Court File No. C61116

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants
(Appellants)

- and -

LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent in Appeal)

- and -

ATTORNEY GENERAL OF CANADA

Intervener
(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), 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 CONSTITUTION FOUNDATION and CANADIAN BAR ASSOCIATION

Interveners

APPLICATION UNDER rule 14.05(1), 38 and 68 of the *Rules of Civil Procedure* and section 2 of the *Judicial Review Procedure Act*, RSO 1990, c J.1.

REPLY FACTUM OF THE APPELLANTS, TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

March 15, 2016

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PART I - OVERVIEW

1. All *Charter* rights are created equal. The submissions of the interveners opposing TWU's accreditation thunder that TWU's Community Covenant constitutes an "impermissible intrusion into the private lives of applicants". Yet at the same time these interveners minimize, or outright dismiss, the need for *this* religious community to learn law in a safe environment where their religious views are not disregarded or trampled on. Canada is a pluralistic society, which does *not* require conformity of views and which celebrates diversity.

2. One of the common themes of the interveners, parroting a finding of the Divisional Court, is a perplexing one. It is stated by some of the interveners that there is a "limitation on the number of available spots at Canadian law schools", and as such, the alleged differentiation flowing from the Community Covenant is that much more problematic. But what is the remedy? If TWU is denied accreditation, then the only result is that there will be *no* additional spots for potential law graduates—including those on whom the Community Covenant has no effect at all. Those law students who would have attended TWU, if it were accredited, could otherwise have obtained a place at some other law school, taking a spot away from those who might have been affected by the Community Covenant in the manner described by some of the interveners.

3. Put another way, what is happening here is not the Law Society of Upper Canada (the "LSUC") requiring greater accommodation of LGBTQ students. Any number of remedies short of denying accreditation could have accomplished that. What is happening here is a manifestation of tyranny of the majority over the minority, with TWU being punished for the audacity of having a covenant with which its students of similar faith freely agree. TWU is being punished for religious expression. And for some interveners, that is an acceptable hierarchy of rights in Canada. The Supreme Court of Canada has said there is no such hierarchy, and those views should rightfully be rejected.

PART II - POINTS IN REPLY

A. The Choice to Attend TWU Is A Protected Religious Freedom

4. The Canadian Secular Alliance casts the rights of TWU and its members as a mere preference unworthy of *Charter* protection.[1] This plainly ignores the Supreme Court of Canada's admonishment against inquiring into the content of religious beliefs or practice.[2] The *Charter* protects any practice or belief, having a nexus with religion, which calls for a particular line of conduct, whether obligatory, customary or subjectively "engendering a personal connection with the divine".[3]

5. Similarly, The Advocates' Society ("TAS") argues that the freedom of religion of TWU and its members is not infringed because "exposing students to a variety of different religious backgrounds and moral perspectives does not in itself infringe the religious freedoms of individuals who would prefer education in a faith-based school". TWU does not argue against teaching different religious and moral perspectives.[4] The LSUC has undermined the choice of TWU and its members to attend and be part of an evangelical Christian university community for the study of law.[5] That choice is protected by the *Charter* and the LSUC's decision undermines the vitality of a specific religious educational community, founded on a shared set of religious beliefs.[6] If "exposing students to a variety of different religious backgrounds and moral perspectives" was really the LSUC's intent, this goal could have been achieved by a number of methods short of denying accreditation.

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[1] Factum of the Canadian Secular Alliance at ¶4.

[2] *Syndicat Northcrest v Amselem*, 2004 SCC 47 at ¶¶47, 50, JBA, Tab 64: "[47] ... It is the religious or spiritual essence of an action, not any mandatory or perceived-as-mandatory nature of its observance, that attracts protection. An inquiry into the mandatory nature of an alleged religious practice is not only inappropriate, it is plagued with difficulties."

[3] *Ibid* at ¶54.

[4] Affidavit of Robert Wood, sworn August 22, 2014 (the "**Wood Affidavit**"), pages 4-5, ¶15, ABC, vol 2, Tab 9C, pages 797-798, Exhibit Book, vol 1, Tab 1, pages 4-5. Moreover, unlike the students in *SL v Commission scolaire des Chênes*, 2012 SCC 7, JBA, Tab 69 and *Loyola High School v Quebec*, 2015 SCC 12, JBA, Tab 49 [***Loyola***] – cases on which TAS relies – TWU students are not minors receiving a publicly-mandated education. They are adults seeking a community of choice for their legal education.

[5] *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31 at ¶32, JBA, Tab 9 [***TWU 2001***]; *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250 at ¶81, Appeal Book & Compendium of the Appellants (**ABC**), Tab 4 [***TWU v LSUC***]; *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at ¶237, JBA, Tab 1 [***TWU v NSBS***]; *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326 at ¶138, JBA, Tab 54 [***TWU v LSBC***]. As the Supreme Court held in *TWU 2001*, *supra* at ¶32, failing to accredit TWU places a "burden on members of a particular religious group and, in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice."

[6] *Loyola*, *supra* note 4 at ¶¶60, 62 and 67, JBA, Tab 49. The Supreme Court held that "measures which undermine the character of lawful religious institutions and disrupt the vitality of religious communities represent a profound interference with religious freedom".

B. *TWU 2001* Decision Is Binding and Good Law

6. Out on Bay Street and OUTLAWS submit that the Supreme Court's decision in *TWU 2001* is no longer binding because a "sea change in equality rights for LGBTQ persons since 2001 has fundamentally shifted the parameters of the debate".[7]

7. The Supreme Court's reasons in *TWU 2001* set the fundamental parameters and the appropriate analytical framework for the *current* debate on reconciling rights in Canadian law. The court's recent decision in *Doré* endorsed the analytical approach in *TWU 2001*.[8] In the *Same-Sex Marriage Reference*, the court relied on the framework established in *TWU 2001* to decide how to reconcile religious freedom and marriage rights for LGBTQ persons.[9] It remains binding and good law.

8. There has been no fundamental shift in the parameters of the debate concerning equality rights. To depart from binding precedent, there must be circumstances or evidence that fundamentally shift the debate.[10] When *TWU 2001* was decided, the Supreme Court had already recognized broad protections for LGBTQ persons:

- in *Egan v Canada*, the majority of the court held that sexual orientation was an analogous ground protected under section 15 of the *Charter*[11]
- in *Vriend v Alberta*, the court held that Alberta's human rights legislation violated section 15 because it failed to include sexual orientation as a prohibited ground of discrimination[12]
- in *M v H*, the Supreme Court held that excluding same-sex couples from spousal support obligations violated section 15[13]

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[7] They rely on the test set out by the Supreme Court in *Bedford v Canada (Attorney General)*, 2013 SCC 72 at ¶42, JBA, Tab 23 and *Carter v Canada (Attorney General)*, 2015 SCC 5 at ¶44, JBA, Tab 13 [***Carter***], which allows courts to revisit precedents where (1) a new legal issue has been raised or (2) there has been a change in the circumstances of evidence that "fundamentally shifts the parameters of the debate".

[8] *Doré v Barreau du Québec*, 2012 SCC 12 at ¶32, JBA, Tab 10.

[9] *Reference re Same-Sex Marriage*, 2004 SCC 79 at ¶50, JBA, Tab 63: "The collision between rights must be approached on the contextual facts of actual conflicts. The first question is whether the rights alleged to conflict can be reconciled: *Trinity Western University v College of Teachers (British Columbia)*, [2001] 1 SCR 772, 2001 SCC 31 (SCC), at para. 29."

[10] *Carter, supra* note 7 at ¶44, JBA, Tab 13 .

[11] [1995] 2 SCR 513, JBA, Tab 44 [***Egan***].

[12] [1998] 1 SCR 493, JBA, Tab 60 [***Vriend***].

[13] *M v H*, [1999] 2 SCR 3, JBA, Tab 45 [***M v H***].

- in *Little Sisters Book and Art Emporium v Canada*, the court held that practices of customs officials obstructing the import of gay and lesbian erotica were a breach of section 15[14]

9. Out on Bay Street and OUTLAWS further claim that legislative and judicial decisions since *TWU 2001* indicate a fundamental shift. But these decisions, such as advances in the parental rights or hate speech law protections for LGBTQ persons, did not change the fundamental protections afforded to LGBTQ persons under section 15 (as decided in *Egan*, *Vriend* and *M v H*). The test for equality rights under section 15 of the *Charter* has been largely the same since the Supreme Court's 1989 decision in *Andrews*, where the Court held that the focus of section 15 is to protect substantive equality.[15]

10. Yet, in *TWU 2001*, the Supreme Court protected and reconciled the rights of TWU and its students and the equality concerns of LGBTQ persons. The legislative and judicial decisions that Out on Bay Street and OUTLAWS rely on concern rights as against the state (for either breaching the *Charter* or human rights legislation). They do not address how LGBTQ rights are to be reconciled with those of a private religious community, such as that at TWU, which itself is protected under human rights law.[16]

11. Nor did these cases reduce the protections under section 2 of the *Charter*. The Supreme Court has consistently confirmed the important two principles pronounced in *TWU 2001*: (a) there is no hierarchy of *Charter* rights; and (b) a proper delineation of rights allows for the reconciliation of competing rights.[17]

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[14] [2000] 2 SCR 1120, JBA, Tab 241.
[15] *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143 at 164, JBA, Tab 21; *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30 at ¶17, JBA, Tab 18.
[16] Factum of Out on Bay Street and OUTLAWS at ¶¶13-14; *TWU 2001*, *supra* note 5 at ¶25, JBA, Tab 9; *Human Rights Code*, RSBC 1996, c 210, s 41(1).
[17] *TWU 2001*, *supra* note 5 at ¶¶29-31, JBA, Tab 9; *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835 at 877, JBA, Tab 161; and recently *R v NS*, 2012 SCC 72 at ¶¶30-32, JBA, Tab 100.

C. The U.S. Experience Affirms That TWU's Freedom of Religion Has Been Unjustifiably Denied

12. The Canadian Bar Association (the "CBA") makes submissions on the U.S. jurisprudence on freedom of religion, arguing in essence that state actors such as the LSUC should be entitled to refuse accreditation to TWU for *allegedly* discriminating against a protected group. The case law does not support the CBA's position.

13. In *Martinez v Christian Legal Society*, on which the *CBA* heavily relies, Justice Ginsburg held that when the state engages in "viewpoint discrimination" by singling out a group for its views, then the state will face a heavy burden in justifying its suppression of religious expression.[18] The LSUC singled out and subjected TWU to unprecedented scrutiny precisely because of TWU's religious beliefs on marriage.[19] This action was unjustified.

14. TWU does not seek a subsidy from the state, as the group in *Martinez* did. TWU seeks accreditation so that its graduates will be recognized as meeting the LSUC's curricular requirements—the LSUC is not required to provide it any financial support. Rejecting TWU and its graduates is akin to denying accreditation to a Catholic high school because of its teachings.[20]

15. The CBA also relies on the U.S. Supreme Court's decision in *Bob Jones University v. United States*, where that court held that tax authorities were entitled to refuse tax-exempt charitable status to Bob Jones University because the state had an interest in eradicating racial

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[18] 561 US 661 (2010) at 671, 684-685, JBA, Tab 176. Justice Ginsburg, for the majority, held that the Hastings College of Law was permitted to deny recognition and subsidies to a campus Christian group because the group excluded non-Christian students from its membership. The law school had a neutral rule requiring school-approved groups to allow any student to join subsidized campus groups.

[19] Convocation Transcript (Ms. Minor), April 24, 2014, Record of Proceedings, Tab 295, pages 3155-3161, ABC, vol 1, Tab 6, pages 379-385, Exhibit Book, vol 5, Tab 20, pages 2425-2431; Convocation Transcript (Mr. Campion), April 24, 2014, Record of Proceedings, Tab 295, page 3079, lines 9-23, page 3080, lines 14-22, ABC, vol 1, Tab 6, pages 303, 304, Exhibit Book, vol 5, Tab 20, pages 2349, 2350; Convocation Transcript (Ms. Leiper), April 24, 2014, Record of Proceedings, Tab 295, pages 3088-3089, lines 23-25, 1-6, 12-20, ABC, vol 1, Tab 6, pages 312-313, Exhibit Book, vol 5, Tab 20, pages 2358-2359; Convocation Transcript (Mr. Wardle), April 24, 2014, Record of Proceedings, Tab 295, pages 3109-3110, lines 20-25, 1-16, ABC, vol 1, Tab 6, pages 333-334, Exhibit Book, vol 5, Tab 20, page 2379-2380; and Convocation Transcript (Mr. Goldblatt), April 24, 2014, Record of Proceedings, Tab 295, pages 3146-3148, lines 16-25, 1-4, 15-25, 1-22, ABC, vol 1, Tab 6, pages 370-372, Exhibit Book, vol 5, Tab 20, pages 2416-2418.

[20] *Loyola, supra* note 4, JBA, Tab 49.

discrimination.[21] Again, that case is not applicable to the circumstances of our case because, as the Supreme Court of Canada has held, TWU does not discriminate.[22]

D. International Human Rights Law Provides Broad Protections for Religious Freedom

16. Lawyers' Rights Watch Canada ("LWRC") submits that, because of international human rights law, LGBTQ equality rights trump religious freedom.[23] LWRC fails to acknowledge that international human rights law prohibits discrimination on the grounds of religion.[24] LWRC also fails to note that international law protects the "freedom, either alone or in community with others and in public or private, *to manifest his religion or belief in teaching, practice, worship and observance.*"[25]

17. LWRC's submission also contradicts the Supreme Court's clear instruction that there is no hierarchy of rights under the *Charter*.[26] The *Charter* prevails.[27]

E. Not Accrediting TWU Will Unreasonably and Disproportionately Burden the Exercise of Religious Freedom

18. The Criminal Lawyers' Association argues that TWU graduates are not affected by the LSUC's decision because TWU students have the option to apply for admission to the LSUC through the National Committee on Accreditation (the "NCA") process. This is not true. The NCA rules confirm that the NCA process only applies to graduates of foreign law schools, and does not

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[21] 461 US 574 (1983), JBA, Tab 154.

[22] *TWU 2001*, *supra* note 5 at ¶25, JBA, Tab 9: "That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality."

[23] The factum of LRWC submits, at ¶21,"[w]hile the rights to equality and non-discrimination are non-derogable, the right to manifest one's religion or belief may be subject to limitations".

[24] *International Covenant on Civil and Political Rights*, 16 December 1966, 993 UNTS 3, CanTS 1976 No. 47, 5 ILM 368 (entered into force 23 March 1976), accession by Canada 19 May 1976), art 26, JBA, Tab 214 [***ICCPR***]: "All persons are equal before the law and are entitled without any discrimination to the equal protection of the law…on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status."

[25] *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 74, art 18, JBA, Tab 236; *ICCPR*, *supra* note 24 (emphasis added). See also *Metropolitan Church of Bessarabia and Others v Moldova*, no. 45701/99, [2001] ECHR (QL), JBA, Tab 242.

[26] See footnote 17.

[27] In *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62 at ¶150, JBA, Tab 243, the Supreme Court held that, in Canada's dualist system of application of international law, the mere existence of an international obligation is not enough to establish a principle in Canadian law. Courts must not cast aside the principles of parliamentary sovereignty and democracy.

apply to graduates of Canadian law schools.[28] Requiring TWU law students to apply through a different and discretionary—separate but not equal—process unjustifiably punishes them for exercising their freedom of religion.[29]

F. Accrediting TWU Would Not Impact Other Groups

19. TAS argues that accrediting TWU would deprive LGBTQ and other groups admission spaces in law schools.[30] Bencher Janet Minor and other benchers voting against TWU made an unreasonable error when they found that accrediting TWU would limit the number of law school spaces for LGBTQ and other groups.[31] The Divisional Court repeated this error.[32] The evidence is that there is no bar on LGBTQ students attending TWU and that evangelical LGBTQ students have attended and do attend TWU.[33] The notion that TWU prevents LGBTQ students from attending is based on negative stereotypes, unsupported by the evidence, about evangelical Christians. There is also no evidence that fewer LGBTQ persons will receive admission into law school if TWU is accredited.[34]

20. Importantly, TWU is protected under the *Charter* and the B.C. *Human Rights Code* to create a religious educational community. Rejecting TWU graduates does not increase opportunity for anyone—it can only have the opposite effect by *limiting* the number of spaces for law school.

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[28] Bencher Vern Krishna, who was the executive director of the NCA for 26 years, explained to Convocation: "The national committee on accreditation does not have any mandate at all over domestic graduates, except Quebec, and its mandate would have to be changed and that mandate change would have to be approved by the thirteen law societies." Convocation Transcript (Mr. Krishna), April 24, 2014, Record of Proceedings, Tab 295, pages 3194-3195, lines 21-25, 1-7, ABC, vol 1, Tab 6, pages 418-419, Exhibit Book, vol 5, Tab 20, pages 2464-2465.

[29] Convocation Transcript (Mr. Bredt), April 24, 2014, Record of Proceedings, Tab 295, pages 3116-3117, lines 23-25, 1-4, ABC, vol 1, Tab 6, pages 3410-341, Exhibit Book, vol 5, Tab 20, pages 2386-2387: "It would not be constitutional to admit students from foreign faith-based law schools and to deny entry to graduate of a Canadian faith-based law school, nor would it be constitutional to deny entry to our licensing process to individuals because they exercise a constitutional right to attend a faith-based school."

[30] Factum of TAS at ¶15.

[31] Convocation Transcript (Ms. Minor), April 24, 2014, Record of Proceedings, Tab 295, page 3157, lines 3-13, ABC, vol 1, Tab 6, page 381, Exhibit Book, vol 5, Tab 20, page 2427; Convocation Transcript (Mr. Anand), April 24, 2014, Record of Proceedings, Tab 295, page 3097, lines 18-25, ABC, vol 1, Tab 6, page 323, Exhibit Book, vol 5, Tab 20, page 2367; Convocation Transcript (Ms. Backhouse), April 24, 2014, Record of Proceedings, Tab 295, pages 3074-3076, ABC, vol 1, Tab 6, pages 298-300, Exhibit Book, vol 5, Tab 20, pages 2344-2346.

[32] *TWU v LSUC, supra* note 5 at ¶135, ABC, Tab 4.

[33] Affidavit of Iain Cook, sworn August 19, 2014 (the "**Cook Affidavit**"), ABC, vol 2, Tab 9J, Exhibit Book, vol 1, Tab 10; Affidavit of Arend Strikwerda, sworn August 20, 2014 (the "**Stirkwerda Affidavit**"), ABC, vol 2, Tab 9I, Exhibit Book, vol 1, Tab 4.

[34] As Justice Campbell noted in *TWU v NSBC, supra* note 5, JBA, Tab 1 at ¶247: "TWU's law school would add 60 students to a total class of about 2500 in Canadian common-law law schools. That is an increase of about 2.4%. Of that 2.4% some percentage may make their way to Nova Scotia. It is a stretch to speculate that requiring that group or individual to make special application for admission on as yet unknown criteria will help to improve the proportion of LGBT lawyers."

21. TAS also condemns the idea the LSUC might next be forced to accredit another religious law school.[35] The claim is every bit as intolerant as it sounds.[36]

G. TWU Is A Community of Individuals Who Choose to Attend

22. The Canadian Civil Liberties Association (the "CCLA") submits that the Community Covenant intrudes on the right to privacy of LGBTQ and other students. Similarly, Out on Bay Street and OUTLAWS argue that LGBTQ persons who attend TWU will face the stigma of not belonging.[37] But the evidence shows that LGBTQ students have attended and do attend TWU, and TWU and its community provide support and affirmation to LGBTQ students.[38] TWU is a private community entitled to govern itself according to its evangelical Christian values, and is clear about those values.[39] Students choose to attend TWU because of those values and their shared beliefs.

23. The CCLA submits that accrediting TWU would create a risk of discipline—and post-graduation revocation of degree—for those are alleged to have lied about or failed to abide by the Community Covenant. There is no evidence of TWU ever taking such action. The argument also ignores the reality that the LSUC is independent and can decide whether a breach of the Covenant should affect a licensee. Like TAS, the CCLA is trading on stereotypes about religious minorities, and evangelical Christians in particular, to make sweeping arguments unsupported by the evidence and that have no place in this appeal.

24. Finally, if one follows the CCLA's logic to its ultimate conclusion, then anyone who has ever graduated—from any degree program—at a religious university with a similar covenant faces a similar risk of sanction and therefore the LSUC should not recognize that degree (whether

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[35] Factum of TAS at ¶16.

[36] Bencher Chris Bredt condemned this logic in his submissions at Convocation: "And I say that if persons of the Jewish faith had decided to establish a law school that was only open to those of the Jewish faith, would we deny them accreditation and say we will not accredit you because you're engaged in religious discrimination, but we'll allow your graduates in through the back door...we are required to accredit the law school." Convocation Transcript (Mr. Bredt), April 24, 2014, Tab 295, page 3119, lines 9-21, ABC, vol 1, Tab 6, page 343, Exhibit Book, vol 5, Tab 20, page 2389.

[37] Factum of Out on Bay Street and OUTLAWS at ¶17.

[38] Cook Affidavit, pages 7, 9, ¶¶34-36, 45, ABC, vol 2, Tab 9J, pages 893, 895, Exhibit Book, vol 1, Tab 10, pages 257, 259; Strikwerda Affidavit, page 8, ¶¶36-38, ABC, vol 2, Tab 9I, page 883, Exhibit Book, vol 1, Tab 4, page 120.

[39] Wood Affidavit, page 5, ¶16, ABC, vol 2, Tab 9C, page 798, Exhibit Book, vol 1, Tab 1, page 5: "The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life."

undergraduate or law degree). The CCLA's argument is support for barring TWU undergraduates, some of whom have testified in this proceeding, from becoming lawyers simply because of their faith.

25. The CCLA also argues that the Covenant places students in a position where they have to disclose their personal private beliefs to their educational institution. This is not true: though faculty and staff at TWU must adhere to the Statement of Faith (which concerns beliefs), the Covenant only governs conduct based on the shared values of the religious community that TWU serves. It requires no specific belief.[40]

H. The Value of TWU's Curriculum Is Not at Issue

26. TAS cites several academic articles that were not before the LSUC or the Divisional Court to support its claim there are benefits to a diverse classroom in legal education.[41] These submissions are impermissible as an attempt by TAS to supplement the record.[42]

27. In any event, TWU exposes its students to, and entitles them to express, diverse worldviews and its law school would train professional, ethical and competent lawyers.[43] There is no issue in this case about the quality of TWU's law school curriculum.

I. Three Aspects of the LSUC's Decision Must Be Subject to Correctness Review

28. Finally, TAS claims that the three issues—concerning the LSUC's jurisdiction, its duty of neutrality and whether its Covenant discriminates—should be reviewed on a standard of reasonableness, not correctness. But as the Supreme Court held in 2001, and the British Columbia Supreme Court rightly held this year, the LSUC's jurisdiction to consider factors extraneous to its

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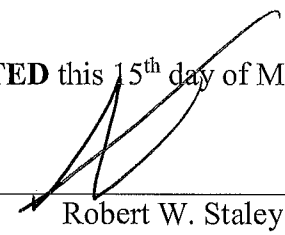
[40] Wood Affidavit, pages 4-5, ¶15, ABC, vol 2, Tab 9C, pages 797-798, Exhibit Book, vol 1, Tab 1, pages 4-5.
[41] TAS Factum at ¶¶19-23.
[42] The Order of Associate Chief Justice Hoy, dated December 16, 2015 states that "Interveners are not entitled to raise new issues, adduce further evidence or otherwise supplement the record of the parties." These facts cannot be judicially noticed because they are not "so notorious or generally accepted as not to be the subject of debate among reasonable persons; or capable of immediate and accurate demonstration by resort to readily accessible sources of indisputable accuracy": *Quebec (Attorney General) v A*, 2013 SCC 5 at ¶238, JBA, Tab 47.
[43] Wood Affidavit, page 3, ¶¶10-11, ABC, vol 2, Tab 9C, page 796, Exhibit Book, vol 1, Tab 1, page 3; Trinity Western University School of Law Proposal, Record of Proceedings, Tab 31, page 244, ABC, vol 2, Tab 9A, page 518, Exhibit Book, vol 3, Tab 18D, page 939; see also Wood Affidavit, pages 4-5, ¶15, ABC, vol 2, Tab 9C, pages 797-798, Exhibit Book, vol 1, Tab 1, pages 4-5.

statutory mandate— namely, whether it can consider factors beyond the training and education of licensees and whether it is an arbiter of discrimination—is reviewed on a standard of correctness.[44]

29. The Supreme Court's recent decision in *Saguenay* also clarifies that the presumption of deference typically owed to administrative decision-makers will be rebutted in circumstances such as those in this case.[45] The court explained that questions of central importance to the legal system are those that require uniform and consistent answers or where correctness review safeguards a basic consistency in the fundamental legal order of our country.[46]

30. The duty of public regulators, such as the LSUC, to be neutral and to accommodate religious diversity requires uniform and consistent answers in our legal order. In Nova Scotia and British Columbia, it has been held that their respective law societies have infringed the religious freedom of TWU and its members.[47] In Ontario, the court has come to the opposite conclusion. Clarity in the law requires correctness.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 15th day of March 2016.



Robert W. Staley

[44] *TWU 2001*, *supra* note 5 at ¶14, JBA, Tab 9.
[45] As Justice Gascon held for the court in *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16 at ¶51, JBA, Tab 3, "In my opinion, in the context of this appeal, this court's decisions, more specifically *Dunsmuir*, *Mowat* and *Rogers*, to which I have referred, support *a separate application of the standard of correctness to the question of law concerning the scope of the state's duty of neutrality that flows from freedom of conscience and religion. I find that the importance of this question to the legal system, its broad and general scope and the need to decide it in a uniform and consistent manner are undeniable.*" (emphasis added).
[46] *Saguenay*, *ibid* at ¶47.
[47] *TWU v NSBS*, *supra* note 5, JBA, Tab 1 and *TWU v LSBC*, *supra* note 5, JBA, Tab 54.

SCHEDULE "A"

LIST OF AUTHORITIES

1. *Syndicat Northcrest v Amselem*, 2004 SCC 47.
2. *SL v Commission scolaire des Chênes*, 2012 SCC 7.
3. *Loyola High School v Quebec*, 2015 SCC 12.
4. *Trinity Western University v College of Teachers (British Columbia)*, 2001 SCC 31.
5. *Trinity Western University v Law Society of Upper Canada*, 2015 ONSC 4250.
6. *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25.
7. *Trinity Western University v Law Society of British Columbia*, 2015 BCSC 2326.
8. *Bedford v Canada (Attorney General)*, 2013 SCC 72.
9. *Carter v Canada (Attorney General)*, 2015 SCC 5.
10. *Doré v Barreau du Québec*, 2012 SCC 12.
11. *Reference re Same-Sex Marriage*, 2004 SCC 79.
12. *Egan v Canada*, [1995] 2 SCR 513.
13. *Vriend v Alberta*, [1998] 1 SCR 493.
14. *M v H*, [1999] 2 SCR 3.
15. *Little Sisters Book and Art Emporium v Canada*, [2000] 2 SCR 1120.
16. *Andrews v Law Society of British Columbia,* [1989] 1 SCR 143.
17. *Kahkewistahaw First Nation v Taypotat*, 2015 SCC 30.
18. *Dagenais v Canadian Broadcasting Corp*, [1994] 3 SCR 835.
19. *R v NS*, 2012 SCC 72.
20. *Martinez v Christian Legal Society*, 561 US 661 (2010).
21. *Bob Jones University v United States*, 461 US 574 (1983).
22. *International Covenant on Civil and Political Rights*, 16 December 1966, 993 UNTS 3, CanTS 1976 No. 47, 5 ILM 368 (entered into force 23 March 1976), accession by Canada 19 May 1976).
23. *Universal Declaration of Human Rights*, GA Res 217 (III), UNGAOR, 3d Sess, Supp No 13, UN Doc A/810, (1948) 74.

24. *Metropolitan Church of Bessarabia and Others v Moldova*, no. 45701/99, [2001] ECHR (QL).

25. *Kazemi Estate v Islamic Republic of Iran*, 2014 SCC 62.

26. *Quebec (Attorney General) v A*, 2013 SCC 5.

27. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16.

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

Human Rights Code, RSBC 1996, c 210

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

TRINITY WESTERN UNIVERSITY
Applicants
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA
Respondent
(Respondent in Appeal)
Court File No. C61116

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

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