

2015

C.A. No. 438894

Nova Scotia Court of Appeal

Between:

THE NOVA SCOTIA BARRISTERS' SOCIETY

APPELLANT

and

TRINITY WESTERN UNIVERSITY and BRAYDEN
VOLKENANT

RESPONDENTS

JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS
ASSOCIATION FOR REFORMED POLITICAL ACTION
EVANGELICAL FELLOWSHIP OF CANADA
CHRISTIAN HIGHER EDUCATION CANADA
ATTORNEY GENERAL OF CANADA
CATHOLIC CIVIL RIGHTS LEAGUE
FAITH AND FREEDOM ALLIANCE
CHRISTIAN LEGAL FOUNDATION
CANADIAN COUNCIL OF CHRISTIAN CHARITIES
NOVA SCOTIA HUMAN RIGHTS COMMISSION

INTERVENORS IN
THE COURT
BELOW

Affidavit of Jade Fraser

I, Jade Fraser, make oath and give evidence as follows:

1. I am a Director and the Secretary of Schulich School of Law OUTlaw Society ("OUTlaw").
2. I have personal knowledge of the evidence sworn to in this affidavit except where otherwise stated to be based on information or belief.
3. I state, in this affidavit, the source of any information that is not based on my own personal knowledge, and I state my belief of the source.

OUTlaw

4. OUTlaw is a society incorporated under the *Societies Act*, R.S.N.S 1989, c. 435. Attached as **Exhibit 1** is a copy of a document confirming OUTlaw's incorporation and registration with the Registry of Joint Stock Companies. Attached as **Exhibit 2** is a copy of OUTlaw's Certificate of Incorporation.
5. OUTlaw was incorporated as a society on May 11, 2015. I am informed by Leah Staples, a previous President and Co-Chair of OUTlaw, and verily believe that prior to its incorporation, OUTlaw existed as an unincorporated association since 2010.
6. OUTlaw currently has a membership of approximately 25 to 30 students at the Schulich School of Law ("**Schulich**") at Dalhousie University.
7. A number of OUTlaw's members are also members of the LGBTQ community at Schulich. However, membership in OUTlaw is not restricted in this regard, and a number of heterosexual students (also referred to as "allies") are also members.
8. Generally, OUTlaw's objectives are to:
 - (a) promote a queer-positive atmosphere at Schulich;
 - (b) support queer law students and their allies; and
 - (c) facilitate a connection between queer law students and the legal community.
9. I am advised by Emily Hansen, one of the current Vice-Chairs of OUTlaw, that another aspect of OUTlaw's mandate is to advocate for change in our areas of focus.
10. In this affidavit, I use the terms "queer" and "LGBTQ" interchangeably. Specifically, I use the term "queer" to refer to the broader LGBTQ community.
11. OUTlaw is a chapter of OUTlaws Canada, an organization of LGBTQ affinity groups and organizations at 15 law schools across Canada.
12. OUTlaws Canada is focused on promoting a queer-positive learning environment within Canadian law schools, as well as raising awareness regarding LGBTQ issues.
13. OUTlaw tries to promote and further its objectives (as well as the objectives of OUTlaws Canada) in a number of ways, including the following:
 - (a) OUTlaw liaises with a number of other organizations regarding issues, events and campaigns relating to its mandate. These groups include the Nova Scotia Rainbow Action Project, DalOUT, the South House Sexual & Gender Resource Centre ("**South House**"), and the Youth Project.
 - (b) I am advised by Ms. Staples and verily believe that OUTlaw held a bakesale during the 2013-2014 academic year to raise money for a donation in support

of Scott Jones, an active member of the LGBTQ community who suffered a violent attack which left him partially paralyzed.

- (c) I am also advised by Ms. Staples and verily believe that OUTlaw organized and hosted a lecture regarding LGBTQ issues by Professor Elaine Craig during the 2013-2014 academic year.
- (d) OUTlaw made a donation to DalOUT, the LGBTQ society for the entirety of Dalhousie University, during the 2014-2015 academic year to help fund a lecture by Julia Serano, a transgender and bisexual activist and author.
- (e) OUTlaw organized and hosted a lunchtime lecture during the 2014-2015 academic year by Susanne Litke, an employee of the Dalhousie Legal Aid Clinic.
- (f) OUTlaw made a donation to South House during the 2014-2015 academic year to assist it with a promotional campaign regarding reproductive rights.
- (g) OUTlaw made a donation during the 2014-2015 academic year to assist a transsexual person to cover the cost of medical procedures not covered by publicly-funded health care.
- (h) OUTlaw was invited to participate in a workshop with Ruthann Robson, a law professor from the United States, following a lunchtime lecture regarding constitutional issues, sexuality and gender presentation which she gave at Schulich during the 2014-2015 academic year.
- (i) OUTlaw collaborated with a group at the Dalhousie School of Social Work to host an event for LGBTQ students and allies in an effort to foster social connections and facilitate an interdisciplinary conversation about the community and individual impacts of the law.
- (j) OUTlaw hosts an annual joint social event with the Sexual Orientation and Gender Identity Committee of the Canadian Bar Association-Nova Scotia.
- (k) As outlined in more detail below, OUTlaw participated in proceedings before the Nova Scotia Barristers' Society ("NSBS") regarding the approval or accreditation of Trinity Western University's ("TWU") planned law school.

OUTlaw and Trinity Western University

- 14. I have reviewed Justice Campbell's decision in the Court below. As outlined at paras. 45-52 of the decision, TWU is planning to create a law school, and has sought accreditation or approval of same from the NSBS.
- 15. As outlined at para. 33 of Justice Campbell's decision, all TWU students are required to sign a Community Covenant Agreement, a copy of which can be found on TWU's website and is attached as Exhibit 3.
- 16. Section 3 of the Community Covenant Agreement provides in part as follows:

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

17. Section 5 of the Community Covenant Agreement provides in part as follows:

This covenant applies to all members of the TWU community, that is, administrators, faculty and staff employed by TWU and its affiliates, and students enrolled at TWU or any affiliate program. Unless specifically stated otherwise, expectations of this 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, and by campus policies published in the Academic Calendar and Student Handbook.

Ensuring that the integrity of the TWU community is upheld may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant. As a covenant community, all members share this responsibility. The University also provides formal accountability procedures to address actions by community members that represent a disregard for this covenant. These procedures and processes are outlined in TWU's Student Handbook and Employment Policies and will be enacted by designated representatives of the University as deemed necessary.

18. Attached as Exhibit 4 is a copy of the Student Accountability Policy from TWU's Student Handbook, which is also available on its website. It reads in part as follows:

Each student who accepts an invitation to Trinity Western University has agreed to accept the Community Covenant and/or policies and guidelines of the University for living in accordance with the community standards of this private, creedal Christian academic community. These are specified in the Community Covenant Contract that each student signs. It is the responsibility of each student to clarify any misunderstanding that may arise in their mind before committing their signature to this contract. The University does not view a student's agreement to comply with these standards and guidelines as a mere formality. Therefore, students who find themselves unable to maintain the integrity of their commitment should seek a living-learning situation more acceptable to them.

19. Attached as Exhibit 5 is a copy of the Student Accountability Process from TWU's Student Handbook, which is also available on its website. It reads in part as follows:

If a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University.

20. It is OUTlaw's position that the effect of the Community Covenant Agreement and the other documents outlined above is to discriminate against LGBTQ students at TWU, as well as LGBTQ persons seeking to become (or considering becoming) students at TWU.
21. OUTlaw has a number of discrete concerns in this regard, including the following:
 - (a) The Community Covenant Agreement is inconsistent with the *Canadian Charter of Rights and Freedoms* (the "*Charter*"), provincial human rights legislation, and general values of equity, equality, inclusivity and non-discrimination.
 - (b) The Community Covenant Agreement perpetuates the systemic discrimination, exclusion and hatred experienced by many LGBTQ persons because of their sexual orientation.
 - (c) The Community Covenant Agreement places a *de facto* quota upon the number of law school places available to LGBTQ students in Canada.
22. OUTlaw is therefore opposed to the accreditation of TWU's proposed school of law.
23. In light of its position, OUTlaw has closely followed developments regarding TWU's proposed school of law, and has provided or signed on to a number of submissions to various regulatory authorities across Canada. Specifically:
 - (a) I am advised by Ms. Staples and verily believe that on January 24, 2014, OUTlaw delivered a petition opposing TWU's proposed law school to the NSBS. A copy of the petition is attached as **Exhibit 6**.
 - (b) I am further advised by Ms. Staples and verily believe that OUTlaw delivered an updated version of the above petition to the NSBS on February 10, 2014. A copy of the updated petition is attached as **Exhibit 7**.
 - (c) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) delivered oral submissions opposing TWU's request for accreditation of its proposed law school at a public meeting of the Executive Committee of the Council of NSBS on February 13, 2014. A copy of the relevant portion of the transcript of this meeting is attached as **Exhibit 8**.
 - (d) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a February 24, 2014 letter from OUTlaws Canada to the Officers and Members of Council of the NSBS asking that any application for accreditation of TWU's proposed law school be refused or qualified. A copy of this letter is attached as **Exhibit 9**.
 - (e) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a February 24, 2014 letter from OUTlaws Canada to the Law Society of British Columbia urging that TWU's application for accreditation in that province be refused or qualified. A copy of this letter is attached as **Exhibit 10**.

- (f) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a February 24, 2014 letter from OUTlaws Canada to the Law Society of New Brunswick, asking that TWU's request for accreditation of its proposed law school in that Province be refused or qualified. A copy of this letter is attached as Exhibit 11.
- (g) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a March 1, 2014 letter from OUTlaws Canada to the Law Society of Upper Canada, asking that TWU's request for accreditation of its proposed law school in Ontario be refused or qualified. A copy of this letter is attached as Exhibit 12.
- (h) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a November 6, 2014 letter from OUTlaws Canada to the Honourable Amrik Verk, Minister of Advanced Education for the Province of British Columbia, asking the Ministry to reverse a previous approval regarding TWU's proposed law school. A copy of this letter is attached as Exhibit 13.
- (i) I am further advised by Ms. Staples and verily believe that she (on behalf of OUTlaw) signed a November 24, 2014 letter from OUTlaws Canada to Thomas G. Conway, President of the Federation of Law Societies of Canada, asking that the Federation reverse or reconsider a previous approval regarding TWU's proposed law school. A copy of this letter is attached as Exhibit 14.

24. The submissions set out in Exhibits 6 to 14 accurately reflect OUTlaw's position and concerns regarding the Community Covenant Agreement and TWU's proposed law school.

The Proceedings in the Court Below

25. I have reviewed the written submissions filed in the proceedings in the Court below. I note that:
- (a) The brief filed on behalf of the Evangelical Fellowship of Canada and Christian Higher Education Canada on October 27, 2014 indicates that those intervenors supported TWU in the proceedings in the Court below;
 - (b) The brief filed on behalf of the Justice Centre for Constitutional Freedoms on October 28, 2014 indicates that it supported TWU in the proceedings in the Court below;
 - (c) The brief filed on behalf of the Christian Legal Foundation on October 28, 2014 indicates that it supported TWU in the proceedings in the Court below;
 - (d) The brief filed on behalf of the Catholic Civil Rights League and the Faith and Freedom Alliance on October 28, 2014 indicates that those intervenors supported TWU in the proceedings in the Court below;

- (e) The brief filed on behalf of the Canadian Council of Christian Charities on October 28, 2014 indicates that it supported TWU in the proceedings in the Court below;
 - (f) The brief filed on behalf of the Association for Reformed Political Action on October 28, 2014 indicates that it supported TWU in the proceedings in the Court below; and
 - (g) The brief filed on behalf of the Attorney General of Canada on November 7, 2014 indicates that it supported TWU in the proceedings in the Court below.
26. The only brief filed in the proceedings below which supported the NSBS's position in the proceedings in the Court below was that filed on behalf of the Nova Scotia Human Rights Commission on November 28, 2014.
27. In light of the briefs filed and the style of cause in the proceedings below, it is my understanding that no LGBTQ-focused or LGBTQ-oriented organizations intervened in the proceedings in the Court below.

OUTlaw as an Intervenor on Appeal

28. I have reviewed the Notice of Appeal filed on behalf of the NSBS in this proceeding, a copy of which is attached as Exhibit 15.
29. OUTlaw seeks leave to intervene in the appeal from Justice Campbell's decision. Its interest in the appeal is premised upon:
- (a) its mandate (both as an individual organization and as a chapter of OUTlaws Canada) to promote a queer-positive atmosphere and environment within Canadian law schools, to support queer law students, and to raise awareness regarding LGBTQ issues;
 - (b) its concerns regarding the Community Covenant Agreement, as described above, which (in OUTlaw's view) directly engage its mandate; and
 - (c) its participation in the proceedings before the NSBS which gave rise to this appeal.
30. If OUTlaw is granted leave to intervene in this proceeding, its position would be that the appeal from Justice Campbell's decision should be allowed.
31. Specifically, OUTlaw would seek to develop submissions along the following lines, focusing upon the second, fourth, fifth and sixth grounds of appeal set out in the NSBS's Notice of Appeal:
- (a) The Community Covenant Agreement would exclude any LGBTQ students married to a spouse of the same sex. It would also effectively exclude (or, at the very least, significantly and unacceptably undermine the dignity and self-respect of) LGBTQ students generally, as they would only be able to attend

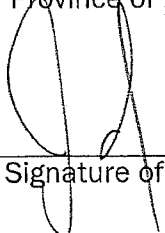
TWU's law school if they abstained from relationships with partners during their time at the school, or if they "went into the closet" and effectively hid their relationships from the outside world. This would result in unequal access for LGBTQ students to the total number of available spaces in Canada's law schools.

- (b) The above-mentioned effects of the Community Covenant Agreement would also serve to perpetuate systemic discrimination against LGBTQ students and the broader LGBTQ community, which has historically been a marginalized and disadvantaged segment of Canadian society.
- (c) In determining whether to accredit TWU's proposed law school, the NSBS was required to consider the public interest. In the context of this case, the public interest includes the importance of equitable access to legal education and the profession, as well as the importance of a diverse bar. The NSBS was also required to consider the values and principles set out in the *Charter* and provincial human rights legislation, including values of equity, equality, non-discrimination and inclusivity, as well as the history of systemic discrimination against LGBTQ persons in society generally. In light of these considerations, the NSBS's decision to conditionally accredit TWU's proposed law school was reasonable or, in the alternative, correct.
- (d) As a regulatory authority and statutory actor, the NSBS cannot condone discrimination in the course of carrying out its mandate. As granting accreditation on the terms proposed by TWU would have amounted to the NSBS condoning and perpetuating the discriminatory effect of the Community Covenant Agreement, the NSBS was right to only provide TWU with a conditional accreditation.
- (e) The guarantee of freedom of religion in the *Charter* revolves around the notion of personal choice and individual autonomy and freedom. As such, the key consideration in determining whether a person's right to freedom of religion has been infringed is whether they have been left with a meaningful choice to follow their religious beliefs and practices. The NSBS's decision to conditionally accredit TWU's proposed law school goes not deny TWU students the ability to practice their faith, particularly as they could still sign the Community Covenant Agreement if they wanted to do so. Rather, it simply denies TWU the ability to open a law school with an admissions policy which discriminates against LGBTQ students.
- (f) Further, depriving TWU of the ability to open a law school with an admissions policy that discriminates against LGBTQ persons cannot and does not outweigh the effect that the Community Covenant Agreement would have upon LGBTQ students. Put slightly differently, a single aspect of a set of religious beliefs cannot in and of itself simply trump the non-discrimination and equality rights of LGBTQ students. As such, the NSBS's decision struck an appropriate balance between freedom of religion, equality rights, and values of non-discrimination and inclusivity, or (alternatively) can be saved under Section 1 of the *Charter*.

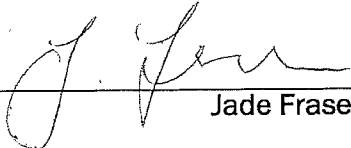
32. I confirm that if OUTlaw is granted leave to intervene, it will:

- (a) not expand the grounds of (or issues to be considered on) appeal;
- (b) not seek leave to adduce fresh evidence on appeal, or otherwise attempt to broaden or expand the record of the proceedings in the Court below;
- (c) endeavour to work cooperatively with the parties and other intervenors to ensure that its submissions are not duplicative;
- (d) comply with any schedule imposed and directions given regarding the conduct of the appeal, including any directions regarding the length of its submissions to the Court;
- (e) not seek costs against any other party; and
- (f) ask that costs not be ordered against it.

Sworn to before me on May 26th, 2015)
at Halifax, Province of Nova Scotia.)



Signature of Authority



Jade Fraser

Print Name:

JACK K. TOWNSEND
A Barrister of the Supreme

Official Capacity: Court of Nova Scotia