

**ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT**

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

**FACTUM OF THE PROPOSED INTERVENERS,
OUT ON BAY STREET and OUTLAWS**

SACK GOLDBLATT MITCHELL LLP
Barristers & Solicitors
20 Dundas St. West, Suite 1100
Toronto, ON M5G 2G8

PAUL JONATHAN SAGUIL
66 Wellington St. W.
TD Tower, P.O. Box 1
Toronto, ON M5K 1A2

Marlys Edwardh, LSUC#: 15939K
Vanessa Payne, LSUC #: 34422F
Frances Mahon, LSUC#: 65613T
Tel: 416-979-6970
Fax: 416-591-7333

Paul Jonathan Saguil, LSUC#: 55360B
Tel.: 416-308-1719

Solicitors for the Moving Parties/Proposed
Intervenors, Out on Bay Street and OUTlaws

TO: THIS HONOURABLE COURT

AND TO: BENNETT JONES LLP
3400 One First Canadian Place
P.O. Box 130
Toronto, ON M5X 1A4

Robert W. Staley, Derek J. Bell and Ranjan K. Agarwal
Tel.: (416) 863-1200
Fax: (416) 863-1716

Solicitors for the Applicants, Trinity Western University and Brayden Volkenant

AND TO: BORDEN LADNER GERVAIS
Scotia Plaza
40 King Street West, 44th Floor
Toronto, ON M5H 3Y4

Guy J. Pratte and Nadia Effendi
Tel.: (416) 367-6000
Fax: (416) 367-6749

Solicitors for the Respondent, The Law Society of Upper Canada

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... What's missing around this room are the voices of out gays and lesbians, who are not represented equitably in our profession.

Bencher Beth Symes, April 24, 2014

PART I - NATURE OF THE MOTION

1. Out on Bay Street and the OUTlaws groups at York University's Osgoode Hall Law School, the Faculty of Law at the University of Windsor and Queen's University Faculty of Law, and the University of Toronto Faculty of Law's Out in Law group (together the "OUTlaws") seek leave to intervene jointly as friends of the Court in this application for judicial review. The application, brought by Trinity Western University ("TWU"), challenges the April 24, 2014 decision of the Law Society of Upper Canada (the "Law Society") to refuse to accredit TWU's proposed law school.

2. Out on Bay Street and OUTlaws propose to make submissions on some of the issues raised by the application that will be helpful to the Court and provide a different perspective from that of the parties. In general terms, the positions Out on Bay Street and OUTlaws seek to put forward, if granted leave to intervene, address the issues from the perspective of the lesbian, gay, bisexual, transgender and queer (“LGBTQ”) community, and particularly of LGBTQ students and prospective students who wish to ensure that access to legal education and participation in the legal profession are offered to LGBTQ people on equitable terms.

3. Specifically, Out on Bay Street and OUTlaws propose to make submissions regarding: (i) the discriminatory impact of TWU’s Community Covenant on LGBTQ students and prospective students; (ii) the impact of equality rights on the Law Society’s public interest mandate; (iii) the relevance of the 2001 decision of the Supreme Court of Canada in *British Columbia College of Teachers v. Trinity Western University*; and (iv) the appropriate analytical approach to the scope and balancing of equality rights and freedom of religion in the context of the Law Society’s obligation to consider the public interest.

4. This case is of broad public interest and the Court’s decision will have a significant impact on persons who are not immediate parties to the proceedings, including Out On Bay Street’s and OUTlaws’ memberships. The participation of Out on Bay Street and OUTlaws will not delay the proceedings or cause prejudice or injustice to any party. Accordingly, it would be appropriate for this Court to exercise its discretion to grant Out On Bay Street and OUTlaws leave to intervene on the terms proposed below.

PART II - THE FACTS

A. Out on Bay Street and OUTlaws

5. Out On Bay Street is a non-profit organization that facilitates the professional development of LGBTQ students as they transition through school to career, and seeks to build a national professional network within the LGBTQ community. The organization primarily serves the community of LGBTQ students at law schools and business schools.¹

6. Out On Bay Street was established in 2007 when its founders organized its first Annual Conference and Career Fair. Since then, its activities have expanded to encompass year-round initiatives, including monthly networking socials for LGBTQ professionals and students, a speaker series, scholarships, and the annual Leaders To Be Proud Of Awards, which recognize role models and community leaders on LGBTQ issues, workplace diversity, and inclusiveness.²

7. Out On Bay Street is supported by a variety of corporate sponsors and community partners, including major law firms and business organizations. These include TD, CIBC, BMO, RBC, ScotiaBank, HSBC, Accenture, Deloitte, E&Y, Torys, Blakes, McCarthy Tétrault, Gowlings, Bennett Jones, Dentons Canada, Telus, the Ontario Gay and Lesbian Chamber of Commerce, and Pride at Work Canada, among many others.³

¹ Affidavit of Douglas Judson, sworn August 14, 2014, para. 3, Motion Record, Tab 2, p. 10 ["Judson affidavit"].

² Judson Affidavit, para. 4, Motion Record, Tab 2, p. 10.

³ Judson Affidavit, para. 5, Motion Record, Tab 2, p. 10.

8. Out On Bay Street's objectives include:

- providing LGBTQ students with resources to leverage their confidence, skills, and knowledge to enable them to distinguish themselves and act as leaders of their communities and professions; and
- establishing a positive public profile for the advancement of the LGBTQ community in the Canadian workforce, including the legal profession.⁴

9. In furtherance of these objectives, Out On Bay Street holds an Annual Conference and Career Fair, which draws hundreds of students from undergraduate and professional faculties from universities across the country. LGBTQ students pursuing careers in business, law, technology, and related fields come together to network with their peers and with established LGBTQ professionals. This Conference is the only LGBTQ student conference for professionals in Canada. Out On Bay Street provides bursaries for travel and accommodation to students in need in order to allow as many students as possible to come to Toronto to attend the Conference.⁵

10. Through workshops, panels, and interactive seminars, students who attend the Annual Conference learn about developing their career paths and discuss issues faced by LGBTQ individuals in the workplace. For example, the upcoming 2014 Annual Conference will include panel sessions on "The Changing Landscape of Legal Education in Canada" and "Trans Issues in the Workplace". The Conference also gives students an opportunity to develop and sharpen their skills in various competitions, including a moot court competition.⁶

⁴ Judson Affidavit, para. 6, Motion Record, Tab 2, p. 11.

⁵ Judson Affidavit, para. 7, Motion Record, Tab 2, p. 11.

⁶ Judson Affidavit, para. 8, Motion Record, Tab 2, pp. 11-12.

11. Out On Bay Street has also established a National Ambassador Program as a means to increase its presence at universities and academic institutions across Canada, and its ability to provide career development opportunities to LGBTQ students. Under the National Ambassador Program, a volunteer Out On Bay Street representative acts as a liaison between a student community and Out On Bay Street, ensuring that Out On Bay Street can reach out to as many LGBTQ students as possible. Out On Bay Street currently has volunteer Ambassadors at thirteen faculties at nine Canadian Universities, including at four faculties of law (Osgoode, McGill, Ottawa and Windsor).⁷

12. Among Out On Bay Street's key partnerships is its ongoing collaboration with the LGBTQ student groups at the various law schools across Canada, generally known as OUTlaws. These OUTlaws groups have a long tradition of advancing the interests of LGBTQ law students, and serve four primary purposes:

- fostering mentorship relationships with members of the LGBTQ legal community;
- facilitating advocacy, learning, and information-sharing around legal issues that impact the LGBTQ community;
- providing LGBTQ students with opportunities to socialize in a queer-friendly atmosphere; and
- working towards making law schools and legal education more inclusive for LGBTQ individuals.⁸

13. The OUTlaws network across Canada includes hundreds of law students, as well as many alumni who have since established themselves professionally in various career environments,

⁷ Judson Affidavit, para. 9, Motion Record, Tab 2, p. 12.

⁸ Judson Affidavit, para. 10, Motion Record, Tab 2, pp. 12-13.

including law firms, government, and corporate legal departments. There are OUTlaws chapters at fifteen of Canada's law schools.⁹

14. As noted, it is the Outlaws chapters at York University's Osgoode Hall Law School, Queen's University Faculty of Law, the Faculty of Law at the University of Windsor, and Out in Law at the University of Toronto Faculty of Law that are seeking leave to intervene jointly with Out On Bay Street in this application for judicial review.¹⁰

B. The Proposed Interveners' Interest in the Issues Raised in the Application, Experience and Distinct Perspective

15. TWU has a Community Covenant Agreement that all TWU students, faculty, and staff must sign annually. It includes a clause that requires TWU community members to promise to voluntarily abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman":

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.¹¹

16. Signing the Community Covenant constitutes a "solemn pledge" that creates a "contractual agreement and a relational bond" between the student and the university and other

⁹ Judson Affidavit, para. 11, Motion Record, Tab 2, p. 13.

¹⁰ Judson Affidavit, para. 12, Motion Record, Tab 2, p. 13.

¹¹ Community Covenant, pp. 2-3, Motion Record, Tab 2-E, pp. 89-90. This section of the Covenant cites Romans 1:26-27 and Proverbs 6:23-35. In the King James translation of the Bible, Romans 1:26-27 refers to "vile affections" and changing "natural use into that which is against nature" and, in the New International Version of the Bible, refers to "shameful" and "unnatural" "lusts". Proverbs 6:23-35 refers to adultery.

members of the university. The expectations set out in the Covenant “apply to both on and off TWU’s campus and extension sites”. Students “sign this covenant with the commitment to abide by the expectations contained within the Community Covenant ...”.¹²

17. In order to ensure the “integrity of the TWU community”, the Covenant provides that all members of the TWU community are responsible “to hold one another accountable to the mutual commitments outlined in this covenant.” TWU “provides formal accountability procedures to address actions by community members that represent a disregard for this covenant” which could include suspension and expulsion.¹³

18. Out On Bay Street and OUTlaws believe that requiring students, on pain of sanction, to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman” is inherently discriminatory to LGBTQ students at or applying to TWU, and is particularly exclusionary toward trans-identified people and both married and unmarried same-sex couples. It erects a significant barrier to legal education for these students by effectively making them ineligible for scarce law school positions. It is the position of Out on Bay Street and OUTlaws that it would be contrary to the public interest for the Law Society to grant accreditation to TWU in light of this systemic policy of discrimination.¹⁴

¹² Community Covenant, pp. 1, 5, Motion Record, Tab 2-E, pp. 88, 92.

¹³ Community Covenant, Motion Record, p. 5, Tab 2-E, p. 92.

¹⁴ Judson Affidavit, para. 14, Motion Record, Tab 2, p. 14.

19. Out On Bay Street and OUTlaws have a special interest and concern in ensuring that LGBTQ students' access to legal education and the legal profession is offered on equitable terms, based on merit and qualifications.¹⁵

20. Out On Bay Street and OUTlaws have closely followed TWU's various stages of requests to obtain accreditation for its proposed law school. In 2013, over 1000 OUTlaws members and their allies at the University of Victoria, Dalhousie University, the University of British Columbia, Osgoode Hall Law School, the University of Alberta, the University of Saskatchewan, the University of Ottawa, and the University of Western Ontario wrote letters and made submissions to the Federation of Law Societies of Canada opposing the approval of TWU's proposed law school.¹⁶

21. OUTlaws groups also organized various protests and rallies to express concern with TWU's proposed law school, one of which took place at the Osgoode Hall courthouse on October 17, 2013.¹⁷

22. When Convocation considered whether to accredit TWU's proposed law school – the process that led to this application for judicial review – Out On Bay Street and OUTlaws made submissions opposing accreditation.¹⁸

23. At each stage of the process, Out On Bay Street and OUTlaws have attempted to ensure that the interests and unique perspective of LGBTQ students are heard and understood by the decision-makers charged with determining the important questions raised by TWU's application

¹⁵ Judson Affidavit, para. 15, Motion Record, Tab 2, p. 14.

¹⁶ Judson Affidavit, para. 16, Motion Record, Tab 2, p. 14.

¹⁷ Judson Affidavit, para. 17, Motion Record, Tab 2, p. 15.

¹⁸ Judson Affidavit, para. 18, Motion Record, Tab 2, p. 15.

to accredit its proposed law school. They seek leave to intervene in this application for the same reason so that, unlike the proceedings before Convocation, “the voices of out gays and lesbians, who are not represented equitably in our profession”, are not missing.¹⁹

PART III -ISSUES AND THE LAW

A. General Principles

24. This Court’s discretion to grant leave to intervene is governed by Rule 13 of the *Rules of Civil Procedure*, which sets out two bases upon which leave to intervene may be granted: (1) as an added party (under Rule 13.01); or (2) as a friend of the Court (under Rule 13.02). Out on Bay Street seeks leave to intervene under Rule 13.02, which provides:²⁰

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

25. In considering a motion for leave to intervene, a court will consider “the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties.”²¹

26. In public interest cases, and in constitutional cases in particular, where a judgment often has a significant impact on persons who are not immediate parties to the proceedings, the courts have relaxed the traditional rules to allow for participation by interveners. As the Ontario Court

¹⁹ Judson Affidavit, para. 20, Motion Record, Tab 2, p. 15.

²⁰ *Ontario Rules of Civil Procedure*, Rule 13.02.

²¹ *Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd.* 1990 CanLII 6886 (ON CA), pp. 4-5; *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824, at para. 10; *Ontario Human Rights Commission v. Christian Horizons* 2008 CanLII 68129 (ON SCDC), at paras. 4-5, 12-13.

of Appeal has observed, a successful intervener in a Charter case has usually met “at least one of three criteria”:

...it has a real substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well-recognized group with special expertise and a broadly identifiable membership base.²²

27. The fact that a proposed intervener may support of one of the parties, and that their positions may overlap, is not a reason to deny intervener status. As this Court has noted, “where the prospective intervener is generally aligned with the position of one side, it can still make a useful contribution to the argument of the issues before the court”.²³

B. Leave to Intervene Should be Granted

28. Out on Bay Street and OUTlaws submit that they meet all three of the criteria set out by the Court of Appeal in *Bedford v. Canada*. They have a real substantial and identifiable interest in the subject matter of this application, an important perspective distinct from the immediate parties, experience relevant to the issues before the Court, and a broadly identifiable membership base. Further, the nature of the case, the issues it has raised, and the likelihood Out on Bay Street and OUTlaws will be able to make a useful contribution to the resolution of the issues in dispute without causing any injustice to the immediate parties, militate in favour of granting Out on Bay Street and OUTlaws leave to intervene.

²² *Bedford v. Canada (Attorney General)* 2009 ONCA 669 (CanLII), para. 2; *Ontario Society for the Prevention of Cruelty to Animals*, *supra*, para. 8.

²³ *Blue Mountain Resorts Limited v. Den Bok* 2011 ONSC 1909 (CanLII), para. 11; *Regional Municipality of Peel*, *supra*, p. 4.

(i) The Nature of the Application and the Issues it Raises

29. This application is a quintessential public interest case. It involves the nature and scope of the Law Society's statutory obligation to protect the public interest and to maintain and advance the cause of justice and the rule of law in carrying out its functions, duties and powers under the *Law Society Act*. More generally, it involves access to legal education and to the legal profession itself. It raises issues of *Charter* rights and values, including the scope of equality rights and freedom of religion, and how *Charter* values are to be balanced in the exercise of a statutory discretion.

30. The Applicants' challenge to the Law Society's decision raises a number of issues, including:

- whether the Law Society's mandate to protect the public interest is restricted to considering whether the future graduates of TWU's proposed law school would meet the standards of learning, professional competence and professional conduct required in Ontario;
- whether the Law Society failed to properly take into account, or improperly balanced, *Charter* values in interpreting its statutory objectives and exercising its discretion to refuse to accredit TWU;
- whether the Law Society's decision infringes sections 2(a), (b) and (d) and 15 of the *Charter*, and cannot be justified under section 1 of the *Charter*;
- whether the Law Society's decision infringes the Ontario *Human Rights Code*; and
- whether the terms of the Community Covenant that students are required to sign annually while attending TWU were a consideration relevant to the exercise of the

Law Society's discretion or was an irrelevant consideration that the Law Society erred in considering in its deliberations.

31. The application thus raises significant human rights issues that merit the intervention of Out on Bay Street and OUTlaws, and in particular:

- The impact of the Community Covenant on LGBTQ students and prospective students, and how that impact should be considered within the Law Society's accreditation decision and obligation to consider the public interest;
- How the Law Society (and the Court) should balance the equality rights of LGBTQ students and the religious claims of TWU, within the context of the Law Society's obligation to consider the public interest.

32. This Court's decision, including the interpretation of the freedom of religion and equality rights guaranteed by the *Charter*, will have an impact beyond the interests of the immediate parties. Indeed, the students with whom Out on Bay Street and OUTlaws network as part of their mandate will be directly affected by unequal access to legal education based on sexual orientation or other human rights grounds and, as a result, unequal access to participation in the legal profession. By virtue of their mandates and experience, Out on Bay Street and OUTlaws are well suited to assist the Court in its task of reconciling these interests.

(ii) Out on Bay Street and OUTlaws Will Make a Useful Contribution

33. As set out above, Out On Bay Street and OUTlaws are actively involved in promoting the interests of LGBTQ students across Canada, including ensuring that these students have equal opportunities to advance professionally in their chosen vocations and careers. If granted leave to intervene, they will be able to provide the Court with submissions from a different perspective

than that which will be offered by the parties. From this unique perspective and interest, they seek to assist the Court in understanding:

- a) the impact of the Community Covenant on LGBTQ students and prospective students;
- b) the nature and scope of the public interest that the Law Society was entitled to appropriately consider in assessing TWU's application to accredit its proposed law school, in particular as it relates to equality rights and non-discrimination;
- c) the reasons why the Supreme Court of Canada's decision in *British Columbia College of Teachers v. Trinity Western University* does not govern this application; and
- d) the appropriate legal approach to balancing the equality rights of LGBTQ students and freedom of religion in the context of assessing the public interest.²⁴

Below we set out an overview of the submissions Out on Bay Street and OUTlaws would develop if granted leave to intervene as a friend of the Court.

(a) The impact of the Community Covenant on LGBTQ students

34. If granted leave to intervene, Out on Bay Street and OUTlaws propose to address the discriminatory barrier that TWU's Community Covenant would create for LGBTQ students who seek access to a legal education, and therefore to the legal profession. They will argue that the Law Society appropriately considered this discriminatory barrier in its assessment of the public interest. The submissions Out on Bay Street and OUTlaws would make would expand on the following points:

²⁴ See Judson affidavit, para. 22, Motion Record, Tab 2, p. 16.

- i. Requiring LGBTQ law students, who are young adults, to enter into a contractual agreement in which they promise not to engage in any sexual intimacy that TWU would consider to violate the sacredness of marriage between a man and a woman would necessarily exclude from the law school any LGBTQ students who are married to a spouse of the same sex. It would also effectively exclude LGBTQ students generally, since they would not be able to live openly and enter into relationships without violating the terms of the Covenant. They could not engage in even the most innocent expressions of affection with a partner without risking sanction by the university.
- ii. LGBTQ-identified potential law students should not have to make a choice between access to a legal education (and therefore the legal profession) and their dignity and self-respect or have to live in fear of potentially career-ending sanctions, as a result of a fundamental and inescapable aspect of their identity.
- iii. In necessarily excluding married LGBTQ students and in creating a climate in which unmarried LGBTQ students will be discouraged or deterred from applying, the Covenant would create a barrier that would result in unequal access to the total available spaces in Canada's law schools for LGBTQ students.
- iv. The Covenant may also have a discriminatory and devastating impact on students who might enter TWU's law school and sign the Covenant in good faith, but who come to realize while they are still in law school that they fall somewhere within the LGBTQ spectrum. In addition to all of the other stressful issues that often arise on "coming out", those students would be faced with an impossible choice between continuing their legal education and their dignity and self-respect.

(b) Equality rights and the Law Society's public interest mandate

35. If granted leave to intervene, Out on Bay Street and OUTlaws also propose to make submissions regarding the nature and scope of the Law Society's mandate to consider the public

interest and how the law governing the equality rights of LGBTQ students relates to the exercise of that mandate, developing the following points:

- i. The scope of appropriate considerations by the Law Society under s. 4.1 of the *Law Society Act* should not be limited to considering the skills and knowledge of students seeking call to the bar, but include consideration of the public interest, as provided by s. 4.2 of the *Act*.²⁵
- ii. The Law Society's obligation to consider the public interest properly includes a recognition of the importance of both equitable access to the profession and a diverse legal profession. The Law Society considers the public interest in all other types of decisions, and it is an appropriate consideration in a decision to accredit a new law school. Failure to consider the public interest would be a failure of the Law Society's responsibility to maintain and advance the cause of justice and the rule of law, and facilitate access to justice for the people of Ontario.
- iii. In effectively limiting access to positions in law schools for LGBTQ-identified potential law students, the Community Covenant creates a barrier to access that discriminates on the basis of sexual orientation. The Law Society properly took into account the importance of ensuring that LGBTQ persons have equitable access to places in law school in its assessment of the public interest.
- iv. The barrier created by the Community Covenant is not just an issue of access to a legal education. Because law school graduation is required to enter the profession, a barrier at the stage of entering law school represents a barrier to advancement in the profession, and to the opportunities that presents, such as participation in Canada's judicial system by appointment as a judge. Convocation reasonably considered the role law schools play as gatekeepers to the legal profession and reasonably (and in any event correctly) concluded that it would not be in the

²⁵ *Law Society Act*, R.S.O. 1990, c L.8 at ss. 4.1, 4.2 [“LSA”].

public interest to accredit a law school that would exclude and create a barrier to legal education for LGBTQ students.

- v. The public interest issues raised by the Law Society's decision include not only the actual barrier to access created by the Community Covenant, but also the perception of the profession if the Law Society were to accredit TWU. Accreditation would be seen as approval or acceptance by the Law Society of TWU's discriminatory policy. This would adversely affect public confidence in the profession's commitment to equality and non-discrimination, and undermine the perception of the profession by members of the public, members of the profession, and potential members of the profession. It would also impact LGBTQ students considering a career in law, who would feel that the Law Society is not committed to their equality, and would thus feel unwelcome in the profession. These factors are part of the public interest the Law Society was entitled to consider.²⁶

(c) The applicability of the *BCCT* case

36. In its submissions to the Law Society, TWU has maintained that the equality rights of LGBTQ students have already been considered and balanced by the Supreme Court of Canada in *British Columbia College of Teachers v. Trinity Western University* (the "*BCCT* case"),²⁷ and that the result in that case governs in relation to the LSUC's accreditation decision. If granted leave to intervene, Out on Bay Street and OUTlaws would submit that the *BCCT* case is distinguishable, both factually and legally, developing the following points:

²⁶ *Adams v. Law Society of Alberta*, 2000 ABCA 240 at paras. 6-10; *Pharmascience v. Binet*, [2006] 2 S.C.R. 513 at para. 36; *Kelly v. Ontario*, 2014 ONSC 3824 at paras. 37-38; *Bolton v. Law Society*, [1994] 1 W.L.R. 512.

²⁷ *British Columbia College of Teachers v. Trinity Western University*, [2001] 1 S.C.R. 772.

- i. The arguments made, and the primary focus of the Court's concern, in the *BCCT* case centred on the lack of evidence that TWU teaching graduates would be unqualified to teach and would discriminate against LGBTQ pupils in the public school system.²⁸ The legal issues in the Law Society's accreditation deliberations (and in this application) are distinguishable. In this case, the Benchers of the Law Society accepted or assumed that TWU graduates would be qualified to practice law in Ontario and would be no more or less likely to discriminate against LGBTQ persons. Instead, the Benchers were concerned that the Community Covenant created a barrier to legal education, and therefore to the legal profession, for LGBTQ students. These are different issues from those that the Supreme Court of Canada considered in the *BCCT* case.
- ii. The evidence and findings about the impact of TWU's "Community Standards" document at issue in the *BCCT* case are distinguishable from the evidence before the Law Society in the instant case. There is no indication in the Supreme Court's reasons in the *BCCT* case that student applicants who refused to sign the Community Standards document would be denied admission or that students who failed to comply with the Community Standards document would be subject to discipline and possibly expelled. Indeed, the Supreme Court specifically noted that there was no such evidence.²⁹ In this case, on the other hand, the Community Covenant explicitly provides that students and faculty are to "hold each other accountable" in order to ensure the requirements of the covenant are met. Where a student violates the Covenant, the student may be subject to various accountability measures, including disciplinary action and expulsion (see paragraphs 15 to 17 above).
- iii. The *BCCT* decision does not address the vital importance of ensuring both access to justice and access to the legal profession for LGBTQ persons. The Law Society has an obligation to consider access to justice, the importance of a diverse legal

²⁸ *BCCT*, *supra* at paras. 32-38.

²⁹ *BCCT*, *supra* at para. 22.

profession and equitable access to the profession. This is reflected not only in Section 4.2 of the *Law Society Act*, but also in Rule 5.04(1) of the *Rules of Professional Conduct*, which mandates that lawyers have 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 various enumerated grounds. The Commentary to this Rule further provides that “[t]he 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.”³⁰

- iv. Finally, in considering the public interest, the Law Society could properly consider that, since the Supreme Court’s decision in *BCCT*, there has been a sea change in the legal recognition of equality rights for LGBTQ people in Canada,³¹ and consequently the manner in which rights are balanced would likely be very different today.

(d) Balancing religious freedom and equality rights

37. Finally, Out on Bay Street and OUTlaws propose to make submissions addressing the proper approach to determining and balancing equality rights and religious freedom in the context of a statutory obligation to act in the public interest. Drawing from recent Supreme Court of Canada *Charter* jurisprudence on equality rights and religious freedom, they would expand on the following points and issues:

³⁰ *LSA* at ss. 4.2; *Rules of Professional Conduct*, Rule 5.04(1).

³¹ *Halpern v. Canada (Attorney General)* 2003 CanLII 26403 (ON CA); *Reference re Same-Sex Marriage*, [2004] 3 SCR 698; *M.D.R. v. Ontario (Deputy Registrar General)*, 2006 CanLII 19053 (ON SC); *A.A. v. B.B.*, 2007 ONCA 2 (CanLII); *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, [2011] S.J. No. 3, 2011 SKCA; *XY v. Ontario (Government and Consumer Services)*, [2012] O.H.R.T.D. No. 715, 2012 HRTO 726; *Hincks v. Gallardo*, [2014] O.J. No. 3048, 2014 ONCA 494.

- i. The *Charter's* guarantee of freedom of religion does not extend to a right to accreditation for running a private law school intended to prepare students to enter the legal profession. In this respect, “‘Religious freedom revolves around the notion of personal choice and individual autonomy and freedom.’ The question is whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices”.³² The Law Society’s decision to refuse to accredit TWU’s proposed law school does not leave TWU or its law students bereft of opportunities to practice their faith.
- ii. Alternatively, if TWU’s or its prospective law students’ freedom of religion is impacted by the Law Society’s refusal to accredit TWU’s proposed law school, the Court will be required to balance freedom of religion with equality rights in the context of the facts of this case, including the Law Society’s duty to consider and protect the public interest. This will require the Court to evaluate the seriousness of the interference with freedom of religion, in part by determining how central the practice or activity in question is to the religion. As the Supreme Court has held, some aspects of a religion “may be so sacred that any significant limit verges on forced apostasy”, while “other practices may be optional or a matter of personal choice” and a vast array of other beliefs and practices lie in between those extremes.³³
- iii. The Court would also be required to consider the Law Society’s statutory objectives, which include a duty to maintain and advance the cause of justice and the rule of law, facilitate access to justice for the people of Ontario and to protect the public interest. Out on Bay Street and OUTlaws would submit that, in light of those statutory objectives, and its obligation to take into account and balance

³² *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at para. 88, quoting with approval *Syndicat Northcrest v. Amselem*, [2004] 2 S.C.R. 551.

³³ *Hutterian Brethren*, *supra* at para. 89 and see generally paras. 87 to 96.

Charter values in assessing its duty to protect the public interest,³⁴ the Law Society reasonably (and correctly) decided that the public interest would be served by ensuring that LGBTQ law students have equitable access to and representation within the legal profession, and that these objectives outweighed the Applicants' right (if such a right exists) to have the Law Society accredit a private law school in which students are required to sign and abide by a covenant that creates a discriminatory barrier to LGBTQ students' access to legal education. To the extent the Law Society was weighing competing rights, its decision was consistent with other decisions holding that broader, fundamental societal values – and in particular equality rights – will in some cases prevail over religious claims.³⁵

- iv. At present, access to legal education is determined on qualifications and merit, without restrictions based on protected grounds. If the Law Society's decision is overturned and TWU's proposed law school is accredited, the composition of the pool from which persons enter the Law Society's licensing process will change. The practical effect of the Community Covenant is that LGBTQ students would not have equitable access to law school spaces. The Law Society would not be expected to accredit a law school that, based on religious beliefs, actually or effectively prohibited female students from attending or required its students to enter into a contract promising not to enter into an interracial marriage. The negative impact on equality rights of accrediting a law school with such policies would outweigh the religious claim in the balance. This case is no different.

³⁴ *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395 at para. 35.

³⁵ See, for example, *Bruker v. Marcovitz*, [2007] 3 SCR 607 at paras. 2, 68-82, 92. *Bruker* was decided under the Quebec *Charter of Human Rights and Freedoms*, but Out on Bay Street and the OUTlaws will submit that the same principles apply under the *Canadian Charter of Rights and Freedoms*, and in relation to the Law Society's assessment of the public interest.

C. Conclusion

38. The interests of LGBTQ students who wish to attend law school will be significantly affected by the disposition of the issues in this application. Made from a perspective different from those of the immediate parties, a perspective uniquely grounded in their mandates to advance the interests of LGBTQ students in the legal profession, the submissions of Out on Bay Street and OUTlaws will be of assistance to the Court in deciding the issues raised in the application.

D. Terms of Out on Bay Street's intervention

39. If granted leave to intervene in this application, Out on Bay Street and OUTlaws:

- will not seek to supplement the record or raise any new issues;
- undertake to file their factum in accordance with any directions given by the Court; and
- request 30 minutes for oral submissions (alternatively, if time for oral submissions is to be determined at a later date through case management, Out on Bay Street and OUTlaws request that they be allowed to participate in the case management meeting to determine the length of submissions).³⁶

40. Out on Bay Street and OUTlaws will not seek costs and request an Order that no costs shall be ordered against them.³⁷

³⁶ Judson affidavit, para. 24, Motion Record, Tab 2, pp. 16-17.

³⁷ Judson affidavit, para. 24, Motion Record, Tab 2, pp. 16-17.

PART IV - ORDER REQUESTED

41. Out on Bay Street and OUTlaws request an Order granting them leave to intervene on the terms set out above and ask that no costs be ordered in this motion.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

August 15, 2014

for Vanessa Payne
Marlys Edwardh /Vanessa Payne /Frances Mahon
SACK GOLDBLATT MITCHELL LLP

*and
for* Paul Jonathan Saguil
BARRISTER AND SOLICITOR

Solicitors for the Moving Parties/Proposed
Interveners, Out on Bay Street and OUTlaws

SCHEDULE “A”

Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd. 1990 CanLII 6886 (ON CA)

Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society 2010 ONSC 824

Ontario Human Rights Commission v. Christian Horizons 2008 CanLII 68129 (ON SCDC)

Bedford v. Canada (Attorney General) 2009 ONCA 669 (CanLII)

Blue Mountain Resorts Limited v. Den Bok 2011 ONSC 1909 (CanLII)

Adams v. Law Society of Alberta, 2000 ABCA 240

Pharmascience v. Binet, [2006] 2 S.C.R. 513

Kelly v. Ontario, 2014 ONSC 3824

Bolton v. Law Society, [1994] 1 W.L.R. 512

British Columbia College of Teachers v. Trinity Western University, [2001] 1 S.C.R. 772

Halpern v. Canada (Attorney General) 2003 CanLII 26403 (ON CA)

Reference re Same-Sex Marriage, [2004] 3 SCR 698

M.D.R. v. Ontario (Deputy Registrar General), 2006 CanLII 19053 (ON SC)

A.A. v. B.B., 2007 ONCA 2 (CanLII)

Canada (Attorney General) v. Hislop, [2007] 1 SCR 429

Marriage Commissioners Appointed Under The Marriage Act (Re), [2011] S.J. No. 3, 2011 SKCA 3

XY v. Ontario (Government and Consumer Services), [2012] O.H.R.T.D. No. 715, 2012 HRTO 726

Hincks v. Gallardo, [2014] O.J. No. 3048, 2014 ONCA 494

Alberta v. Hutterian Brethren of Wilson Colony, 2009 SCC 37, [2009] 2 S.C.R. 567

Syndicat Northcrest v. Amselem, 2004 SCC 47, [2004] 2 S.C.R. 551

Doré v. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

Bruker v. Marcovitz, 2007 SCC 54, [2007] 3 S.C.R. 607

SCHEDULE “B”

Ontario Rules of Civil Procedure, Rules 13.01 and 13.02

13.01 (1) A person who is not a party to a proceeding may move for leave to intervene as an added party if the person claims,

(a) an interest in the subject matter of the proceeding;

(b) that the person may be adversely affected by a judgment in the proceeding; or

(c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

(2) On the motion, the court shall consider whether the intervention will unduly delay or prejudice the determination of the rights of the parties to the proceeding and the court may add the person as a party to the proceeding and may make such order as is just.

13.02 Any person may, with leave of a judge or at the invitation of the presiding judge or master, and without becoming a party to the proceeding, intervene as a friend of the court for the purpose of rendering assistance to the court by way of argument.

Law Society Act, R.S.O. 1990, c L.8 at ss. 4.1, 4.2

Function of the Society

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

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

(b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario. 2006, c. 21, Sched. C, s. 7.

Principles to be applied by the Society

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

1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
3. The Society has a duty to protect the public interest.
4. The Society has a duty to act in a timely, open and efficient manner.
5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized. 2006, c. 21, Sched. C, s. 7.

Law Society of Upper Canada, *Rules of Professional Conduct*, Rule 5.04(1)

Rule 5: Relationship to Students, Employees, and Others

DISCRIMINATION

Special Responsibility

5.04(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 identify, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

Commentary

The 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.

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.

Rule 5.04 will be interpreted according to the provisions of the Ontario Human Rights Code and related case law.

The Ontario Human Rights Code defines a number of grounds of discrimination listed in rule 5.04. For example,

Age is defined as an age that is eighteen years or more.

[Amended - January 2009]

Disability is broadly defined in s. 10 of the Code to include both physical and mental disabilities.

[Amended - January 2009]

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

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]

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

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.

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 5.04, 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]

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 Ontario Human Rights Code requires that the affected individuals or groups must be accommodated unless to do so would cause undue hardship.

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

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 Code.

In addition to prohibiting discrimination, rule 5.04 prohibits harassment on the ground of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identify, 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]

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 5.04. This could include, for example, repeatedly subjecting a client or colleague to jokes based on race or creed.

**TRINITY WESTERN
UNIVERSITY and
BRAYDEN VOLKENANT**
Applicants

- and -

**THE LAW SOCIETY OF
UPPER CANADA**
Respondent

Court File No. 250/14

**ONTARIO
SUPERIOR COURT OF JUSTICE**
(Proceeding commenced at Toronto)

**FACTUM
OF THE PROPOSED INTERVENERS,
OUT ON BAY STREET and OUTLAWS**

**Marlys Edwardh, LSUC#: 15939K
Vanessa Payne, LSUC #: 34422F
Frances Mahon, LSUC#: 65613T
SACK GOLDBLATT MITCHELL LLP
20 Dundas St. West, Suite 1100
Toronto, ON M5G 2G8
Tel: 416-979-6970
Fax: 416-591-7333**

**Paul Jonathan Saguil, LSUC#: 55360B
66 Wellington St. W., TD Tower, P.O. Box 1
Toronto, ON M5K 1A2
Tel.: 416-308-1719**

**Solicitors for the Moving Parties/Proposed
Intervenors, Out on Bay Street and OUTLAWS**