

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

-and-

ATTORNEY GENERAL OF CANADA, THE CHRISTIAN LEGAL FELLOWSHIP, THE  
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS, THE EVANGELICAL  
FELLOWSHIP OF CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, OUT  
ON BAY STREET AND OUTLAWS, THE ADVOCATES' SOCIETY and THE CRIMINAL  
LAWYERS' ASSOCIATION (ONTARIO)

Interveners

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## **PART I – OVERVIEW**

1. On April 24, 2014, the Law Society of Upper Canada (“LSUC”) refused to accredit Trinity Western University’s (“TWU”) proposed school of law. In so doing, the LSUC exercised its broad public interest mandate to regulate access to the legal profession, as it is entitled to do. Its decision was the result of an appropriate and respectful weighing of the *Charter* rights and values at stake, and a consideration of the public interest in equal access to the legal profession.

2. The LSUC was not obliged to accredit a law school that effectively blocks access to the legal profession for lesbian, gay, bisexual, transgendered/transsexual and queer (“LGBTQ”) people. TWU’s Community Covenant creates real and meaningful barriers to the legal profession for LGBTQ persons, who cannot attend TWU without experiencing discrimination through the Covenant’s mandatory character, the fact that signatories to the Covenant are required to report infractions, and the harsh discipline that may be imposed (including suspension and expulsion).

3. It is in the public interest to have a diverse body of lawyers, serving the needs of a diverse community. It was reasonable for the LSUC to consider the advances in equality rights for and the remaining challenges still faced by LGBTQ persons, and to conclude that TWU cannot rely on statutory exemptions or its so-called private character to claim it does not discriminate against LGBTQ persons. The LSUC correctly concluded that the barriers to access for LGBTQ persons created by the Covenant were an overriding public interest concern, and reasonably refused to accredit TWU.

## **PART II – THE FACTS**

4. 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.

5. The OUTlaws are LGBTQ student groups from various law schools across Canada.<sup>1</sup> The OUTlaws have a long tradition of advancing the interests of LGBTQ law students through: fostering mentorships with members of LGBTQ legal community; facilitating advocacy, learning and information sharing around legal issues that impact the LGBTQ community; providing LGBTQ law students with opportunities to socialize in a queer-friendly atmosphere; and working towards making law schools and legal education more inclusive for LGBTQ individuals.

6. Out on Bay Street and OUTlaws adopt the facts as presented by the LSUC.

### PART III – ISSUES AND THE LAW

7. Out on Bay Street and OUTlaws support the LSUC’s submissions. Out on Bay Street and OUTlaws address how *Charter* and human rights values are to be balanced in the public interest and whether the balance the LSUC chose in this case was reasonable.

#### A. BALANCING *CHARTER* AND HUMAN RIGHTS VALUES IN THE PUBLIC INTEREST

8. The LSUC was required to balance the *Charter* rights and values engaged by TWU’s religious character with its statutory mandate to make decisions in the public interest.<sup>2</sup> Every decision the LSUC is required to make as a self-governing body – whether disciplining lawyers, enacting by-laws, or ensuring that equity-seeking groups are served by the profession – must be exercised in the public interest. The TWU accreditation decision was no different.

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<sup>1</sup> 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 intervene jointly.

<sup>2</sup> *Doré v. Barreau du Québec*, 2012 SCC 54, [2007] 3 S.C.R. 607 at para. 55 [*Doré*], **Out on Bay Street and OUTlaws Book of Authorities [“BoA”] Tab 1**; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12 at para. 35 [*Loyola*], **BoA, Tab 2**; *Law Society Act*, RSO 1990, c L8 at s. 4.2.



9. The LSUC's public interest mandate includes regulating access to the legal profession. Like all administrative decision-makers, the LSUC must consider the *Charter* and human rights values – including religious freedom, equality, dignity, and the right to be free from discrimination – when making decisions, including regulating access to the profession.<sup>3</sup> When regulating access to the legal profession, the LSUC must also take into account the challenges faced by equity-seeking groups who might be denied access as a result of its decision making.<sup>4</sup>

10. The LSUC had the authority to consider TWU's discriminatory practices in considering its application, including how its Covenant creates barriers to LGBTQ people seeking to enter the legal profession,<sup>5</sup> among others.<sup>6</sup> The LGBTQ community is one of several groups protected by the *Charter* and human rights legislation that have historically been denied access to the legal profession.<sup>7</sup> The LSUC is aware of systemic barriers to the profession for equity-seeking groups, including the LGBTQ community, and is making strides to remedy this legacy of historic discrimination.<sup>8</sup> Nevertheless, LGBTQ persons, as well as other minority groups, are underrepresented in the total population of Ontario lawyers.<sup>9</sup>

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<sup>3</sup> *Doré, supra* at para. 24 **BoA, Tab 1**; *Loyola, supra* at para. 47, **BoA, Tab 2**.

<sup>4</sup> Affidavit of Josée Bouchard, sworn October 23<sup>rd</sup>, 2014 [“Bouchard Affidavit”] at paras. 8-13, **Respondent's Application Record [“RAR”], Tab 3**.

<sup>5</sup> *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772 at para. 14, *per* Iacobucci and Bastarache JJ [BCCT], **BoA, Tab 3**.

<sup>6</sup> Many Benchers expressed their concern about the discriminatory barriers at TWU for non-Christian religious minorities, as well as women and common-law heterosexual married couples.

<sup>7</sup> “Sexual Orientation and Gender Identity: Creating An Inclusive Work Environment”, The Law Society of Upper Canada, October 2013, Exhibit “H” to the Bouchard Affidavit, *supra* at p. 502, **RAR, Tab 3H**.

<sup>8</sup> Bouchard Affidavit, *supra* at paras. 8-26, **RAR, Tab 3**.

<sup>9</sup> “Snapshots of the Profession”, *Report to Convocation*, Equity and Aboriginal Affairs Committee of the Law Society of Upper Canada, released April 23<sup>rd</sup> 2015. Available online at:

<[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-april-2015-snapshots.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-april-2015-snapshots.pdf)>, **BoA, Tab 4**; see also “Statistical Snapshots of Ontario Lawyers”, *Report to Convocation*, Equity and Aboriginal Affairs Committee of the Law Society of Upper Canada, released April 23<sup>rd</sup> 2015 at p. 10, available online at:

[http://www.lsuc.on.ca/uploadedFiles/For\\_the\\_Public/About\\_the\\_Law\\_Society/Convocation\\_Decisions/2015/convocation-april-2015-equity.pdf](http://www.lsuc.on.ca/uploadedFiles/For_the_Public/About_the_Law_Society/Convocation_Decisions/2015/convocation-april-2015-equity.pdf), **BoA, Tab 5** (both accessed April 24<sup>th</sup>, 2015).

11. The LSUC was entitled to conclude that the barriers to access for LGBTQ persons caused by the Covenant created an overriding public interest concern. 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 the opportunities that presents, such as participation in Canada’s judicial system by appointment as a judge. It is in the public interest to have a diverse body of lawyers and judges, serving the needs of a diverse community. It may even enhance judicial independence.<sup>10</sup> Even if the LSUC’s decision interfered with the Applicant’s asserted religious freedom, the Supreme Court of Canada has confirmed that religious beliefs may be properly limited when they “conflict with or harm overriding public interests”.<sup>11</sup> Given its broad mandate to promote the public interest, the LSUC reasonably concluded that accrediting TWU would undermine its commitment to ensuring equitable access to the legal profession.

**B. THE LSUC CHOSE A REASONABLE BALANCE**

12. The LSUC properly balanced the *Charter* and human rights values at issue, including equality, human dignity, and the right to be free from discrimination. To do so, it reasonably considered: advances in LGBTQ equality rights since the Supreme Court’s decision in *BCCT*; TWU’s insupportable distinction between sexual identity and sexual conduct; whether TWU could hide behind its claim that it “lawfully” discriminates against LGBTQ persons; and how public confidence in the profession’s commitment to equality could best be maintained.

**i. Advances in LGBTQ Equality Rights Since *BCCT***

13. Since 2001, there has been a sea change in the legal recognition of equality rights for the LGBTQ community. During Convocation many Benchers expressed the view that the decision in

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<sup>10</sup> Sonia Lawrence, “Reflections: On Judicial Diversity and Judicial Independence”, from *Judicial Independence in Context*, Adam M. Dodek and Lorne Sossin, eds. (Toronto: Irwin Law, 2010). Available online at: < [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2043089](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043089)>, **BoA, Tab 6**.

<sup>11</sup> *Loyola, supra* at para. 43, **BoA, Tab 2**; *Brucker v. Marcovitz*, 2007 SCC 54 at para. 2, **BoA, Tab 7**.

*BCCT* “smacks of another era”.<sup>12</sup> Most obviously, three years after *BCCT*, people in same-sex relationships won the legal right to marry, after several years of litigation in courts around the country.<sup>13</sup> This advancement was a crucial recognition of equality for the LGBTQ community.

14. In addition, a number of other significant decisions have assisted in repairing both subtle and overt forms of discrimination experienced by the LGBTQ community:

- a) *Rutherford et al v. Ontario (Deputy Registrar General)*: The right to include the names of both same-sex parents on a newborn’s Statement of Live Birth [2006];<sup>14</sup>
- b) *A.A. v. B.B.*: Adoptive same-sex parents as well as the biological parents may be declared a child’s parent under the *Children’s Law Reform Act* [2007];<sup>15</sup>
- c) *Canada (AG) v. Hislop*: Same-sex partners of deceased Canada Pension Plan contributors can enjoy retroactive benefits [2007];<sup>16</sup>
- d) *Ontario Human Rights Commission v. Christian Horizons*: Religious organizations may not discriminate against LGBTQ persons in employment when the employee’s sexual orientation is not a *bona fide* occupational requirement [2010];<sup>17</sup>
- e) *Re Saskatchewan Marriage Commissioners*: Public marriage commissioners cannot refuse to marry same-sex couples because of their religious beliefs [2011];<sup>18</sup>
- f) *X.Y. v. Ontario (Government and Consumer Services)*: The requirement that transsexual people must have “transsexual surgery” in order to change their sex designation on birth certificates is contrary to the *Ontario Human Rights Code* [2012];<sup>19</sup>
- g) *Saskatchewan (Human Rights Commission) v. Whatcott*: Recognition of the link between sexual orientation and sexual conduct [2013].<sup>20</sup>

<sup>12</sup> Convocation Transcript, April 10<sup>th</sup>, 2014 at p. 94, lines 11-12 (Schabas), **Application Record [“AR”] Vol. 1, Tab 3.**

<sup>13</sup> *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 S.C.R. 698, **BoA, Tab 8.**

<sup>14</sup> *Rutherford et al v. Ontario (Deputy Registrar General)*, 2006 CanLII 19053, 81 O.R. (3d) 81 (CA), **BoA, Tab 9.**

<sup>15</sup> *A.A. v. B.B.*, 2007 ONCA 2, [2007] 83 O.R. (3d) 561, **BoA, Tab 10.**

<sup>16</sup> *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 S.C.R. 429, **BoA, Tab 11.**

<sup>17</sup> *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105, 102 O.R. (3d) 267 [*Christian Horizons*], **BoA, Tab 12.**

<sup>18</sup> *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011 SKCA 3, **BoA, Tab 13.**

<sup>19</sup> *X.Y. v. Ontario (Minister of Government and Consumer Services)*, 2012 HRTO 726, **BoA, Tab 14.**

<sup>20</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*], **BoA, Tab 15.**

15. The judicial condemnation of discrimination against LGBTQ people across many areas of life is a major evolution in the contemporary understanding of LGBTQ personhood since *BCCT*. The Supreme Court of Canada unanimously held in *Bedford* that its precedents may be re-visited when “new legal issues are raised as a consequence of significant developments in the law, or if there is a change in the circumstances or evidence that fundamentally shifts the parameters of the debate”.<sup>21</sup> The LSUC was entitled to distinguish *BCCT* and conduct its balancing exercise in light of both the contemporary understanding and jurisprudential principles that have since been developed regarding the *Charter* values in play, and the different factual record from that presented to the Supreme Court of Canada in *BCCT*.<sup>22</sup>

ii. **The LSUC Reasonably Rejected TWU’s Insupportable Distinction Between Sexual Identity and Sexual Conduct**

16. TWU posits itself as a welcoming place for LGBTQ people – as long as they do not engage in “sexual intimacy that violates the sacredness of marriage between a man and a woman”, even within a legal marriage.<sup>23</sup> The LSUC reasonably considered and rejected this false dichotomy between sexual identity and sexual conduct advocated by TWU in its Covenant and submissions to Convocation.

17. In so doing, the LSUC followed the contemporary jurisprudence which rejects the dated notion that sexual conduct can be separated from sexual identity. Indeed, the LSUC recognized that “[s]exuality and sexual practices are such intimately central aspects of an individual’s identity that it is artificial to suggest that the practices of gays and lesbians in this regard can

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<sup>21</sup> *Canada (Attorney General) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para. 42, **BoA, Tab 16**.

<sup>22</sup> Respondent’s Factum at paras. 75-77.

<sup>23</sup> Covenant, Exhibit “C” to the Affidavit of Robert Wood [“Wood Affidavit”], sworn August 22<sup>nd</sup>, 2014, at p. 442, **AR Vol. 2, Tab 5C**.

somehow be separated out from those individuals themselves”.<sup>24</sup> As the Supreme Court of Canada unanimously held in *Whatcott*,

Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself.<sup>25</sup>

18. TWU’s arbitrary separation of sexual expression from sexual identity cannot shield it from allegations of discrimination against LGBTQ persons. While the “hate the sin, love the sinner” construct may be a part of TWU’s own religious beliefs, the LSUC reasonably took into account the harm caused by the distinction between sexual identity and sexual expression in considering whether accrediting TWU’s proposed law school was in the public interest.<sup>26</sup>

**iii. The LSUC Was Required To Consider *Charter* and Human Rights Values**

19. While TWU is not bound by Ontario human rights law, and arguably not bound by the *Charter*,<sup>27</sup> the LSUC certainly is. Like all administrative decision-makers, the LSUC is obligated to give effect to any relevant *Charter* and human rights values when making decisions, and therefore properly considered both the *Charter* and the Ontario *Human Rights Code* (“the *Code*”) in determining whether to accredit TWU.

20. The LSUC was not obliged to accept TWU’s assertion that its private institutional character and claimed exemption from human rights legislation allows it to “legally”

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<sup>24</sup> *Owens v. Saskatchewan (Human Rights Commission)*, 2006 SKCA 41 at para. 82, 267 DLR (4th) 733, **BoA, Tab 17**; see also *BCCT*, *supra* at para. 69, *per* L’Heureux-Dubé J. (dissenting), **BoA, Tab 3**.

<sup>25</sup> *Whatcott*, *supra* at paras. 121-124, **BoA, Tab 15**.

<sup>26</sup> See, for example, Convocation Transcript, April 10<sup>th</sup>, 2014, at p. 75-76 (Anand), **AR Vol. 1, Tab 3**.

<sup>27</sup> Professor Kathleen Lahey of Queen’s University Faculty of Law and Lawyers’ Rights Watch both argued in their submissions to the Law Society that TWU would in fact be bound by the *Charter* because of the large amount of public funding it receives and its public nature: **Record of Proceedings [“RoP”], Tabs 217 and 218**. Bencher Constance Backhouse also questioned TWU’s self-characterization as a “private” institution, because “all law school positions cross over into the public domain”: Convocation Transcript, April 24<sup>th</sup>, 2014, at p. 261-5, **AR Vol. 1, Tab 4**.

discriminate. Rather, the LSUC reasonably viewed the Covenant for what it truly is: a mandatory code of conduct that discriminates against TWU members who identify as LGBTQ.

a) The Covenant is a code of conduct with a discriminatory impact

21. The Community Covenant is much more than an expression of TWU's religious belief. It is a mandatory "code of conduct", indeed a "contractual agreement"<sup>28</sup> that requires TWU staff, students and faculty to comply or face significant punishment from the university, including expulsion. "Sexual misconduct" is one of the most serious violations in the Student Handbook. It is regarded and treated as seriously as property damage, theft and aggressive behaviour towards another student, and even a first offence will warrant short-term suspension. Expulsion is the punishment for repeat offences.<sup>29</sup> The Covenant also requires staff, students and faculty to act as both guardians and enforcers of the Covenant as a part of the accountability procedures: all TWU members are required to report infractions.<sup>30</sup>

22. The requirements of behaviour modification, enforcement and punishment for homosexual conduct go far beyond the expression of religious belief. Were the Covenant purely aspirational, TWU could claim that it is solely an expression of religious belief. However, the Covenant does not merely ask staff, students and faculty to aspire to certain religious goals. The Covenant is a binding contract and demands compliance.

23. That the two LGBTQ students who tendered affidavits found TWU welcoming<sup>31</sup> does not mean that the Covenant lacks an inherently discriminatory character or does not act as a

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<sup>28</sup> Covenant, *supra* at p. 440, **AR, Vol. 2, Tab 5C**.

<sup>29</sup> Student Handbook, Exhibit "M" to the Wood Affidavit ["Student Handbook"] at p. 501, **AR, Vol. 2, Tab 5M**. The coercive character of the Covenant is not altered by the absence of evidence in this record that students have been expelled.

<sup>30</sup> Student Handbook, *supra* at p. 498, **AR, Vol. 2, Tab 5M**.

<sup>31</sup> Affidavit of Arend Strikwerda, sworn August 20<sup>th</sup>, 2014 ["Strikwerda Affidavit"], **AR, Vol. 2, Tab 8**; Affidavit of Iain Cook, sworn August 19<sup>th</sup>, 2014 ["Cook Affidavit"], **AR, Vol. 2, Tab 14**.

barrier to the legal profession. This anecdotal evidence cannot, and does not, provide a basis to draw general conclusions about the experience of the LGBTQ community at TWU.

24. In her dissent in *BCCT*, Justice L’Hereaux Dubé recognized that the way in which TWU and the Covenant draw a line between sexual identity and sexual conduct is arbitrary and cruel:

...This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALE, “[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation”...<sup>32</sup>

25. Further, “sexual intimacy” undoubtedly includes expressive sexual speech. As a result, there is what is a tantamount to a ban on LGBTQ sexual expression. Such a ban conveys a powerful message. In *Little Sisters*, Justice Binnie held:

There was ample evidence to support the trial judge's conclusion that the adverse treatment meted out by Canada Customs to the appellants and through them to Vancouver’s gay and lesbian community violated the appellants’ legitimate sense of self-worth and human dignity... When Customs officials prohibit and thereby censor lawful gay and lesbian erotica, they are making a statement about gay and lesbian culture, and the statement was reasonably interpreted by the appellants as demeaning gay and lesbian values. The message was that their concerns were less worthy of attention and respect than those of their heterosexual counterparts.<sup>33</sup>

26. LGBTQ persons considering applying to TWU law school, or coming out while at the school, will experience the stigma of not belonging, as most will never find themselves in a (true) heterosexual marriage which is the only “healthy” sexuality sanctioned by the Covenant.<sup>34</sup> This stigma causes harm to the self-worth and dignity of LGBTQ persons. As the Supreme Court of Canada held in *Vriend*, exclusion from protection is itself harm-causing:

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<sup>32</sup> *BCCT*, *supra* at para. 69, *per* L’Heureux-Dubé J. (dissenting), **BoA, Tab 3**.

<sup>33</sup> *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 SCR 1120 at para. 123, *per* Binnie J, **BoA, Tab 18**.

<sup>34</sup> *Covenant*, *supra* at p. 443, **AR, Vol. 2, Tab 5C**.

Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem. Compounding that effect is the implicit message conveyed by the exclusion, that gays and lesbians, unlike other individuals, are not worthy of protection. This is clearly an example of a distinction which demeans the individual and strengthens and perpetrates the view that gays and lesbians are less worthy of protection as individuals in Canada's society. The potential harm to the dignity and perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination.<sup>35</sup>

27. Perhaps the best description of how damaging discrimination can be comes from TWU's own evidence. Ian Cook, a gay alumnus, published an article while he was a TWU student; it is a powerful testament about the negative effects of discrimination on LGBTQ people:

Compounded with the fear of social rejection has been the confusion that comes when you find your sexuality and your religious beliefs to be seemingly irreconcilable... This has been a serious cause of depression in my life because there seemed to be only two possible futures. In one, I would fall in love with another guy, but the very choice of embracing that would simultaneously be a choice to turn my back on God. In the other, I would be lonely and single for life. I felt trapped and hopeless. [...]

I'm not being melodramatic when I say that this is the type of thing that causes suicides. You feel desperately alone, hopeless, defective. You want something so badly while at the same time, you hate the fact that you do... You feel like if everyone knew who you were inside that no one would love you. Yet, all the while these things stay bottled up inside you and it destroys you. [...] Most of the time I am comfortable writing off any homosexual ideas as evil and destructive. Most of the time I can rest in the love of God and the hope that as I follow him one step at a time, he will give me every good thing. But there are times that I still feel lost, confused or frustrated, and that, I suppose is part of what it means to be human.<sup>36</sup>

28. Even if one accepts the position that the Covenant does not specifically target LGBTQ persons because all TWU members must abstain from pre-marital sex, the differential treatment for opposite-sex and same-sex married couples is abundantly clear. Nothing in the TWU evidence describes how a legally married LGBTQ person could attend TWU, and TWU makes no claim that it would be welcoming to married LGBTQ persons.

<sup>35</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 102, **BoA, Tab 19**.

<sup>36</sup> Iain Cook, "Living the questions", November 21, 2007, Exhibit "A" to the Cook Affidavit, *supra* at p. 612, **AR, Vol. 2, Tab 14A**.



29. The Covenant thus creates real and meaningful barriers for LGBTQ-identified prospective law students. As the Court noted in *BCCT*, “a homosexual student would not be tempted to apply, and could only sign the so-called student contract at a considerable personal cost”.<sup>37</sup> Many LGBTQ persons, including the Interveners here, made submissions to the LSUC regarding the limitations that accrediting TWU would impose on LGBTQ-identified prospective law students, including the fewer spaces in law school for LGBTQ persons that would result from accrediting TWU.<sup>38</sup> The LSUC reasonably took into account these barriers.

30. TWU’s claim to be exempt from the *Charter* and British Columbia human rights legislation does not mean that the institutionalized discrimination created by the Covenant was irrelevant to the LSUC’s accreditation decision. While this discrimination may be “legal” in the sense that TWU may not itself be subject to a *Charter* or human rights application, the LSUC was not obliged to turn a blind eye to it in considering TWU’s application. *Loyola* affirms that equality, human rights and democracy are shared values that “the state always has a legitimate interest in promoting and protecting. They enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences”.<sup>39</sup> In considering the public interest, and its own commitment to ensuring equal access to the profession, the LSUC reasonably took into account the Covenant’s mandatory requirements of students, staff and faculty to discriminate against LGBTQ people.

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<sup>37</sup> *BCCT*, *supra* at para. 25, **BoA, Tab 3**.

<sup>38</sup> See, for example, Submission from EGALE Canada, **RoP, Tab 3**; Submission from Osgoode Hall Law School OUTlaws, **RoP, Tab 14**; Submission from University of Alberta, Faculty of Law, OUTlaws, **RoP, Tab 15**; Submission from University of Ottawa OUTlaws, **RoP, Tab 16**; Submission from Mark L. Berlin, **RoP, Tab 34**; Submission from OUTlaws Canada, **RoP, Tab 59**; Submission from Katelyn Scorer to LSUC, **RoP, Tab 87**; Submission from John V. Rider to LSUC, **RoP, Tab 104**; Submission from I. Loui Dallas, **RoP, Tab 126**; Submission from David Bronskill to LSUC, **RoP, Tab 152**; Submission from Karen Andrews to LSUC, **RoP, Tab 160**, Submission from Emily Hill to LSUC, **RoP, Tab 182**; Submission from Angela Cameron, Jena McGill, and Angela Chiasson to LSUC, **RoP, Tab 195**; Submission from Valerie Hussey to LSUC, **RoP, Tab 212** .

<sup>39</sup> *Loyola*, *supra* at para. 47, **BoA, Tab 2**.

b) TWU would not be exempted under Ontario human rights law

31. It was also reasonable for the LSUC to refuse to put its stamp of approval on an institution that would violate Ontario human rights law if it were located in Ontario.<sup>40</sup> In this regard, while s. 18 of the *Code* provides an exemption from the prohibition against discrimination in the provision of services, it applies where a religious or educational institution is “primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination” and membership is “restricted to persons who are similarly identified”.<sup>41</sup> This exemption would not apply to TWU.

32. First, the proposed law school would be “primarily engaged” in the provision of legal education, not religious community building. While an organization’s purpose need not be exclusively for the protection of a identified group to qualify for the exemption,<sup>42</sup> such goals must be “primary”.<sup>43</sup> The provision of legal education is essentially secular in nature; it is not a religious obligation.<sup>44</sup> Second, s. 18 only shields the decision of an organization to restrict membership along the axis of its own group affiliation, and does not prevent other human rights claims against it.<sup>45</sup> According to TWU, it does not seek to restrict its membership to Evangelicals. Anyone, regardless of religion or creed, is permitted to attend, as long as he or she is willing to sign the Covenant.

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<sup>40</sup> See the legal opinion prepared by Andrew Pinto particularly for the Benchers’ consideration on this issue, **RoP, Tab 248**. This legal opinion forms part of LSUC’s reasons for decision: Convocation Transcript, April 10<sup>th</sup>, 2014 at p. 40, **AR, Vol. 1, Tab 3**.

<sup>41</sup> *Human Rights Code*, RSO 1990, c H.19 at s. 18 [*Code*].

<sup>42</sup> *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Inq.), **BoA, Tab 20**.

<sup>43</sup> *Brossard v. Quebec*, [1988] 2 SCR 279 at p. 324, **BoA, Tab 21**.

<sup>44</sup> For this reason, it is distinguishable from *Christian Horizons*, *supra* at paras. 77-78, where the Court found “ministering to the sick” to be a religious obligation, **BoA, Tab 12**.

<sup>45</sup> See, for example, *Tsehaye v. English District Lutheran Church, Missouri Synod*, 2009 HRTO 1921 (interim decision of Adjudicator Cook) at para. 7: “the applicants are not claiming that it is discriminatory to restrict Church membership to persons who are Lutherans, but rather that they are Lutherans who have been subject to discrimination [by their Church] on other grounds”, **BoA, Tab 22**.

33. Moreover, there is a human rights duty not to condone or further discrimination carried out by others. In *Payne*, the Ontario Board of Inquiry (as it then was) held that:

[T]here is a human rights duty not to condone or further a discriminatory act that has already occurred. To condone or further a discriminatory act would extend or continue the life of the initial discriminatory act. Indeed, it is conceivable that the subsequent discriminatory act or tail-end could be worse in impact than the beginning of the chain of discrimination.<sup>46</sup>

In considering TWU's application, the LSUC was entitled, and indeed obliged, to consider whether accreditation would condone the Covenant's barriers to LGBTQ persons seeking to enter the legal profession.

34. Finally, and in any event, the LSUC is bound by section 6 of the *Code*, which prohibits discrimination in membership in self-governing professions. Religious or educational institutions are not exempt from this prohibition.<sup>47</sup>

**iv. Public Confidence in the LSUC's Commitment to Equality Rights**

35. The LSUC's public interest mandate necessarily engages the question of how its decisions will affect public confidence in the legal system.<sup>48</sup> The Benchers at Convocation were appropriately aware of their responsibilities in this regard.<sup>49</sup> Had the LSUC condoned TWU's discriminatory practices by accrediting its law school, the decision would have sent a strong message to the public about the low value placed on the equality rights of LGBTQ persons.

36. The LSUC received many submissions spelling out precisely what accrediting TWU would mean to the LGBTQ community, and to the public at large, including:

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<sup>46</sup> *Payne v. Otsuka Pharmaceuticals*, 2002 CanLII 46516 (ON HRT) at p. 22, **BoA, Tab 23**.

<sup>47</sup> Respondents' Factum at paras. 88-89.

<sup>48</sup> *Adams v. Law Society of Alberta*, 2000 ABCA 240 at paras. 6-10, **BoA, Tab 24**; *Pharmascience v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513 at para. 36, **BoA, Tab 25**; *Kelly v. Ontario*, 2014 ONSC 3824 at paras. 37-38, **BoA, Tab 26**; *Bolton v. Law Society*, [1994] 1 W.L.R. 512, **BoA, Tab 27**.

<sup>49</sup> See the legal opinion prepared by Freya Kristjanson at p. 1873-7, **RoP, Tab 246**.

- a) “Accreditation of the program creates a public perception that the Law Society endorses TWU’s moral viewpoint, which does not serve the Law Society’s aims of serving the public without discrimination”.<sup>50</sup>
- b) “By authorizing a school that allows bigotry and hatred against my community [the LGBTQ community], you are diminishing my worth as a member and telling me that it is okay for law schools to discriminate against members of my community”.<sup>51</sup>
- c) “Recognition would also undermine all of LSUC's efforts to promote diversity in the profession. Diversity is only sustainable in an environment of tolerance”.<sup>52</sup>
- d) “A decision to accredit TWU's law graduates would effectively provide an endorsement of a school that actively discriminates against gay/lesbian students”.<sup>53</sup>
- e) “To give this group the sanction of accepting their graduates into the Law Society of Upper Canada would be to compromise the Law Society’s own tenet of acceptance of everyone and the expectation that all members of the LSUC would promote that goal”.<sup>54</sup>

37. Had the LSUC voted to accredit TWU, the decision would have adversely affected public confidence in the profession’s commitment to equality and non-discrimination, and undermined the perception of the profession by members of public, members of the profession and potential members of the profession. It was not unreasonable for the LSUC to have regard to the public’s confidence in its commitment to equality, including the equality of LGBTQ persons, and to equal access to the profession.

### C. CONCLUSION

38. In refusing TWU’s accreditation application, the LSUC chose to be on the right side of history. It ensured that no one would be blocked from accessing the legal profession in Ontario for being a member of a “highly socially vulnerable group” that has “suffered considerable historical disadvantage, stereotyping, marginalization and stigmatization within Canadian

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<sup>50</sup> Submissions from Alexandra Kirschbaum to LSUC, **RoP, Tab 91**.

<sup>51</sup> Submissions from John V. Rider to LSUC, **RoP, Tab 104**.

<sup>52</sup> Submissions from Eric Endicott to LSUC, **RoP, Tab 140**.

<sup>53</sup> Submissions from the HIV & AIDS Legal Clinic of Ontario to LSUC, **RoP, Tab 141**.

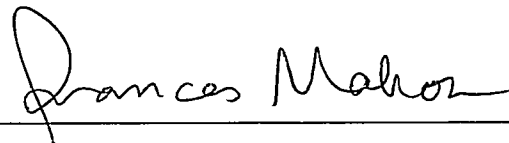
<sup>54</sup> Submissions from John Petrosniak to LSUC, **RoP, Tab 158**.

society”.<sup>55</sup> In reaching its decision, the LSUC drew upon its authority to regulate in the public interest, and its institutional expertise in regulating the legal profession. It relied upon its own expert knowledge of constitutional and human rights law, and submissions from the public which explained how profoundly the LGBTQ community would be affected by the LSUC’s decision. Its decision-making process fits comfortably with the principles of justification, transparency and intelligibility, and the outcome is defensible in respect of the facts and law. Its decision is unquestionably a proportionate balancing of the *Charter* rights and values at stake and there is no basis for this Court to intervene, even if it would have decided the matter differently.

#### **PART IV – ORDER REQUESTED**

39. Out on Bay Street and OUTlaws ask that the Court dismiss the application. Pursuant to the September 24<sup>th</sup>, 2014 order of Justice Nordheimer, they do not seek costs and no costs are to be ordered against them.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of May, 2015.




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<sup>55</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 89, *per* L’Hereaux Dubé J, dissenting (not on this point), **BoA, Tab 28**.

**SCHEDULE “A” – LIST OF AUTHORITIES**

<b>Tab</b>	<b>Authority</b>
1	<i>Doré v. Barreau du Québec</i> , 2012 SCC 54, [2007] 3 S.C.R. 607
2	<i>Loyola High School v. Québec (Attorney General)</i> , 2015 SCC 12
3	<i>Trinity Western University v. British Columbia College of Teachers</i> , 2001 SCC 31, [2001] 1 S.C.R. 772
4	“Snapshots of the Profession”, <i>Report to Convocation</i> , Equity and Aboriginal Affairs Committee of the Law Society of Upper Canada, released April 23 <sup>rd</sup> 2015
5	“Statistical Snapshots of Ontario Lawyers”, <i>Report to Convocation</i> , Equity and Aboriginal Affairs Committee of the Law Society of Upper Canada, released April 23 <sup>rd</sup> 2015
6	Sonia Lawrence, “Reflections: On Judicial Diversity and Judicial Independence”, from <i>Judicial Independence in Context</i> , Adam M. Dodek and Lorne Sossin, eds. (Toronto: Irwin Law, 2010)
7	<i>Bruker v. Marcovitz</i> , 2007 SCC 54, [2007] 3 S.C.R. 607
8	<i>Reference re Same-Sex Marriage</i> , 2004 SCC 79, [2004] 3 S.C.R. 698
9	<i>Rutherford et al v. Ontario (Deputy Registrar General)</i> , 2006 CanLII 19053, 81 O.R. (3d) 81 (CA)
10	<i>A.A. v. B.B.</i> , 2007 ONCA 2, [2007] 83 O.R. (3d) 561
11	<i>Canada (Attorney General) v. Hislop</i> , 2007 SCC 10, [2007] 1 S.C.R. 429
12	<i>Ontario Human Rights Commission v. Christian Horizons</i> , 2010 ONSC 2105, 102 O.R. (3d) 267
13	<i>Marriage Commissioners Appointed Under the Marriage Act (Re)</i> , 2011 SKCA 3, [2011] S.J. No. 3
14	<i>X.Y. v. Ontario (Minister of Government and Consumer Services)</i> , 2012 HRTO 726, [2012] O.H.R.T.D. No. 715
15	<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11, [2013] 1 SCR 467
16	<i>Canada (Attorney General) v. Bedford</i> , 2013 SCC 72, [2013] 3 SCR 1101
17	<i>Owens v. Saskatchewan (Human Rights Commission)</i> , 2006 SKCA 41, 267 DLR (4th) 733

- 18 *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69,  
[2000] 2 SCR 1120
- 19 *Vriend v. Alberta*, [1998] 1 S.C.R. 493
- 20 *Martinie v. Italian Society of Port Arthur* (1995), 24 C.H.R.R. D/169 (Ont. Bd. Inq.)
- 21 *Brossard (Town) v. Quebec (Commission des droits de la personne)*, [1988] 2 SCR 279
- 22 *Tsehay v. English District Lutheran Church, Missouri Synod*, 2009 HRTO 1921
- 23 *Payne v. Otsuka Pharmaceuticals*, 2002 CanLII 46516 (ON HRT)
- 24 *Adams v. Law Society of Alberta*, 2000 ABCA 240
- 25 *Pharmascience v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513
- 26 *Kelly v. Ontario*, 2014 ONSC 3824
- 27 *Bolton v. Law Society*, [1994] 1 W.L.R. 512
- 28 *Egan v. Canada*, [1995] 2 S.C.R. 513

**SCHEDULE “B” – TEXT OF STATUTES, REGULATIONS AND BY-LAWS**

***Law Society Act, R.S.O. 1990, c. L.8:***

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.

***Human Rights Code, R.S.O. 1990, c H.19:***

Vocational associations

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.

Special interest organizations

18. The rights under Part I to 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. R.S.O. 1990, c. H.19, s. 18; 2006, c. 19, Sched. B, s. 10.



**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  
DIVISIONAL COURT**  
(Proceeding commenced at Toronto)

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