Court File No. 250/14

ONTARIO
SUPERIOR COURT OF JUSTICE
(DIVISIONAL COURT)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

- and -

LAW SOCIETY OF UPPER CANADA

Respondent

- and -

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

Interveners

REPLY FACTUM OF THE APPLICANTS TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

May 22, 2015

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PART I: OVERVIEW

1. In this factum, TWU replies to the arguments made by the LSUC and the interveners. TWU also considers the application of the Supreme Court of Canada's decision in *Mouvement laïque québécois v Saguenay (City)*, which was released after TWU served its factum on March 2, 2015.[1]

2. This factum addresses the following three issues:

(a) The standard of review for some of the questions at issue in this appeal is correctness. *Saguenay* requires this court to examine the nature of the specific questions at issue (as opposed to the LSUC's decision in its entirety) to determine the applicable standard of review.

(b) The LSUC mischaracterizes its role and obligations as a regulator. The LSUC is not entitled or required to decide whether certain differential treatment by persons not subject to its regulatory ambit is "discriminatory", especially where the *Charter* and the B.C. *Human Rights Code* have deemed otherwise.

(c) The LSUC cannot ignore *TWU 2001*. Regardless of the standard of review used in that case, the Supreme Court of Canada admonishes regulators from denying accreditation based on speculation. That is what happened here – the LSUC asserts, without evidence, that evangelical Christian law students will be advantaged compared to LGBT students.

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[1] 2015 SCC 16 [*Saguenay*], Joint Book of Authorities ("JBA"), Tab 72

PART II: LAW AND ARGUMENT

A. LAW AND ARGUMENT

1. The Standard of Review

2. In *Saguenay*, which was released on April 15, 2015, the Supreme Court of Canada held that a reviewing court can apply different standards of review for different aspects of a decision that attract differing levels of scrutiny on review.[2]

3. Prior to 2007, this was the law. Indeed, in *TWU 2001*, the British Columbia Court of Appeal applied different standards of review to different issues in that case.[3] The Supreme Court of Canada ultimately applied a correctness standard to all of the issues, finding that the "existence of discriminatory practices" by TWU is a "question of law that is concerned with human rights and not essentially educational matters."[4]

4. But, beginning with *Council of Canadians with Disabilities v VIA Rail Canada Inc.*, the Supreme Court distanced itself from the proposition that an administrative decision can be broken into its component parts and reviewed under multiple standards of review.[5]

5. *Saguenay* clarifies that, in fact, the reviewing court can apply a different standard of review for different questions. As such, if the LSUC is acting within its specialized area of expertise and

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[2] *Ibid,* at ¶81, JBA, Tab 72.
[3] *Trinity Western University v British Columbia College of Teachers* (1998), 59 BCLR (3d) 241, 1998 CarswellBC 2823 (CA) at ¶104, JBA, Tab 73.
[4] *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at ¶18 [*TWU 2001*], JBA, Tab 3.
[5] *Council of Canadians with Disabilities v VIA Rail Canada Inc*, [2007] 1 SCR 650 at ¶100, JBA, Tab 44; *Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, JBA, Tab 74; *Loyola High School v Quebec (Attorney General),* 2015 SCC 12 at ¶79, JBA, Tab 64.

interpreting and applying the *Law Society Act*, it is presumed that the standard of review is reasonableness.[6]

6. But if the LSUC is dealing with general questions of law that are of importance to the legal system and fall outside its specialized expertise, the standard of review is correctness.[7] Administrative bodies must also be correct in their determinations of true questions of jurisdiction or *vires*.[8] Put another way, a tribunal cannot erroneously (but reasonably) exceed its jurisdiction: it has no power to do so.

7. Courts have properly given the LSUC (whether acting through Convocation, tribunals or appeal panels) deference in matters that relate to its core competency. A host of decisions have been reviewable only on a reasonableness standard, including:

(a) the proper conduct of disciplinary proceedings;[9]

(b) the place of hearing for disciplinary proceedings;[10]

(c) what constitutes professional misconduct;[11]

(d) findings of professional misconduct;[12]

(e) the appropriate penalty for misconduct, especially where such decisions are based on findings of credibility;[13]

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[6] *Saguenay, supra* note 1 at ¶46, JBA, Tab 72.
[7] *Ibid* at ¶47, JBA, Tab 72.
[8] *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at ¶59 [*Dunsmuir*], JBA, Tab 5.
[9] *Dmello v Law Society of Upper Canada*, 2015 ONSC 518 (Div Ct), JBA, Tab 75.
[10] *Savone v Law Society of Upper Canada*, 2013 ONSC 1015 (Div Ct), JBA, Tab 76.
[11] *Wise v Law Society of Upper Canada*, 2010 ONSC 1937 (Div Ct), JBA, Tab 77.
[12] *Law Society of Upper Canada v Kazman*, 2011 ONSC 3008 (Div Ct), JBA, Tab 78.

(f) standards for foreign lawyer accreditation (in that case, whether it was fair to deny admission to someone who graduated with third class honours);[14]

(g) whether to grant an extension of time to appeal a tribunal decision;[15]

(h) whether an applicant is of good character;[16]

(i) whether a lawyer has committed conduct unbecoming a lawyer;[17] and

(j) costs decisions.[18]

8. In all such cases, the matter at issue clearly fell within the specialized expertise of the LSUC, and the matter did not engage on generalized questions of law or matters that have importance to the legal system at large.

9. Not so with this case. Here, there is no privative clause in the *Law Society Act* indicating a need for deference. The LSUC has no more expertise than a court in interpreting and applying the *Charter* or statutory human rights codes.[19] Although the benchers are all lawyers, they come from a wide range of practice areas, such that it could not be suggested that the benchers as a whole have, for example, "expertise" in religious freedoms. Indeed, the fact that the benchers felt it

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[13] *Kelly v Law Society of Upper Canada*, 2015 ONSC 886 (Div Ct), JBA, Tab 79; *Mundulai v Law Society of Upper Canada*, 2014 ONSC 7208 (Div Ct), JBA, Tab 80.
[14] *Grant-Kinnear v Law Society of Upper Canada*, 2013 ONSC 1571 (Div Ct), JBA, Tab 81.
[15] *Tollis v Law Society of Upper Canada*, 2012 ONSC 4144 (Div Ct), JBA, Tab 82.
[16] *Payne v Law Society of Upper Canada*, 2014 ONSC 1083 (Div Ct), JBA, Tab 83.
[17] *Cengarle v Law Society of Upper Canada*, 2014 ONSC 1884 (Div Ct), JBA, Tab 84.
[18] *Shore v Law Society of Upper Canada*, 2009 CanLII 18300 (SCJ (Div Ct)), JBA, Tab 85.
[19] *Dunsmuir, supra* note 8 at ¶55, JBA, Tab 5.

necessary to obtain outside legal opinions on the matters at issue is inconsistent with any suggestion that the benchers have any specialized expertise in this area.[20]

10. In *Saguenay*, the Supreme Court found that one generalized area of enquiry – "the scope of the state's duty of neutrality that flows from freedom of conscience and religion" – was reviewable on a correctness standard.[21] Here, the matter of significant importance to the legal system, with which the LSUC has no specialized expertise, is "the extent to which the Law Society can bar access to putative licensees on the basis of their honestly held religious beliefs."

11. In *TWU 2001*, the Supreme Court of Canada applied a *correctness* standard of review to the decision of the BCCT.[22] *TWU 2001* has never been overruled by the Supreme Court of Canada, and, in fact, it was cited with approval in *Doré*, the very case that appears to shift the law on standard of review in a different direction.[23] Applying a correctness standard of review to whether the LSUC can bar access to putative licensees on the basis of their honestly held religious beliefs is consistent with the approach taken by the Supreme Court in *Saguenay* and in *TWU 2001*.

12. Applying *Saguenay,* the LSUC has no special expertise with respect to the following questions, none of which are protected by a privative clause. Each of these questions should be reviewable on a correctness standard:

(a) whether the LSUC had the statutory grant of authority to make the Decision (¶83-91 of TWU's factum);

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[20] Cavalluzzo Shilton McIntyre Cornish LLP, "TWU Accreditation Decision – Discretion and Public Interest" Opinion, Record of Proceedings, Tab 246; Osler, Hoskin & Harcourt LLP, "The Charter and the Law Society's Accreditation Decision" Opinion, Record of Proceedings, Tab 247; Pinto Wray James LLP, "TWU Law School Accreditation Decision – Human Rights Legal Opinion," Record of Proceedings, Tab 248; *TWU 2001, supra* note 4 at ¶17, JBA, Tab 3.

[21] *Saguenay, supra* note 1 at 49, JBA, Tab 72.

[22] *TWU 2001, supra* note 4 at ¶17-19, JBA, Tab 3.

[23] *Doré v Barreau du Québec,* 2012 SCC 12 at ¶32 [*Doré*], JBA, Tab 4.

(b) whether the decision in *TWU 2001* is binding on the LSUC (¶95-98);

(c) whether TWU has a sincerely-held religious belief (¶100-101);

(d) whether the LSUC's decision interferes with TWU's sincerely-held religious belief in a manner that is more than trivial or insubstantial (¶103-105);

(e) whether the LSUC's decision creates a distinction based on a prohibited ground (¶106-108);

(f) whether the distinction created by the LSUC's decision creates a disadvantage by perpetuating prejudice or stereotyping (¶109-113);

(g) whether the Community Covenant is expressive content (¶114-115);

(h) whether the LSUC's decision prevents the applicants from expressing their religious beliefs (¶116-119);

(i) whether the LSUC's decision substantially impairs the ability of TWU and its students, faculty and staff from pursuing shared goals in concert (¶120-126);

(j) whether TWU is a private university subject to the *Charter* (¶128-133);

(k) whether TWU is exempt from the British Columbia *Human Rights Code* (¶134-136);

(l) whether the LSUC's decision violates the Ontario *Human Rights Code* (¶137); and

(m) whether the LSUC's decision reflects a proportionate balance between the *Charter* protections at stake and the LSUC's statutory mandate (¶139-146, ¶148-150).

13. Although the Nova Scotia Supreme Court held that the standard of review of the decision of the Nova Scotia Barristers' Society ("NSBS") was reasonableness, that decision was released before *Saguenay*.[24] As such, the court in that case applied a higher standard even though some of the questions under review may have required a lower standard. Further, the NSBS exercised its powers with respect to TWU differently than LSUC: NSBS amended its regulations to implement a resolution of NSBS Council not approving TWU's proposed law school unless TWU exempted law students from signing the Community Covenant or amended the Community Covenant. As such, the issues in that case involved both NSBS's jurisdiction to require TWU to amend the Community Covenant and its power to amend its regulations as such.

2. The LSUC is not the arbiter of discrimination.

14. The LSUC's justification for its decision is that the Community Covenant discriminates on the basis of sexual orientation, marital status, gender and religion.[25]

15. But not all differential treatment is discrimination in a substantive sense or at law.[26] Nor is the LSUC the *arbiter* of discrimination. In deciding that the Community Covenant discriminates against LGBT individuals, the LSUC ignores the fact that TWU is not subject to section 15(1) of the *Charter* and is exempt from the B.C. *Human Rights Code*. If TWU was an Ontario university, it would similarly be exempt from the Ontario *Human Rights Code*.[27]

16. The Provinces and Parliament and the legislatures of Ontario and British Columbia have, respectively, decided that private religious institutions may differentially treat members of other

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[24] *Trinity Western University v Nova Scotia Barristers' Society,* 2015 NSSC 25 at ¶155-165, JBA, Tab 2.
[25] None of the benchers raised issues relating to marital status, gender or non-evangelical Christian religion. The LSUC cannot recast its decision on judicial review.
[26] *Law v Canada (Minister of Employment and Immigration),* [1999] 1 SCR 497 at ¶38-39, JBA, Tab 53.
[27] RSO 1990, c H.1, s 18.

faiths without infringing constitutional or quasi-constitutional legislation. The LSUC's repeated assertion that it must prohibit discrimination by TWU when no government has done so overstates the LSUC's jurisdiction to protect the public interest or its obligation to consider either the *Charter* or *Human Rights Code* where neither is infringed.

17. Further, the justification for LSUC's decision is entirely speculative. The LSUC asserts that the Community Covenant would "deny equal access to the profession" to LGBT individuals, which is unsubstantiated or incorrect:

(a) The Community Covenant does not bar LGBT individuals from attending TWU. TWU's evidence proves that LGBT individuals can and do enrol and graduate from TWU.

(b) There is *no* evidence that LGBT individuals are disproportionally denied admission to Canadian law schools or that evangelical Christians admitted to TWU would not be admitted to any other Canadian law school. The LSUC's decision (and, now, its argument on this application) engages in the very speculation that the Supreme Court warned against in *TWU 2001*.

18. The LSUC places great emphasis on its "core value of equality". But nowhere in its argument does the LSUC acknowledge that this core value also requires the LSUC to protect religious minorities from discrimination. In making the decision, the LSUC is preferring the equality rights of LGBT individuals over the religious freedoms of evangelical Christians.

19. The LSUC misstates the applicants' religious beliefs. The applicants are not asserting that their religion requires them to go to law school. Instead, the uncontradicted evidence is that the Community Covenant is an expression of evangelical Christian faith, and refusing to accredit

TWU because of the Community Covenant engages the applicants' religious and other constitutional freedoms. Although the LSUC characterizes this infringement as trivial, the Supreme Court, in *TWU 2001*, found that denying admission to a profession places an unconstitutional burden on TWU students.[28]

20. If the LSUC accredited TWU, it would not be "adopting the exclusion" allegedly created by the Community Covenant. In making this argument, the LSUC mischaracterizes its functions as a regulator. In determining admission of a licensee, the *Law Society Act* limits the LSUC to considering whether licensees meet appropriate standards of "learning, professional competence and professional conduct." That is the lens through which the LSUC's accreditation and admission decisions must be made. The LSUC would still retain the right to discipline licensees who *act* on discriminatory beliefs. The LSUC does not have a statutory obligation to refuse to accredit law schools or deny admission to putative licensees because the LSUC, in its view, has decided, where it has no specialized expertise and contrary to both Parliament and the B.C. and Ontario legislatures, that the imposition of certain differential treatment is discriminatory.

3. *TWU 2001* is binding on the LSUC.

21. The LSUC, in three scant paragraphs, effectively dismisses *TWU 2001* as "bad law" and urges this Court to ignore *TWU 2001*.[29]

22. First, even though *TWU 2001* was decided on a correctness standard, the LSUC's decision in this case should also be reviewed on a correctness standard. In any event, leaving aside the standard of review, the Supreme Court of Canada's reasons in *TWU 2001* make clear that the

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[28] *TWU 2001, supra* note 4 at ¶32, JBA, Tab 3.
[29] Factum of the Respondent, Law Society of Upper Canada, at ¶75-77.

BCCT's decision was outside the range of reasonable outcomes given that the regulator failed to consider issues of religious freedom and the burdens on evangelical Christians.[30]

23. Second, the LSUC's decision is equally based on speculative concerns. There is no evidence that TWU graduates would discriminate against LGBT individuals in the provision of legal services. There is also no evidence that the Community Covenant would deny equal access to LGBT individuals to the profession. Instead, the LSUC's decision bars evangelical Christians from accessing the profession.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

May 22, 2015

Bennett Jones LLP

[30] *TWU 2001, supra* note 4, JBA, Tab 3.

SCHEDULE "A"

LIST OF ADDITIONAL AUTHORITIES

1. *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16
2. *Trinity Western University v British Columbia College of Teachers* (1998), 59 BCLR (3d) 241, 1998 CarswellBC 2823 (CA)
3. *Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62
4. *Dmello v Law Society of Upper Canada*, 2015 ONSC 518 (Div Ct)
5. *Savone v Law Society of Upper Canada*, 2013 ONSC 1015 (Div Ct)
6. *Wise v Law Society of Upper Canada*, 2010 ONSC 1937 (Div Ct)
7. *Law Society of Upper Canada v Kazman*, 2011 ONSC 3008 (Div Ct)
8. *Kelly v Law Society of Upper Canada*, 2015 ONSC 886 (Div Ct)
9. *Mundulai v Law Society of Upper Canada*, 2014 ONSC 7208 (Div Ct)
10. *Grant-Kinnear v Law Society of Upper Canada*, 2013 ONSC 1571 (Div Ct)
11. *Tollis v Law Society of Upper Canada*, 2012 ONSC 4144 (Div Ct)
12. *Payne v Law Society of Upper Canada*, 2014 ONSC 1083 (Div Ct)
13. *Cengarle v Law Society of Upper Canada*, 2014 ONSC 1884 (Div Ct)
14. *Shore v Law Society of Upper Canada*, 2009 CanLII 18300 (SCJ (Div Ct))

SCHEDULE "B"

TEXT OF ADDITIONAL STATUTES, REGULATIONS & BY - LAWS

***Ontario Human Rights Code*, RSO 1990 c H 19**

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

TRINITY WESTERN UNIVERSITY
Applicant

-and-

LAW SOCIETY OF UPPER CANADA and others
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PROCEEDING COMMENCED AT
TORONTO

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