

**COURT OF APPEAL FOR ONTARIO**

B E T W E E N :

**TRINITY WESTERN UNIVERSITY and BAYDEN VOLKENANT**

Applicants  
(Appellants)

- and -

**THE LAW SOCIETY OF UPPER CANADA**

Respondent  
(Respondent)

- and -

**CHRISTIAN LEGAL FELLOWSHIP, EVANGELICAL FELLOWSHIP  
CANADA AND CHRISTIAN HIGHER EDUCATION CANADA, JUSTICE  
CENTRE FOR CONSTITUTIONAL FREEDOMS, OUT ON BAY STREET AND  
OUTLAWS, THE ADVOCATES' SOCIETY, CRIMINAL LAWYERS'  
ASSOCIATION (ONTARIO), THE CANADIAN CIVIL LIBERTIES  
ASSOCIATION, LAWYERS' RIGHTS WATCH CANADA, CANADIAN  
SECULAR ALLIANCE, ASSOCIATION FOR REFORMED POLITICAL  
ACTION CANADA, THE SEVENTH DAY ADVENTIST CHURCH IN CANADA,  
CANADIAN CONSTITUTIONAL FOUNDATION and CANADIAN BAR  
ASSOCIATION**

Interveners

**FACTUM OF THE INTERVENER,  
THE CANADIAN CIVIL LIBERTIES ASSOCIATION**

February 25, 2016

**STIKEMAN ELLIOTT LLP**  
5300 Commerce Court West  
199 Bay Street  
Toronto, Canada M5L 1B9

**Alan L.W. D'Silva LSUC# 29225P**  
[adsilva@stikeman.com](mailto:adsilva@stikeman.com)  
Tel: (416) 869-5204  
**Alexandra Urbanski LSUC# 60643P**  
[aurbanski@stikeman.com](mailto:aurbanski@stikeman.com)  
Tel: (416) 869-6856  
Fax: (416) 947-0866

Lawyers for the Intervener,  
The Canadian Civil Liberties Association

**TO: THE REGISTRAR OF THE COURT OF APPEAL FOR ONTARIO**

**AND TO: BENNETT JONES LLP**

One First Canadian Place  
Suite 3400  
Toronto, ON M5X 1A4

**Robert W. Staley** (LSUC#27115J)

[staleyr@bennettjones.com](mailto:staleyr@bennettjones.com)

**Derek J. Bell** (LSUC#43420J)

[belld@bennettjones.com](mailto:belld@bennettjones.com)

**Ranjan K. Agarwal** (LSUC#49488H)

[agarwalr@bennettjones.com](mailto:agarwalr@bennettjones.com)

Tel.: (416) 863-1200

Fax: (416) 863-1716

**Lawyers for the Appellants,  
Trinity Western University and Brayden Volkenant**

**AND TO: BORDEN LADNER GERVAIS LLP**

44<sup>th</sup> Floor, Scotia Plaza  
40 King Street West  
Toronto, ON M5H 3Y4

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

[gpratte@blg.com](mailto:gpratte@blg.com)

**Nadia Effendi** (LSUC#49004T)

[neffendi@blg.com](mailto:neffendi@blg.com)

**Duncan Ault** (LSUC#53916R)

[dault@blg.com](mailto:dault@blg.com)

Tel.: (416) 367-6000

Fax: (416) 367-6749

**Lawyers for the Respondent,  
The Law Society of Upper Canada**

**AND TO: CHRISTIAN LEGAL FELLOWSHIP**  
1235 Fairview Street, Suite 223  
Burlington, ON L7S 2K9

**Derek M. Ross**  
[execdir@christianlegalfellowship.org](mailto:execdir@christianlegalfellowship.org)  
Tel.: (519) 208-9200

**ROCHON GENOVA LLP**  
121 Richmond Street West, Suite 900  
Toronto, ON M5H 2K1

**Peter R. Jervis**  
[pjervis@rochongenova.com](mailto:pjervis@rochongenova.com)  
Tel.: (416) 363-1867  
Fax: (416) 363-0263

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

**AND TO: THE JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS**  
253-7620 Elbow Drive SW  
Calgary, AB T2V 1K2

**John Carpay**  
[jcarpay@jccf.ca](mailto:jcarpay@jccf.ca)  
Tel.: (403) 796-8110

**DOUCETTE BONI SANTORO FURGIUELE**  
1100-20 Dundas Street West  
Toronto, ON M5G 2G8

**Daniel Santoro**  
[santoro@dsflitigation.com](mailto:santoro@dsflitigation.com)  
Tel: (416) 922-7272  
Fax: (416) 342-1766

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

**AND TO: VINCENT DAGENAIS GIBSON LLP**  
260 Dalhousie Street, Suite 400  
Ottawa, ON K1N 7E4

**Albertos Polizogopoulos**  
[albertos@vdg.ca](mailto:albertos@vdg.ca)  
**Kristin Maria Barsoum Debs**  
[kristin@debslaw.ca](mailto:kristin@debslaw.ca)

Tel.: (613) 241-2701  
Fax: (613) 241-2599

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

**AND TO: PAUL JONATHAN SAGUIL**  
66 Wellington Street West  
Toronto Dominion Tower  
Toronto, ON M5K 1A2

**Paul Jonathan Saguil (LSUC# 55360B)**  
[paul.jonathan.saguil@gmail.com](mailto:paul.jonathan.saguil@gmail.com)

Tel: (416) 308-1719

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

**Marlys A. Edwardh (LSUC# 15939K)**  
[medwardh@goldblattpartners.com](mailto:medwardh@goldblattpartners.com)

**Vanessa Payne (LSUC# 34422F)**  
[vpayne@goldblattpartners.com](mailto:vpayne@goldblattpartners.com)

**Frances Mahon (LSUC# 65613T)**  
[fmahon@goldblattpartners.com](mailto:fmahon@goldblattpartners.com)

Tel.: (416) 979-6070  
Fax: (416) 591-7333

**Lawyers for the Intervener, Out on Bay Street and OUTlaws**

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

**Joanna Radbord**  
[Joanna@mccarthyco.ca](mailto:Joanna@mccarthyco.ca)

Tel: (416) 238-7916  
Fax: (416) 862-9001

**PALIARE ROLAND**  
Barristers and Solicitors  
155 Wellington Street West  
35<sup>th</sup> Floor  
Toronto, ON M5V 3H1

**Chris G. Paliare**  
[chris.paliare@paliareroland.com](mailto:chris.paliare@paliareroland.com)

Tel: (416) 646-4318  
Fax: (416) 646-4301

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

**AND TO: SIMCOE CHAMBERS**  
116 Simcoe Street, Suite 100  
Toronto, ON M5H 4E2

**John Norris**  
[john.norris@simcoechambers.com](mailto:john.norris@simcoechambers.com)

Tel: (416) 596-2960  
Fax: (416) 596-2598

**BREESE DAVIES**  
Barrister & Solicitor  
171 John Street, Suite 101  
Toronto, ON M5T 1X3

**Breese Davies**  
[bdavies@bdlaw.ca](mailto:bdavies@bdlaw.ca)

Tel: (416) 649-5061  
Fax: (416) 352-7733

**Lawyers for the Intervener, Criminal Lawyers' Association**

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

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

Tel: (613) 297-5171

Fax: (613) 249-3238

**André Marshall Schutten**

[andre@ARPACanada.ca](mailto:andre@ARPACanada.ca)

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

**AND TO: FARRIS, VAUGHAN, WILLS & MURPHY LLP**

700 W. Georgia St. #25  
Vancouver, BC V7Y 1B3

Tel: (604) 661-9341

Fax: (604) 661-9349

**Tim Dickson**

[tdickson@farris.com](mailto:tdickson@farris.com)

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

**AND TO: MAGRATH'S INTERNATIONAL LEGAL COUNSEL**

393 University Avenue  
Suite 2000  
Toronto, ON M5G 1E6

Tel: (416) 931-0463

Fax: 1-888-816-8861

**Gavin Magrath**

[gavin@magraths.ca](mailto:gavin@magraths.ca)

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

**AND TO: URSEL PHILLIPS FELLOWS HOPKINSON LLP**

555 Richmond Street West  
Suite 1200  
Toronto, ON M5V 3B1

Tel.: (416) 969-3515

Fax: (416) 968-0325

**Susan Ursel**

[sursel@upfhlaw.ca](mailto:sursel@upfhlaw.ca)

**Amy Sakalauskas**

[asakalauskas@outlook.com](mailto:asakalauskas@outlook.com)

**David Grossman**

[dgrossman@imk.ca](mailto:dgrossman@imk.ca)

**Sage Neufeld**

[sneufeld@upfhlaw.ca](mailto:sneufeld@upfhlaw.ca)

**Kristen Allen**

[kallen@upfhlaw.ca](mailto:kallen@upfhlaw.ca)

**Ashley Schulteman**

[aschulteman@upfhlaw.ca](mailto:aschulteman@upfhlaw.ca)

**Audrey Boctor**

[aboctor@imk.ca](mailto:aboctor@imk.ca)

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

**AND TO: MILLER THOMSON LLP**

700-9<sup>th</sup> Avenue SW, Suite 3000  
Calgary, AB T2P 3V4

**Gerald Chipeur, Q.C.**

[gchipeur@millerthomson.com](mailto:gchipeur@millerthomson.com)

Tel.: (403) 298-2434

Fax: (403) 262-0007

**Lawyers for the Intervener,  
Seventh-Day Adventist Church of Canada**

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

Tel: (416) 927-1211  
Fax: (416) 862-7602

**Sam Goldstein**  
[sam@samgoldstein.ca](mailto:sam@samgoldstein.ca)

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



**TABLE OF CONTENTS**

**PART I - OVERVIEW..... 1**

**PART II - FACTS..... 2**

**PART III - ISSUES AND THE LAW ..... 2**

    A.    GOVERNING PRINCIPLES..... 2

    B.    PRIVACY RIGHTS IMPLICATIONS..... 3

    C.    POST-GRADUATION DISCLOSURE AND DISCIPLINARY DILEMMAS..... 8

**PART IV - ORDER SOUGHT ..... 10**

## PART I - OVERVIEW

1. The Canadian Civil Liberties Association (the “CCLA”) is a national, non-profit, independent, non-governmental organization that has been advocating for the civil liberties and human rights and freedoms of Canadians for more than fifty years. The manner in which this Honourable Court addresses how religious and equality rights are to be reconciled in the context of this appeal is of significant public interest and falls squarely within the CCLA’s mandate to promote and protect civil liberties and individual rights.

2. The CCLA’s position is that the decision of the Law Society of Upper Canada (the “Law Society”), to refuse to accredit the law school proposed by Trinity Western University (“TWU”), was fully debated, well informed, reasonable and took into account and reconciled all the competing rights and interests, including the appellants’ religious rights and beliefs. As such, the reconciliation reached by the Law Society was reasonable and was properly upheld by the Divisional Court.

3. The TWU Community Covenant (the “Covenant”) has a discriminatory effect on many groups and individuals who are protected by enumerated or analogous protected grounds under provincial human rights statutes and the *Canadian Charter of Rights and Freedoms*<sup>1</sup> including: sexual orientation, gender, marital status, and religion. The Law Society cannot directly or indirectly discriminate by accrediting a law school that discriminates directly on these grounds. To accredit the TWU law school, with its discriminatory Covenant, is to condone and promote discriminatory conduct and to diminish the rights and freedoms of those unfairly and unjustifiably affected in a discriminatory manner by the Covenant.

4. The Covenant is an impermissible discriminatory intrusion into the rights, private lives

---

<sup>1</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [“*Charter*”].

and activities of various groups and individuals that are protected by human rights statutes and the *Charter*. Moreover, as set out below, the accreditation of TWU's proposed law school, with its discriminatory Covenant, leads to a myriad of privacy and "disciplinary conduct" issues for the Law Society.

## **PART II - FACTS**

5. The CCLA adopts the facts as presented by the Law Society.

## **PART III - ISSUES AND THE LAW**

6. Pursuant to the Order of the Honourable Associate Chief Justice Hoy dated December 16, 2015, the CCLA herein focuses its submissions on the following two issues:

- (1) the broader public policy concerns and privacy implications associated with requiring the disclosure of one's sexual activity, sexual orientation and/or beliefs through the signing and ongoing purported adherence to the Covenant, and the consequences that the ideals articulated in the Covenant translate into prohibitions on private conduct; and
- (2) the disciplinary and licensing issues that the Law Society and future members of the Law Society who graduate from the TWU law school may face as a result of post-graduation disclosure that they had either been untruthful in affirming the Covenant, or had failed to abide by the terms of the Covenant because they are a member of the LGBTQ community and/or because the Covenant never expressed their true beliefs and/or their beliefs had changed during their time at law school.

### **A. Governing Principles**

7. It is well established that the Law Society, must act in the public interest and govern itself and its members in accordance with the *Charter* and human rights, such as the constitutional guarantees of equality and freedom from discrimination.<sup>2</sup> The guarantee of equality, as noted by the Supreme Court of Canada, reflects "the fondest dreams, the highest

---

<sup>2</sup> *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, 2012 SCC 12 at para. 24, Joint Book of Authorities ("JBA"), Tab 10.

hopes and finest aspirations of Canadian society”,<sup>3</sup> and recognizes the inherent dignity in, and equality of, every human being. The right to equality and non-discrimination is one that “the state always has a legitimate interest in promoting and protecting” as “they enhance the conditions for integration and points of civic solidarity by helping connect us despite our differences”.<sup>4</sup>

8. A long line of human rights jurisprudence mandates that courts prohibit discrimination on prohibited grounds, such as sex, sexual orientation, and religion; and that human rights legislation and *Charter* rights be interpreted in a manner consistent with overarching goals and the recognition that such legislation is often “the final refuge of the disadvantaged and the disenfranchised”.<sup>5</sup>

9. In acting in the public interest and having regard to the foregoing principles, the Law Society could not, and should not, discriminate indirectly by accrediting and approving the practices of a law school, such as TWU with its mandatory Covenant, that directly discriminates against individuals and groups based on sexual orientation, gender, marital status and religion.

#### **B. Privacy Rights Implications**

10. The impermissible and discriminatory incursion of rights, and the intrusion into the private lives of prospective law students, graduates, faculty and staff must be viewed in the context of the constraints and pressures associated with pursuing a legal education (such as the number of available law school spots), democratic rights of privacy and equality, and the realities of 2016 life in Canada.

---

<sup>3</sup> *Vriend v. Alberta*, [1998] 1 S.C.R. 493 at para. 67 [“*Vriend*”], JBA, Tab 60.

<sup>4</sup> *Loyola High School v. Québec (Attorney General)*, [2015] 1 S.C.R. 613, 2015 SCC 12 at para. 47, JBA, Tab 49.

<sup>5</sup> *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at para. 94, JBA, Tab 185.

11. The Divisional Court summarized the evidence of the substantial limitation on the number of available spots at Canadian law schools. In 2013, for instance, there were approximately 9,000 law school applicants in Canada for only 2,782 law school spots.<sup>6</sup> As found by the Divisional Court, “[i]ndividuals who refuse to sign the Covenant will, perforce, be denied admission”.<sup>7</sup> Consequently, a potential law school student, vying for one of those coveted spots in a Canadian law school, would be faced with an unacceptable dilemma in applying to TWU’s law school – they are aware that no person can become a student unless they sign the mandatory Covenant, which purports to bind them to a set of beliefs and restrictions over their private sex lives and personal beliefs.

12. The foregoing dilemma faced by applicants and students is profound when considered in the larger context of the use of the Covenant and the fundamental fact that the commitments being asked of in the Covenant are, by any contemporary, democratic standards, discriminatory and an impermissible intrusion to the private lives of the individuals.

13. As recognized by the Divisional Court, in order for individuals who do not hold the beliefs that TWU espouses, to attend TWU, they must openly and contractually renounce those beliefs and commit instead to TWU’s beliefs, by signing the Covenant. Those applicants and eventual students who do not share in TWU’s beliefs – particularly members of the LGBTQ community – but who wish to obtain one of its coveted law school spots are otherwise encouraged “to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered”, or to be forced to

---

<sup>6</sup> *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250 (Div. Ct.) [“*TWU v. LSUC*”] at para. 67, Appeal Book and Compendium (“**Appeal Book**”), Tab 4.

<sup>7</sup> *TWU v. LSUC*, *supra* at para. 62, Appeal Book, Tab 4.

forfeit potential access to the TWU law school and the practice of law.<sup>8</sup> The “deceptive” practice itself is caused by an unfair, unwarranted, and discriminatory intrusion into their private lives and corresponding unjustified incursions into legal rights.

14. Any student who signs the Covenant, but who then does not adhere to its restrictions (whether on or off campus), is at risk of being expelled.<sup>9</sup> TWU reserves the right to “question, challenge or discipline any member in response to actions that impact personal or social welfare”.<sup>10</sup> It is not clear how the process of “challenging or questioning” will be conducted (or could be conducted) to inquire into one’s most private personal life, who will conduct such an inquiry, let alone what kind of “proof” will be adequate to meet the test of “non-compliance”. What is clear is that the sanctions, which are expanded upon in TWU’s Student Handbook, are severe and include: discipline, dismissal, or refusal of re-admission to the University.<sup>11</sup> Therefore, the obligation to follow the Covenant, both in one’s beliefs and actions, appears to be an ongoing one, which will somehow be “policed” by the TWU in ways and means that are unclear, but which violate clearly legislative and constitutionally guaranteed legal protections and rights regarding, equality, non-discrimination, privacy and interrelated human rights and civil liberties. The inquiry into one’s private sex life and the ongoing “monitoring” of one’s private life is unwarranted, discriminatory and completely divorced from modern day life in Canada in 2016, and the requirements of a modern day law school education.

15. Applicants and students who do not truly believe in the terms of the Covenant, or who may have believed it at one time, but whose views have evolved over time, are placed in an

---

<sup>8</sup> *TWU v. LSUC, supra* at para. 112, Appeal Book, Tab 4.

<sup>9</sup> *TWU v. LSUC, supra* at para. 63, Appeal Book, Tab 4.

<sup>10</sup> *TWU v. LSUC, supra* at para. 63, Appeal Book, Tab 4; Covenant, Exhibit Book, Vol. 1, Tab 1C.

<sup>11</sup> *TWU v. LSUC, supra* at para. 63; Student Handbook, Exhibit Book, Vol. 1, Tab 1M.

untenable position having been “deceptive” in their declarations, or of presumably having a positive obligation to disclose their personal private beliefs and/or sexual activities to their educational institution, and in turn, face severe and broad sanctions and risks. It follows that the Covenant, by its nature, its words, and its ongoing obligations and sanctions, is an impermissible discriminatory intrusion into the private lives of the applicants and future law students in this and other ways, with perhaps the most profound effect being on those individuals who are members of the LGBTQ community.

16. The Divisional Court points out that the following are purported “freedoms” that TWU asserts are granted to prospective students at TWU law school:

- the ability to “hold and express diverse opinions on moral, ethical and religious issues”, including “legal, religious and social issues arising in relation to homosexuality and same-sex relationships”;<sup>12</sup>
- “an environment in which sexual minorities are supported, loved, and respected” and where members are required and accountable “to treat people and ideas with charity and respect”, and “demonstrate concern for the well-being of others”;<sup>13</sup> and
- a community free of “harassment, shaming, ostracizing, contempt, humiliation, intimidation or insults” and “homophobic, disrespectful or discriminatory remarks or behaviour.”<sup>14</sup>

17. However, any practical, and common sense, approach to the realities of the situation discloses that these so called freedoms, or assurances of tolerance and inclusiveness, are illusory and hollow when considered in the context of the real life workings of the Covenant. The Divisional Court recognized that “TWU’s technically correct statement that it ‘does not ban or prohibit admission’ to LGBTQ students must be read and understood in this context”.<sup>15</sup>

18. Students, staff and faculty cannot really express diverse opinions on moral, ethical

---

<sup>12</sup> *TWU v. LSUC, supra* at para. 9, Appeal Book, Tab 4.

<sup>13</sup> *TWU v. LSUC, supra* at para. 15, Appeal Book, Tab 4.

<sup>14</sup> *TWU v. LSUC, supra* at para. 15, Appeal Book, Tab 4.

<sup>15</sup> *TWU v. LSUC, supra* at para. 112, Appeal Book, Tab 4.

and religious issues without running head on into a conflict with the terms of the Covenant. For example, how can an LGBTQ individual actually express their own beliefs about their own homosexuality, without also disclosing that the Covenant that they signed is not accurate, or denies their sexuality? How is the Covenant itself and the dire sanctions for non-compliance not direct discrimination against LGBTQ individuals? How is the TWU community free from discriminatory behaviour when it requires students to sign a Covenant, which is plainly discriminatory on its face and a breach of their privacy and equality right?

19. The inherent conflict and impermissible intrusion into the private lives of applicants and law students is perhaps most profound and damaging to those members of the LGBTQ community who are being asked, by way of the signed Covenant to not only impart private information that is not required for educational purposes, but to denounce their sexual orientation, or as the Supreme Court of Canada described over 20 years ago, to disavow or conceal the “deeply personal characteristic that is either unchangeable or changeable only at unacceptable personal cost”.<sup>16</sup> In other words, to deny the very essence of who they are.<sup>17</sup> Fundamentally, prospective students and future students of the TWU law school should not be placed in this intolerable position of conflict.

20. By signing the Covenant, LGBTQ persons must agree to deny or “to bury a crucial component of their very identity, by forsaking any form of intimacy with those persons whom they would wish to form a relationship”.<sup>18</sup> Modern day human rights jurisprudence and common sense, however, has rejected the notion that sexual conduct can be separated from

---

<sup>16</sup> *Egan v. Canada*, [1995] 2 S.C.R. 513 at para. 5, JBA, Tab 44; see also, *Vriend, supra* at para. 186, JBA, Tab 60.

<sup>17</sup> In *TWU v. British Columbia College of Teachers*, 2001 SCC 31 at para. 69 [“*TWU v. BCCT*”], JBA, Tab 186, L’Heureux-Dubé J. (dissenting), challenged the notion that “it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.”

<sup>18</sup> *TWU v. LSUC, supra* at para. 113, Appeal Book, Tab 4.



sexual identity.<sup>19</sup> Accordingly, the statement that TWU “does not overtly ban or prohibit admission to lesbian, gay, bisexual, or transgendered students or faculty or encourage discrimination of any kind against LGBTQ individuals” does not hold any value.

**C. Post-Graduation Disclosure and Disciplinary Dilemmas**

21. The constraints and pressures associated with pursuing a legal education are undeniable, and as detailed above, competition is fierce amongst applicants vying for coveted law school spots across Canadian law schools. However, as addressed by the Divisional Court, unlike the proposed TWU law school, no other accredited law school has a policy that discriminates against a class of applicants (in this case LGBTQ applicants) seeking entry to that law school.<sup>20</sup> Consequently, accrediting TWU law school would create a benefit based on prohibited discriminatory grounds, as those who are willing to sign the discriminatory Covenant will have greater odds to access a legal education than those unwilling to sign it.

22. The foregoing exposes how the Covenant, in fact, puts individuals who do not hold the beliefs that TWU espouses, or never held such beliefs, in the untenable position of having to choose between forfeiting an opportunity to attain a coveted law school spot in a crowded field, or instead to sign the Covenant and effectively engage in “an active deception, in terms of their true beliefs and their true identity”.<sup>21</sup> However, this so called “active deception” combined with the ongoing nature of the obligations and sanctions in the Covenant (as detailed above), also raises incredible uncertainty for TWU law students after they graduate, an issue that is not addressed by the Divisional Court.

---

<sup>19</sup> *TWU v. BCCT*, *supra* at para. 69, JBA, Tab 186; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, 2013 SCC11, at para. 123, JBA, Tab 61.

<sup>20</sup> *TWU v. LSUC*, *supra* at para. 99, Appeal Book, Tab 4.

<sup>21</sup> *TWU v. LSUC*, *supra* at para. 106, Appeal Book, Tab 4.

23. As a public body, in carrying out its functions, duties and powers, the Law Society must have regard to the public interest.<sup>22</sup> It cannot, as pointed out by the Law Society in its factum, “exercise its statutory licensing power, including educational requirements, in a discriminatory manner”.<sup>23</sup>

24. The possibility of the imposition of post-graduation sanctions by TWU raises serious licensing and “disciplinary” dilemmas for the Law Society and future members of the Law Society who graduate from TWU. As a consequence of the Covenant’s outwardly ongoing obligations of accountability,<sup>24</sup> there is potential for staff, students and faculty to make post-graduation disclosure against fellow TWU graduates whose views may have evolved over time, or who no longer adhere to the beliefs and restrictions that the Covenant bound them to. This would obviously be the case for many members of the LGBTQ community and the large population of Canadians who engage in sexual relations outside of the TWU Covenant’s definition of marriage. It could also, as recognized by the Divisional Court, extend to “women generally”, “persons of any gender who might prefer, for their own purposes to live in a common law relationship”, and “those persons who have other religious beliefs”.<sup>25</sup> This quandary is real and should not exist in the first place. How is the Law Society supposed to respond to complaints it may receive that a TWU graduate who has been called to the Ontario Bar and is alleged to have “lied about”, or failed to abide by the terms of the Covenant?

25. The ongoing obligations to TWU that could lead to the post-graduation “disclosure” described above, the potential sanctions, such as expulsion, would presumably also extend

---

<sup>22</sup> *TWU v. LSUC*, *supra* at para. 28, Appeal Book, Tab 4.

<sup>23</sup> Law Society’s Factum at para. 59; see also para. 19 of the Factum, which highlights the Law Society’s mandate and adoption of policies that promote equality, diversity, and combat discrimination of any kind.

<sup>24</sup> The Covenant encourages students, staff and faculty to hold each other accountable to the commitments made in the Covenant; Student Handbook, Exhibit Book, Vol. 1, Tab 1M, p. 85.

<sup>25</sup> *TWU v. LSUC*, *supra* at para. 104, Appeal Book, Tab 4.

beyond graduation. In effect, this means that TWU law school could still have the authority to revoke a law degree if an individual was found, or presumptively “alleged”, to be in breach of the Covenant. If the Law Society was to accredit TWU’s proposed law school this would undoubtedly lead to a regulatory quandary for the Law Society. The Law Society would have to address how to deal with a licensee who no longer has a law degree because their degree from an “accredited law school” has been revoked for alleged acts of conduct and/or beliefs, against the Covenant, which are not unlawful, but to the contrary, are protected under the *Charter*, Canadian human rights law, and equity principles. The Law Society would be in the untenable position of having endorsed, sanctioned and approved of these discriminatory practices against their own public policy and legal obligations. There has been no consideration on how to address such licensing and disciplinary issues, which truly exemplify some of the practical realities that can result if the Law Society was to accredit TWU’s proposed law school.

#### **PART IV - ORDER SOUGHT**

26. The CCLA asks that this Honourable Court dismiss the appeal. Pursuant to the Order of the Honourable Associate Chief Justice Hoy, the CCLA does not seek costs, and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 25th day of February, 2016.



**Alan L. W. D'Silva/ Alexandra M. Urbanski**  
STIKEMAN ELLIOTT LLP

Counsel for the Intervener,  
The Canadian Civil Liberties Association

**SCHEDULE “A”  
LIST OF AUTHORITIES**

<b><u>Case</u></b>	<b><u>Reference</u></b>
<i>Doré v. Barreau du Québec</i> , 2012 SCC 12	JBA, Tab 10
<i>Vriend v. Alberta</i> , [1998] 1 S.C.R. 493	JBA, Tab 60
<i>Loyola High School v. Québec (Attorney General)</i> , 2015 SCC 12	JBA, Tab 49
<i>Canada (Attorney General) v. Mossop</i> , [1993] 1 S.C.R. 554	JBA, Tab185
<i>Trinity Western University v. Law Society of Upper Canada</i> , 2015 ONSC 4250	Appeal Book, Tab 4
<i>Egan v. Canada</i> , [1995] 2 S.C.R. 513	JBA, Tab 44
<i>Trinity Western University v. British Columbia College of Teachers</i> , 2001 SCC 31	JBA, Tab 186
<i>Saskatchewan (Human Rights Commission) v. Whatcott</i> , 2013 SCC 11	JBA, Tab 61

**TRINITY WESTERN UNIVERSITY and  
BRAYDEN VOLKENANT**  
Appellants

and

**THE LAW SOCIETY OF UPPER  
CANADA**  
Respondent

Court of Appeal File No. C61116

---

**COURT OF APPEAL FOR ONTARIO**

Proceeding commenced at Toronto

---

**FACTUM OF THE INTERVENER,  
THE CANADIAN CIVIL LIBERTIES  
ASSOCIATION**

---

**STIKEMAN ELLIOTT LLP**  
Barristers & Solicitors  
5300 Commerce Court West  
199 Bay Street, Toronto, Canada M5L 1B9

**Alan L.W. D'Silva LSUC# 29225P**  
[adsilva@stikeman.com](mailto:adsilva@stikeman.com)  
Tel: (416) 869-5204

**Alexandra Urbanski LSUC# 60643P**  
[aurbanski@stikeman.com](mailto:aurbanski@stikeman.com)  
Tel: (416) 869-6856  
Fax: (416) 947-0866

Lawyers for the Intervener,  
The Canadian Civil Liberties Association