

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent

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

GOLDBLATT PARTNERS LLP

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

Marlys Edwardh, LSUC#: 15939K

Vanessa Payne, LSUC #: 34422F

Frances Mahon, LSUC#: 65613T

Tel: 416-979-6970

Fax: 416-591-7333

PAUL JONATHAN SAGUIL

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

Paul Jonathan Saguil, LSUC#: 55360B

Tel.: 416-308-1719

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

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

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

Solicitors for the Appellants, Trinity Western University and Brayden Volkenant

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

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

Solicitors for the Respondent, The Law Society of Upper Canada

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

Bencher Beth Symes, April 24, 2014,
speaking at Convocation

PART I - NATURE OF THE MOTION

1. Out On Bay Street and the OUTlaws groups at York University's Osgoode Hall Law School, the Bora Laskin Faculty of Law at Lakehead University, the Faculty of Law at the University of Windsor, Western Law, the University of Ottawa Faculty of Law, and the University of Toronto Faculty of Law's Out in Law group (together the "OUTlaws") seek leave to intervene jointly as friends of the Court in this appeal. The appeal, brought by Trinity Western University ("TWU"), seeks to overturn the Divisional Court's decision upholding the Law Society of Upper Canada's ("LSUC") refusal to accredit TWU's proposed law school.

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

3. Specifically, Out On Bay Street and OUTlaws propose to make submissions regarding: (i) the discriminatory impact of TWU’s Community Covenant on LGBTQ students and prospective students; (ii) the nature and scope of the public interest that the LSUC was entitled to consider in assessing TWU’s application to accredit its proposed law school, in particular as it relates to equality rights and non-discrimination; (iii) the reasons why the 2001 decision of the Supreme Court of Canada in *British Columbia College of Teachers v. Trinity Western University* (hereinafter, “*BCCT*”) does not govern this appeal; and (iv) the appropriate analytical approach to balancing, if it is required, the equality rights of LGBTQ students and freedom of religion in the context of the LSUC’s obligation to consider the public interest.

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

PART II - THE FACTS

A. Out On Bay Street and OUTlaws

5. Out On Bay Street is a non-profit organization that facilitates the professional development of LGBTQ law and business students as they transition through school to a career, and seeks to build a national professional network of LGBTQ persons.¹ Its objectives include: (1) providing LGBTQ students with resources to leverage their confidence, skills, and knowledge to enable them to distinguish themselves and act as leaders of their communities and professions; and (2) establishing a positive public profile for the advancement of the LGBTQ community in the Canadian workforce, including the legal profession.²

6. In furtherance of these objectives, Out On Bay Street holds an annual Conference and Career Fair, which draws hundreds of LGBTQ law and business students from undergraduate and professional faculties from universities across the country. This Conference is the only LGBTQ student conference for professionals in Canada.³ Out On Bay Street also offers monthly networking socials for LGBTQ professionals and students, a speaker series, scholarships, and the annual *Leaders To Be Proud Of Awards*, which recognize role models and community leaders on LGBTQ issues, workplace diversity, and inclusiveness.⁴

7. Among Out On Bay Street's key partnerships are the LGBTQ student groups at law schools across Canada, generally known as the OUTlaws. The OUTlaws have a long tradition of advancing the interests of LGBTQ law students, and serve four primary purposes: (1) fostering

¹ Affidavit of Douglas Judson, sworn November 20, 2105, para. 3, Motion Record, Tab 2, p. 10 ["Judson affidavit"].

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

³ Judson Affidavit, para. 4, Motion Record, Tab 2, p. 10.

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

mentorship relationships with members of the LGBTQ legal community; (2) facilitating advocacy, learning, and information-sharing around legal issues that impact the LGBTQ community; (3) providing LGBTQ students with opportunities to socialize in a queer-friendly atmosphere; and (4) working towards making law schools and legal education more inclusive for LGBTQ individuals.⁵ The OUTlaws network across Canada includes hundreds of law students, as well as alumni who have since established themselves professionally in various career environments, including law firms, government, and corporate legal departments.⁶

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

8. TWU has a Community Covenant Agreement that all TWU students, faculty, and staff must sign annually. It includes a clause that requires TWU members to promise to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman”.⁷ Signing the Community Covenant constitutes a “solemn pledge” that creates a “contractual agreement and a relational bond” between the student and the university. The expectations set out in the Covenant “apply to both on and off TWU’s campus and extension sites”.⁸

9. In order to ensure the “integrity of the TWU community”, the Covenant provides that all members of the TWU community are responsible “to hold one another accountable to the mutual commitments outlined in this covenant,” meaning that staff, students and faculty should bring

⁵ Judson Affidavit, para. 10, Motion Record, Tab 2, p. 13.

⁶ Judson Affidavit, para. 11, Motion Record, Tab 2, p. 13.

⁷ Community Covenant, pp. 2-3, Motion Record, Tab 2F, pp. 188-189. This section of the Covenant cites Romans 1:26-27 and Proverbs 6:23-35. In the King James translation of the Bible, Romans 1:26-27 refers to “vile affections” and changing “natural use into that which is against nature” and, in the New International Version of the Bible, refers to “shameful” and “unnatural” “lusts”. Proverbs 6:23-35 refers to adultery.

⁸ Community Covenant, pp. 1, 5, Motion Record, Tab 2F, p. 187, 191.

formal complaints when breaches of the Covenant are suspected. TWU “provides formal accountability procedures to address actions by community members that represent a disregard for this covenant”.⁹ Breaching the Covenant by engaging in “sexual misconduct” (which includes same sex relationships) can result in discipline, including suspension and expulsion.¹⁰

10. Out On Bay Street and the OUTlaws believe that requiring students, on pain of sanction, to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman” is inherently discriminatory to LGBTQ students at or applying to TWU, and is particularly exclusionary toward both married and unmarried same-sex couples and trans-identified people. It erects a significant barrier to legal education for LGBTQ students by effectively making them ineligible for scarce law school positions.¹¹

11. TWU does not limit its exclusionary practices to the Community Covenant. Recently, TWU invited Mark Yarhouse to speak about “Sexual Identity and Gender Dysphoria”.¹² Mark Yarhouse is an American psychology professor who has researched and promoted the efficacy of so-called “conversion therapy”, which seeks to change a person’s sexual orientation from gay to straight.¹³ In Ontario, conversion therapy for persons under 18 is now prohibited under the *Regulated Health Professions Act*, and is no longer insured by the Ontario Health Insurance Plan.¹⁴ The United Nations Committee Against Torture has expressed concern about the practice of conversion therapy in the United States, noting that conversion therapy has been condemned

⁹ Community Covenant, p. 5, Motion Record, Tab 2F, p. 191.

¹⁰ Student Handbook, pp. 4-5, Motion Record, Tab 2G, p. 196-197.

¹¹ Judson Affidavit, para. 15, Motion Record, Tab 2, p. 14-15.

¹² TWU Hearts and Minds Conference Listing, Motion Record, Tab 2I, p. 202-203.

¹³ Andrea Woo, “Controversial sexual-identity speaker sparks debate at B.C. university”, *The Globe and Mail* (3 November 2015), Motion Record, Tab 2H, p. 199-200.

¹⁴ Bill 77, *Affirming Sexual Orientation and Gender Identity Act, 2015*, Motion Record, Tab 2J, p. 205.

by every major medical organization and can lead to severe depression and even suicide.¹⁵ Earlier this year, the United Nations Human Rights Council called for the end of conversion therapy, describing it as a form of torture and a human rights violation.¹⁶ Even while recognizing the importance of academic freedom, inviting a proponent of conversion therapy to speak on “Sexual Identity and Gender Dysphoria” sends a clear message about what TWU considers to be “healthy” sexuality, and creates an unsafe environment for LGBTQ staff, students and faculty.

12. Law schools are the primary gatekeeper to the legal profession. No one can become a lawyer without first completing law school. TWU’s Community Covenant erects a significant barrier to legal education for LGBTQ law students and prospective law students by effectively making them ineligible for scarce law school positions. Moreover, LGBTQ persons still experience barriers to equality in the legal profession in Ontario.¹⁷ It is the position of Out On Bay Street and OUTlaws that the LSUC would have condoned TWU’s discriminatory conduct and acted contrary to the public interest if it had accredited TWU’s proposed law school.¹⁸

13. Out On Bay Street and the OUTlaws have a special interest and concern in ensuring that LGBTQ students’ access to legal education and the legal profession is offered on equitable terms, based on merit and qualifications.¹⁹ For this reason Out On Bay Street and the OUTlaws have attempted to ensure at each stage of the process that the interests and unique perspective of LGBTQ students are heard and understood by the decision-makers charged with determining the

¹⁵ Press release from the National Centre for Lesbian Rights dated November 12, 2014, Motion Record, Tab 2K, p. 210.

¹⁶ Report of the Office of the United Nations High Commissioner for Human Rights, dated May 4, 2015, Motion Record, Tab 2L, p. 212.

¹⁷ Law Society of Upper Canada, “Sexual Orientation and Gender Identity: Creating an Inclusive Work Environment”, p. 8, Motion Record, Tab 2M, p. 242.

¹⁸ Judson Affidavit, para. 19, Motion Record, Tab 2, p. 16.

¹⁹ Judson Affidavit, para. 20, Motion Record, Tab 2, p. 17.

important questions raised by TWU's accreditation application.²⁰ The OUTlaws chapters in Nova Scotia and British Columbia have also been granted leave to intervene in similar proceedings in those provinces.²¹ Most recently, Out On Bay Street and the OUTlaws intervened in *TWU v. LSUC*, where they provided the following oral and written submissions:

- The authority of the LSUC to consider TWU's discriminatory practices towards LGBTQ staff, student and faculty alongside the systemic barriers for LGBTQ persons seeking to access or enter the legal profession; and
- The reasonableness of the LSUC's refusal to accredit TWU, in light of its broad public interest mandate. This mandate, properly construed, allowed it to consider:
 - (a) the significant advances in LGBTQ equality rights, as reflected in jurisprudential developments since the Supreme Court of Canada's 2001 decision in *BCCT*, and to conclude it was not binding;
 - (b) TWU's insupportable distinction between sexual identity and sexual conduct within the Covenant;
 - (c) the LSUC's requirement to consider *Charter* and human rights values; and
 - (d) the LSUC's need to maintain public confidence in its commitment to equality rights.²²

14. Out On Bay Street and the OUTlaws now seek leave to intervene in this appeal so that, unlike the proceedings before Convocation, "the voices of out gays and lesbians, who are not represented equitably in our profession", are not missing.²³

²⁰ Judson Affidavit, paras. 21-24, Motion Record, Tab 2, p. 17-18; Supplementary Affidavit of Douglas Judson sworn November 30, 2015, paras. 2-6, Motion Record, Tab 3, p. 354-356.

²¹ Judson Affidavit, para. 12, Motion Record, Tab 2, p. 13. In Nova Scotia, the Schulich School of Law OUTlaw Society has been granted leave to intervene before the Nova Scotia Court of Appeal in *Trinity Western University v. Nova Scotia Barristers' Society*. In British Columbia, OUTlaws chapters from the University of Victoria School of Law, the University of British Columbia Law School and Thompson Rivers University have been granted leave to jointly intervene before the British Columbia Supreme Court in the judicial review of the Law Society of British Columbia's refusal to accredit TWU.

²² Judson Affidavit, para. 21, Motion Record, Tab 2, p. 17-18.

PART III -ISSUES AND THE LAW

A. General Principles

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

16. When considering a motion for leave to intervene, courts should consider "the nature of the case, the issues which arise and the likelihood of the applicant being able to make a useful contribution to the resolution of the appeal without causing injustice to the immediate parties."²⁴ In *Bedford*, this Honourable Court held that to be granted leave to intervene, the proposed intervener "has a real, substantial and identifiable interest in the subject matter of the proceedings; it has an important perspective distinct from the immediate parties; or it is a well recognized group with a special expertise and a broadly identifiable membership base".²⁵

17. Finally, in public interest and constitutional cases, which may have a significant impact on persons who are not immediate parties to the proceedings, the courts have relaxed the traditional rules to allow for participation by interveners, such that the threshold for granting intervener status is lower than it is for a private interest case.²⁶

²³ Judson Affidavit, para. 26, Motion Record, Tab 2, p. 19.

²⁴ *Regional Municipality of Peel v. Great Atlantic & Pacific Co. of Canada Ltd.* 1990 CanLII 6886 (ON CA), pp. 4-5; *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824, at para. 10; *Ontario Human Rights Commission v. Christian Horizons*, 2008 CanLII 68129 (ON SCDC), at paras. 4-5, 12-13; *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct.), at paras. 4-7 [*TWU v. LSUC* (intervention)].

²⁵ *Bedford v. Canada (Attorney General)* (2009), 98 O.R. (3d) 792 (CA) at para. 2.

²⁶ *Jones v. Tsige*, [2011] O.J. No. 4276 (CA) at para. 23; *TWU v. LSUC* (intervention), *supra* at para. 8.

B. Leave to Intervene Should be Granted

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

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

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

20. The Appellants' challenge to the LSUC's decision raises a number of issues, including:

- whether the LSUC's mandate to protect the public interest is restricted to considering whether the future graduates of TWU's proposed law school would meet the standards of learning, professional competence and professional conduct required in Ontario;
- whether the LSUC failed to properly take into account, or improperly balanced, *Charter* values in interpreting its statutory objectives and exercising its discretion to refuse to accredit TWU;

- whether the LSUC's decision infringes sections 2(a), (b) and (d) and 15 of the *Charter*, and cannot be justified under section 1 of the *Charter*;
- whether the LSUC's decision infringes the Ontario *Human Rights Code*; and
- whether the terms of the Community Covenant that students are required to sign annually while attending TWU were a consideration relevant to the exercise of the LSUC's discretion or was an irrelevant consideration that the LSUC erred in considering in its deliberations.

21. The appeal thus raises significant human rights issues that merit the intervention of Out On Bay Street and the OUTlaws, and in particular:

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

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

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

23. As set out above, Out On Bay Street and OUTlaws are actively involved in promoting the interests of LGBTQ students across Canada, including ensuring that these students have equal

opportunities to advance professionally in their chosen vocations and careers. When deciding the intervention motions in this case, Nordheimer J found that “Out On Bay Street and OUTlaws represent a group of individuals who are directly affected by the issues raised in this judicial review application” who brought an important perspective to the outcome of TWU’s application for judicial review.²⁷ If granted leave to intervene, they will be able to provide the Court with submissions from a different perspective than that which will be offered by the parties. From this unique perspective and interest, they seek to assist the Court in understanding:

- a) the impact of the Covenant on LGBTQ students and prospective students;
- b) the nature and scope of the public interest that the LSUC was entitled to appropriately consider in assessing TWU’s application to accredit its proposed law school, in particular as it relates to equality rights and non-discrimination;
- c) the reasons why the Supreme Court of Canada’s decision in *BCCT* does not govern this appeal; and
- d) the appropriate legal approach to balancing the equality rights of LGBTQ students and freedom of religion in the context of assessing the public interest.²⁸

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

24. If granted leave to intervene, Out On Bay Street and OUTlaws propose to address the discriminatory barrier that TWU’s Community Covenant would create for LGBTQ students who seek access to a legal education, and therefore to the legal profession. They will argue that the LSUC appropriately considered this discriminatory barrier in its assessment of the public interest. LGBTQ law students and prospective law students must not be obligated to enter into a mandatory contractual agreement that asks them to choose between a legal education and their

²⁷ *TWU v. LSUC* (intervention), *supra* at para. 53.

²⁸ Judson affidavit, para. 28, Motion Record, Tab 2, p. 19-20.

dignity and self-respect, or face potentially career-ending sanctions. By necessarily excluding married LGBTQ students and creating a climate in which unmarried LGBTQ students will be discouraged or deterred from applying, the Covenant would create a barrier that would result in unequal access to the total available spaces in Canada's law schools for LGBTQ students.

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

25. If granted leave to intervene, Out On Bay Street and the OUTlaws also propose to make submissions regarding the nature and scope of the LSUC's mandate to consider the public interest. The LSUC's obligation to consider the public interest under sections 4.1 and 4.2 of the *Law Society Act*²⁹ properly includes a recognition of the importance of both equitable access to the profession and a diverse legal profession, particularly since the LSUC is bound by section 6 of the Ontario *Human Rights Code*, which prevents self-governing professions from discriminating against members and prospective members on human rights grounds.³⁰ Moreover, the Federation of Law Societies of Canada (which granted TWU preliminary approval for its proposed school of law) did not address TWU's discrimination against LGBTQ persons since its mandate was limited to examining academic competencies.³¹ The LSUC was thus the sole body who could, and did, address whether TWU's discriminatory conduct should prevent its proposed law school from being accredited. Finally, accreditation would be seen as approval by the LSUC of TWU's discriminatory policy. Accreditation of TWU would therefore adversely affect public confidence in the profession's commitment to equality and non-discrimination, and undermine the perception of the profession by members of the public, members of the profession, and

²⁹ *Law Society Act*, R.S.O. 1990, c L.8 at ss. 4.1, 4.2 [“LSA”].

³⁰ *Human Rights Code*, R.S.O. 1990, c. H.19, s. 6.

³¹ Letter from Thomas Conway to OUTlaws Canada dated April 21, 2015, Motion Record, Tab 3B, p. 382.

potential members of the profession. These factors are part of the public interest the LSUC was entitled to consider.³²

(c) The applicability of the *BCCT* case

26. TWU has maintained that the equality rights of LGBTQ students have already been considered and balanced by the Supreme Court of Canada in *BCCT*, and that the result in that case governs in relation to the LSUC's accreditation decision. However, precedents may be revisited 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".³³ If granted leave to intervene, Out On Bay Street and OUTlaws would submit that there has been a change in the circumstances and evidence, as well as new legal issues that have been raised since *BCCT*, most notably the vital importance of ensuring both access to justice and access to the legal profession for LGBTQ persons. Moreover, in considering the public interest, the LSUC could properly consider that since *BCCT*, there has been a sea change in the legal recognition of equality rights for LGBTQ people in Canada,³⁴ and consequently the manner in which rights are balanced would likely be very different today.

³² *TWU v. LSUC*, 2015 ONSC 4250 at para. 116; *Adams v. Law Society of Alberta*, 2000 ABCA 240 at paras. 6-10; *Pharmascience v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513 at para. 36; *Kelly v. Ontario*, 2014 ONSC 3824 at paras. 37-38; *Bolton v. Law Society*, [1994] 1 W.L.R. 512.

³³ *Canada (AG) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101 at para. 42.

³⁴ See, for example, *Halpern v. Canada (Attorney General)* 2003 CanLII 26403 (ON CA); *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698; *Rutherford et al v. Ontario (Deputy Registrar General)*, 2006 CanLII 19053, 81 O.R. (3d) 81 (SC); *A.A. v. B.B.*, 2007 ONCA 2 (CanLII); *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 SCR 429; *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105, 102 O.R. (3d) 267; *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3, [2011] S.J. No. 3; *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726, [2012] O.H.R.T.D. No. 715.

(d) Balancing religious freedom and equality rights

27. Out On Bay Street and the OUTlaws propose to make submissions addressing the proper approach to determining and balancing equality rights and religious freedom in the context of a statutory obligation to act in the public interest. Drawing from recent *Charter* jurisprudence, they would submit that this Court will be required to balance freedom of religion against the LSUC's statutory objectives, as well as take into account relevant *Charter* rights and values, including the equality rights of LGBTQ persons.³⁵ The LSUC reasonably (and correctly) decided that the public interest would be served by ensuring that LGBTQ law students have equitable access to and representation within the legal profession, and that these objectives outweighed the Appellants' right (if such a right exists) to have the LSUC accredit a private law school in which students are required to sign and abide by a covenant that creates a discriminatory barrier to LGBTQ students' access to legal education. To the extent the LSUC was weighing competing rights, its decision was consistent with other decisions holding that broader, fundamental societal values – and in particular equality rights – will in some cases prevail over religious claims.³⁶

C. Conclusion

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

³⁵ *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at para. 35; *Loyola High School v. Québec (AG)*, 2015 SCC 12, [2015] 1 S.C.R. 613.

³⁶ See, for example, *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607 at paras. 2, 68-82, 92.

D. Terms of Out On Bay Street's intervention

29. If granted leave to intervene in this appeal, Out On Bay Street and OUTlaws:

- will not seek to supplement the record or raise any new issues;
- undertake to file a factum 15 pages in length in accordance with any directions given by the Court; and
- request 20 minutes for oral submissions (alternatively, if time for oral submissions is to be determined at a later date through case management, Out On Bay Street and OUTlaws request that they be allowed to participate in the case management meeting to determine the length of submissions).

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

PART IV - ORDER REQUESTED

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

ALL OF WHICH IS RESPECTFULLY SUBMITTED

November 30, 2015



Marlyş Edwardh /Vanessa Payne /Frances Mahon
GOLDBLATT PARTNERS LLP

Paul Jonathan Saguil
BARRISTER AND SOLICITOR

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

³⁷ Judson affidavit, para. 30, Motion Record, Tab 2, p. 20.

SCHEDULE “A”

1. *Regional Municipality of Peel v. Great Atlantic & Pacific Co.*, 1990 CanLII 6886 (ON CA)
2. *Ontario Society for the Prevention of Cruelty to Animals v. Toronto Humane Society*, 2010 ONSC 824
3. *Ontario Human Rights Commission v. Christian Horizons* 2008 CanLII 68129 (ON SCDC)
4. *Trinity Western University v. Law Society of Upper Canada*, 2014 ONSC 5541 (Div. Ct.)
5. *Bedford v. Canada (Attorney General)* 2009 ONCA 669 (CanLII)
6. *Jones v. Tsige*, [2011] O.J. No. 4276 (CA)
7. *Blue Mountain Resorts Limited v. Den Bok* 2011 ONSC 1909 (CanLII)
8. *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250
9. *Adams v. Law Society of Alberta*, 2000 ABCA 240
10. *Pharmascience v. Binet*, 2006 SCC 48, [2006] 2 S.C.R. 513
11. *Kelly v. Ontario*, 2014 ONSC 3824
12. *Bolton v. Law Society*, [1994] 1 W.L.R. 512
13. *Canada (AG) v. Bedford*, 2013 SCC 72, [2013] 3 SCR 1101
14. *Halpern v. Canada (Attorney General)* 2003 CanLII 26403 (ON CA)
15. *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698
16. *Rutherford et al v. Ontario (Deputy Registrar General)*, 2006 CanLII 19053 (ON SC)
17. *A.A. v. B.B.*, 2007 ONCA 2 (CanLII)
18. *Canada (Attorney General) v. Hislop*, 2007 SCC 10, [2007] 1 SCR 429
19. *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105
20. *Marriage Commissioners Appointed Under The Marriage Act (Re)*, 2011 SKCA 3, [2011] S.J. No. 3

21. *XY v. Ontario (Government and Consumer Services)*, 2012 HRTO 726, [2012] O.H.R.T.D. No. 715
22. *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395
23. *Loyola High School v. Québec (AG)*, 2015 SCC 12, [2015] 1 S.C.R. 613
24. *Bruker v. Marcovitz*, 2007 SCC 54, [2007] 3 S.C.R. 607

SCHEDULE “B”

Ontario Rules of Civil Procedure, Rules 13.01 and 13.02

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

- (a) an interest in the subject matter of the proceeding;
- (b) that the person may be adversely affected by a judgment in the proceeding; or
- (c) that there exists between the person and one or more of the parties to the proceeding a question of law or fact in common with one or more of the questions in issue in the proceeding.

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

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

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

Function of the Society

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

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

Principles to be applied by the Society

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

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

Human Rights Code, R.S.O. 1990, c H.19, s. 6

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.

**TRINITY WESTERN
UNIVERSITY and
BRAYDEN VOLKENANT**
Appellants

- and -

**THE LAW SOCIETY OF
UPPER CANADA**
Respondent

Court File No. C61116

COURT OF APPEAL FOR ONTARIO

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

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

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

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