-enfant.

[8] L'état matrimonial est défini comme le fait d'être marié, célibataire, veuf, divorcé ou séparé. Est également compris le fait de vivre avec une personne dans une union conjugale

Criminal Records Act (Canada) and not revoked) or provincial offences.

[10] The right to equal treatment without discrimination because of sex includes the right to equal treatment without discrimination because a woman is or may become pregnant.

[11] There is no statutory definition of discrimination. Supreme Court of Canada jurisprudence defines discrimination as including (a) Differentiation on prohibited grounds that creates a disadvantage. Lawyers who refuse to hire employees of a particular race, sex, creed, sexual orientation, etc. would be differentiating on the basis of prohibited grounds. [Amended - January 2009] (b) Adverse effect discrimination. An action or policy that is not intended to be discriminatory can result in an adverse effect that is discriminatory. If the application of a seemingly "neutral" rule or policy creates an adverse effect on a group protected by rule 6.3.1, there is a duty to accommodate. For example, while a requirement that all articling students have a driver's licence to permit them to travel wherever their job requires may seem reasonable, that requirement should only be imposed if driving a vehicle is an essential requirement for the position. Such a requirement may have the effect of excluding from employment persons with disabilities that prevent them from obtaining a licence. [Amended - January 2009]

[12] Human rights law in Ontario includes as discrimination, conduct which, though not intended to discriminate, has an adverse impact on individuals or groups on the basis of the prohibited grounds. The Human Rights Code (Ontario) requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

[13] A lawyer should take reasonable steps to prevent or stop discrimination by any staff or agent who is subject to the lawyer's direction

hors du mariage.

[9] Le terme « casier judiciaire » est défini de sorte qu'un employeur éventuel ne peut faire subir de discrimination en fonction d'une infraction qui a fait l'objet d'un pardon en vertu de la Loi sur le casier judiciaire (Canada) qui n'a pas été révoqué, ou d'infractions à une loi provinciale.

[10] Le droit à un traitement égal sans discrimination fondée sur le sexe inclut le droit à un traitement égal sans discrimination fondée sur le fait qu'une femme est enceinte ou peut le devenir.

[11] Le terme « discrimination » n'est défini dans aucune loi. Toutefois, la jurisprudence de la Cour suprême du Canada assimile la discrimination à ce qui suit : a) la différenciation pour des motifs illicites qui crée un désavantage; par exemple, le refus d'embaucher des personnes d'une certaine race, croyance ou orientation sexuelle, ou d'un sexe donné; [Modifié - janvier 2009] b) la discrimination indirecte : des actes ou des politiques qui, ne se voulant pas discriminatoires, ont un effet préjudiciable qui l'est. Si l'application d'une règle apparemment « neutre » a un effet préjudiciable sur un groupe visé par la règle 6.3.1, il existe une obligation d'accommodement. Par exemple, s'il peut paraître raisonnable d'exiger le permis de conduire pour que les stagiaires puissent se déplacer pour des raisons professionnelles, cette exigence ne devrait être imposée que si le fait de conduire un véhicule est essentiel au poste. Cette exigence peut avoir pour effet d'exclure ceux et celles qu'un handicap empêche d'obtenir un tel permis. [Modifié - janvier 2009]

[12] En Ontario, la législation sur les droits de la personne assimile à de la discrimination les gestes ou la conduite qui, ne se voulant pas discriminatoires, ont néanmoins un effet préjudiciable pour une personne ou un groupe

or control.

[14] Ontario human rights law excepts from discrimination special programs designed to relieve disadvantage for individuals or groups identified on the basis of the grounds noted in the Human Rights Code (Ontario).

[15] In addition to prohibiting discrimination, rule 6.3.1 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences, marital status, family status, or disability. Harassment by superiors, colleagues, and co-workers is also prohibited. [Amended – January 2009, January 2014]

[16] Harassment is defined as "engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome" on the basis of any ground set out in rule 6.3.1. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

de personnes pour des motifs illicites. Le Code des droits de la personne impose l'obligation d'accommoder les personnes ou les groupes visés à moins qu'il n'en résulte une contrainte excessive.

[13] L'avocat doit prendre des précautions raisonnables pour empêcher un membre de son personnel ou un de ses mandataires qui se trouve sous sa direction ou son contrôle d'exercer de la discrimination ou pour la faire cesser.

[14] Ne constituent pas de la discrimination au sens des lois ontariennes les programmes destinés à pallier un désavantage subi par des personnes ou des groupes de personnes pour les motifs énoncés dans le Code des droits de la personne.

[15] En plus d'interdire la discrimination, la règle 6.3.1 interdit le harcèlement fondé sur la race, l'ascendance, le lieu d'origine, la couleur, l'origine ethnique, la citoyenneté, la croyance, le sexe, l'orientation sexuelle, l'identité sexuelle, l'expression de l'identité sexuelle, l'âge, l'existence d'un casier judiciaire, l'état matrimonial, l'état familial ou un handicap. Le harcèlement est également interdit, qu'il soit le fait de supérieurs hiérarchiques, d'autres avocats ou de collègues de travail. [Modifié - janvier 2009, octobre 2014]

[16] Le harcèlement s'entend du « fait pour une personne de faire des remarques ou des gestes vexatoires lorsqu'elle sait ou devrait raisonnablement savoir que ces remarques ou ces gestes sont importuns » pour des motifs énumérés à la règle 6.3.1. Faire régulièrement des plaisanteries raciales ou religieuses à l'adresse de la même personne constitue, par exemple, du harcèlement.

Court of Appeal File No.: C61116

**TRINITY WESTERN UNIVERSITY and  
BRAYDEN VOLKENANT**

**- and -**

**LAW SOCIETY OF UPPER CANADA**

Applicants (Appellants)

Respondent (Respondent)

**COURT OF APPEAL FOR ONTARIO**

**FACTUM OF THE RESPONDENT,  
LAW SOCIETY OF UPPER CANADA**

**BORDEN LADNER GERVAIS LLP**  
Barristers and Solicitors  
Scotia Plaza, 40 King Street West  
Toronto, Ontario M5H 3Y4

**Guy J. Pratte** (LSUC #23846L)  
**Nadia Effendi** (LSUC #49004T)  
**Duncan Ault** (LSUC #53916R)

Tel: 416.367.6728  
Fax: 416.361.2721

Lawyers for the Respondent (Respondent),  
Law Society of Upper Canada