

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)

- and -

ATTORNEY GENERAL OF CANADA

Intervener
(Respondent)

**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

**REPLY FACTUM OF THE RESPONDENT,
LAW SOCIETY OF UPPER CANADA**

March 14, 2016

BORDEN LADNER GERVAIS LLP

44th Floor - Scotia Plaza
40 King Street West
Toronto, ON M5H 3Y4

Guy J. Pratte (LSUC #23846L)

Nadia Effendi (LSUC #49004T)

Duncan Ault (LSUC #53916R)

Tel: 416.367.6728

Fax: 416.361.2721

Lawyers for the Respondent, Law Society of Upper
Canada

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

Robert W. Staley
Email: staleyr@bennettjones.com

Derek J. Bell
Email: belld@bennettjones.com

Ranjan K. Agarwal
Email: agarwalr@bennettjones.com

Telephone: (416) 863-1200
Facsimile: (416) 863-1716

**Lawyers for the Applicants (Appellants) Trinity Western
University and Brayden Volkenant**

AND TO: **DEPARTMENT OF JUSTICE LITIGATION BRANCH**
59 O'Connor Street, Suite 500
Ottawa, ON K1A 0H8

Christopher Rupar
Email: christopher.Rupar@justice.gc.ca

Telephone: (416) 952-2946

Lawyers for the Intervener, Attorney General of Canada

AND TO: ROCHON GENOVA LLP
121 Richmond St. W., Ste. 900
Toronto, ON M5H 2K1

Peter R. Jervis
Email: pjervis@rochongenova.com

Telephone: (416) 363-1867
Facsimile: (416) 363-0263

CHRISTIAN LEGAL FELLOWSHIP
Crossroads Centre
1295 North Service Road
Burlington, Ontario

Derek B.M. Ross
Email: execdir@christianlegalfellowship.org

Telephone: (519) 208-9200
Facsimile: (519) 208-3600

Lawyers for the Intervener, Christian Legal Fellowship

AND TO: DOUCETTE SANTORO FURGIUELE
1100-20 Dundas St. W.
Toronto, Ontario M5G 2G8

Daniel C. Santoro
Email: santoro@dbsflitigation.com

Telephone: (416) 922-7272
Facsimile: (416) 342-1766

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

AND TO: VINCENT DAGENAIS GIBSON LLP/s.r.l.
260 Dalhousie Street, Suite 400
Ottawa, ON K1N 7E4

Albertos Polizogopoulos
Email: albertos@vdg.ca

Kristin Marie Barsoum Debs
E-mail: kristin@debslaw.ca

Telephone: (613) 241-2701
Facsimile: (613) 241-2599

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

AND TO: PAUL JONATHAN SAGUIL
66 Wellington Street W.
Toronto, ON M5K 1A2

Paul Jonathan Saguil
Email: paul.jonathan.saguil@gmail.com

Telephone: (416) 308-1719

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

Marlys A. Edwardh
Email: medwardh@goldblattpartners.com

Telephone: (416) 977-6070
Facsimile: (416) 591-7333

Lawyers for the Interveners Out on Bay Street and OUTlaws

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

Joanna Radbord
Email: joanna@mccarthyco.ca

Telephone: (416) 238-7916
Facsimile: (416) 862-9001

PALIARE ROLAND ROSENBERG ROTHSTEIN LLP
Barristers and Solicitors
155 Wellington Street West, 35th Floor
Toronto, ON M5V 3H1

Chris G. Paliare
Email: chris.paliare@paliareroland.com

Telephone: (416) 646-4318
Facsimile: (416) 646-4301

Lawyers for the Intervener, The Advocates' Society

AND TO: JOHN NORRIS
Simcoe Chambers
116 Simcoe Street, Suite 100
Toronto, ON M5G 2G8

John Norris
Email: john.norris@simcoechambers.com

Telephone: (416) 596-2960
Facsimile: (416) 596-2598

BREESE DAVIES
Barristers & Solicitor
17 John Street, Suite 101
Toronto, ON M5T 1X3

Breese Davies
Email: bdavies@bdlaw.ca

Telephone: (416) 649-5061
Facsimile: (416) 352-7733

**Lawyers for the Intervener, Criminal Lawyers' Association
(Ontario)**

**AND TO: ASSOCIATION FOR REFORMED POLITICAL ACTION
CANADA**
Suite 2010-130 Albert Street
Ottawa, ON K1P 5G4

André Marshall Schutten
Email: andre@ARPACanada.ca

Telephone: (613) 297-5171
Facsimile: (613) 249-3238

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

AND TO: STIKEMAN ELLIOTT LLP
5300 Commerce Court West
199 Bay Street
Toronto, ON M5L 1B9

Alan D'Silva
Email: adsilva@stikeman.com

Alexandra Urbanski
Email: aurbanski@stikeman.com

Telephone: (416) 869-5204
Facsimile: (416) 947-0866

**Lawyers for the Intervener, Canadian Civil Liberties
Association**

**AND TO: FARRIS, VAUGHAN, WILLS &
MURPHY LLP**
700 W Georgia St #25,
Vancouver, BC V7Y 1B3

Tim Dickson
Email: tdickson@farris.com

Telephone: (604) 661-9341
Facsimile: (604) 661-9349

Lawyers for the Intervener, Canadian Secular Alliance

AND TO: MAGRATH'S INTERNATIONAL LEGAL COUNSEL
393 University Avenue
Suite 2000
Toronto, ON M5G 1E6

Gavin Magrath
Email: gavin@magraths.ca

Telephone: (416) 931-0463
Facsimile: 1-888-816-8861

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

Susan Ursel
Email: sursel@upfhlaw.ca

Telephone: (416) 968-3333
Facsimile: (416) 968-0325

AMY SAKALAIUSKAS
Barrister and Solicitor
1690 Hollis St., 8th Floor
PO Box 7, Stn. Central
Halifax, Nova Scotia B3J 2L6

Amy Sakalauskas
Email: amy.sakalauskas@outlook.com

Telephone: (902) 424-2956
Facsimile: (902) 424-7158

IRVING MITCHELL KALICHMAN LLP
3500 De Maisonneuve Boulevard West
Suite 1400
Montreal, Quebec H3Z 3C1

David Grossman
Email: dgrossman@imk.ca

Telephone: (514) 934-7730
Facsimile: (514) 935-2999

Lawyers for the Intervener, The Canadian Bar Association

AND TO: MILLER THOMSON
700 - 9th Avenue S.W.
Suite 3000
Calgary, AB T2P 3V4

Gerald Chipeur
Email: gchipeur@millerthomson.com

Telephone: (403) 298-2434
Facsimile: (403) 262-0007

**Lawyers for the Intervener, The Seventh Day Adventist
Church in Canada**

TABLE OF CONTENTS

PART I	OVERVIEW.....	1
PART II	REPLY SUBMISSIONS.....	2
A.	The Law Society’s Decision accords with its statutory and constitutional obligations.....	2
B.	This case is inappropriate for a section 1 analysis.....	3
C.	The Law Society’s Decision does not infringe the Appellants’ freedom of association.....	5
D.	The Law Society’s Decision does not relate to individual TWU graduates.....	7
	Schedule “A” – Authorities Cited.....	9
	Schedule “B” – Legislation, Regulations, Rules and Bylaws Cited.....	10

PART I OVERVIEW

1. The following are the submissions of the Law Society of Upper Canada (the “Law Society”) in reply to the facts of the Interveners. The Law Society will limit its reply submissions to four points.¹ Contrary to the Interveners’ arguments, the Law Society submits that:

- (a) The decision to deny accreditation to Trinity Western University’s (“TWU”) proposed law school (the “Law Society’s Decision” or the “Decision”) is premised on the Law Society’s duty to ensure that admission to the profession is based solely on merit and that the Law Society does not, directly or indirectly, sanction discrimination;
- (b) As the Supreme Court of Canada found, it is inappropriate to analyse the type of decision made by the Law Society using an *Oakes* framework under section 1 of the *Canadian Charter of Rights and Freedoms* (the “*Charter*”) but, in any case, the Law Society’s Decision would satisfy such an analysis;
- (c) The Law Society’s Decision does not infringe the Appellants’ freedom of association; and
- (d) The issue before the Law Society was whether to accredit TWU’s proposed law school, not how individual graduates of TWU’s proposed law school may become licenced to practice law in Ontario if the school is ultimately established.

¹ To the extent that the Interveners’ submissions overlap with those already made by TWU, the Law Society relies upon its original factum herein.

PART II REPLY SUBMISSIONS

A. The Law Society's Decision accords with its statutory and constitutional obligations

2. The Law Society's Decision to deny accreditation to TWU's proposed law school is not merely symbolic without actually protecting equality rights.² On the contrary, the Law Society's Decision fulfills its constitutional obligation of neutrality. As a state actor, the Law Society must treat all prospective licensees equally in accessing the requisite legal education, without diminishing or augmenting the opportunities for access based upon religious or other prohibited grounds. Accreditation of TWU's proposed law school would create a distinction in the access to prerequisite legal education and would have the effect of limiting access to the legal profession for individuals who are excluded by TWU's Community Covenant. Thus, the Decision accords with the Law Society's statutory and constitutional obligations pursuant to section 6 of the *Human Rights Code* and section 15 of the *Charter*.

3. The Decision is also consistent with the Law Society's long standing practice of ensuring that access to the legal profession is determined by merit alone. As found by the Divisional Court:

[T]hroughout its long history, [the Law Society] acted to remove obstacles based on considerations, other than ones based on merit, such as religious affiliation, race, and gender, so as to provide previously excluded groups the opportunity to obtain a legal education and thus become members of the legal profession in Ontario.³

4. Moreover, in addition to its specific constitutional and statutory obligations, the Law Society had to consider the effect of accrediting TWU's proposed law school on

² This is in response to the submissions of the Christian Legal Fellowship.

³ Application Decision, para. 96, Respondent's Compendium ["RC"], Tab 1, p. 28.

public confidence in the legal profession. As the regulator of the legal profession with a duty to maintain the competence of the legal profession in the public interest, the Law Society's obligation to ensure equality of access to the profession and to respect the diverse characteristics of Ontario society must be paramount. It was reasonable for the Law Society to conclude that accrediting TWU would jeopardize the public's confidence in the legal profession.

5. The assertion⁴ that the Decision has a discriminatory effect similar to that which was found by the Supreme Court in *Andrews v. Law Society of British Columbia* is baseless.

6. In that case, where individuals were challenging as discriminatory the citizenship requirement to become members of the British Columbia bar, the Supreme Court found discrimination, *inter alia*, because there had not been "consideration of educational and professional qualifications or the other attributes or merits..." of the group. In contradistinction, in the case at bar, the Law Society's Decision is premised upon the consideration that merit alone should determine access to pre-requisite legal education, whereas TWU excludes candidates on the basis of discriminatory considerations that have nothing to do with competence or merit.

B. This case is inappropriate for a section 1 analysis

7. In *Doré v. Barreau du Québec*,⁵ the Supreme Court held that an *Oakes* section 1 analysis is inappropriate where the impugned state action is a discretionary decision made by a statutory decision-maker, as opposed to where the validity of a statute itself is at

⁴ This is in response to the submissions of the Association for Reformed Political Action Canada.

⁵ *Doré v. Barreau du Québec*, 2012 SCC 12 at paras. 2 – 8, Joint Book of Authorities ("JBOA"), Tab 38 ("Doré").

issue.⁶ The Court observed that the analytical framework outlined in *Oakes* is an “awkward fit” for review of discretionary administrative decisions, and provided that the proportionality analysis outlined in *Doré* is the appropriate means of assessing the constitutionality of such a decision.

8. The *Doré* framework continues to be authoritative and, in this case, was applied by the Divisional Court.⁷ Furthermore, the Appellants themselves have adopted the *Doré* framework in their factum and do not allege that the Divisional Court fell into error in this respect.

9. Indeed, the Law Society’s Decision is the type of discretionary decision that should be assessed under the *Doré* framework. The *Law Society Act* and the Law Society’s By-laws give the Law Society discretion to determine accreditation,⁸ and the Appellants do not challenge the constitutional validity of the *Law Society Act*, the Law Society’s By-Laws or any of the applicable statutory or regulatory provisions. Rather, they only challenge the Law Society’s specific exercise of discretion in this case.

10. In any event, even if it were appropriate to apply the *Oakes* framework to analyse the Law Society’s exercise of its discretion, its Decision is demonstrably justified in a free and democratic society.⁹

11. First, the Law Society’s objective of ensuring that access to the profession is

⁶ This is in response to the submissions of the Christian Legal Fellowship, the Evangelical Fellowship of Canada and Christina Higher Education Canada and the Justice Centre for Constitutional Freedoms.

⁷ Application Decision, para. 92, RC, Tab 1, p. 27.

⁸ Contrary to the Association for Reformed Political Action’s contention at para. 23 of its factum, the Law Society’s decision is not a “law” by any sense of the word, including for the purposes of section 15.

⁹ The Law Society denies any of the Appellants’ rights are infringed as set out in its main factum at paras. 68-76.

based on merit alone is pressing and substantial.¹⁰ The competence of the legal profession is optimized where the legal education qualifications required for access to the bar can be obtained without discrimination and based on merit alone.

12. Second, the Law Society's Decision is rationally connected to this pressing and substantial objective because it maintains, in fact, equal access to legal education. The Decision also minimally impairs any of the Appellants' rights, to the extent they are infringed, and is proportionate in its effect. In this regard, the Law Society refers to the submissions in its original factum (at paragraphs 77-87). The Divisional Court expressly found that the Law Society reasonably considered and balanced Appellants' the *Charter* rights in its Decision.¹¹

C. The Law Society's Decision does not infringe the Appellants' freedom of association

13. The Divisional Court correctly found that the Law Society has not infringed the Appellants' freedom of association.¹²

14. The fundamental purpose of freedom of association is to protect the individual from state-enforced isolation in the pursuit of his or her ends.¹³ The Law Society's Decision results in "no state-enforced isolation of evangelical Christians."¹⁴ The Decision does not prevent Evangelical Christians from attending law school and obtaining law degrees, or from becoming members of the Ontario bar. Nor does the Decision limit an individual's right to freely associate with whomever the individual wishes in undertaking

¹⁰ Factum of Law Rights Watch Canada at para 25. Factum of the Justice Centre for Constitutional Freedoms at para 25; *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 2326 at paras 96 – 97. JBOA, Tab 54.

¹¹ Application Decision, para. 123, RC, Tab 1, pp. 35-36

¹² This is in response to the submissions of the Justice Centre for Constitutional Freedoms.

¹³ *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 11, at para. 35, JBOA, Tab 70.

¹⁴ Application Decision, para. 142, RC, Tab 1, p. 40.

those pursuits.

15. Nothing precludes anyone attending courses offered by the Law Society or any accredited law school from associating freely with those who share their religious beliefs.¹⁵ On the other hand, as found by the Divisional Court,¹⁶ what the Appellants are seeking is not so much a right to associate, but a right to exclude those with whom they disagree and to force the Law Society as a public regulator to endorse a “separate but equal” doctrine.

16. The right to associate does not include the right to force a public actor to adopt and implement a discriminatory practice. Thus Evangelical Christians could not, under the guise of the right to associate, insist upon segregated classes based on religion in education offered by the Law Society or any accredited law school.¹⁷ The fact that the associational activity is taking place at a private institution does not diminish the public nature of the Law Society’s exercise of its statutory power to accredit (or not) law schools.

17. In *Brown v. Board of Education*, the United States Supreme Court held that “separate educational facilities are inherently unequal” because the very act of the separation denotes the inferiority of the minority group.¹⁸ “Separate but equal” has been rejected by Canadian courts, including in the treatment of people in same sex

¹⁵ For e.g. Affidavit of Benjamin Alarie, sworn October 24, 2014, para. 23, RC, Tab 7, p. 81.

¹⁶ Application Decision, para. 142, RC, Tab 1, p. 40.

¹⁷ In this regard, it is noteworthy that neither the Appellants nor the affiants asserted the associational right to matriculate exclusively with others who share their world view while attending public schools.

¹⁸ *Brown v. Board of Education of Topeka* 347, U.S. 483 (1954), JBOA, Tab 239.

relationships.¹⁹

18. Such an extreme interpretation of freedom of association is irreconcilable with the guarantees provided by section 15 of the *Charter*.

D. The Law Society's Decision does not relate to individual TWU graduates

19. The Law Society's Decision does not prevent any individual from being admitted to the Ontario bar.²⁰ The Law Society only considered whether TWU's proposed law school should be accredited. Indeed, as found by the Divisional Court, throughout these proceedings TWU has only requested this specific relief and has never requested that the Law Society address the process by which TWU graduates could become members of the Ontario bar:

In making that observation, we recognize that the respondent has never been asked, by either of the applicants or by anyone else, what its position would be if an individual graduate of a TWU law school made his/her own application for admission. We simply raise the issue to make it clear that the interests of individual graduates may arise at some future point and, if they do, the respondent will be duty bound to properly consider their accreditation requests, in order to ensure that the religious rights of any graduate of TWU's law school are minimally impaired.²¹

20. As a result, for the purposes of these proceedings, consideration of the issue of individual TWU graduates is premature. The manner in which TWU graduates could become members of the Ontario bar would engage different public policy considerations than the decision of whether or not to accredit TWU's proposed law school, and are

¹⁹ Application Decision, para. 142, RC, Tab 1, p. 40; *Halpern v. Canada* (Attorney General) (2003), 65 O.R. (3d) 161 (C.A.), JBOA, Tab 62; *Moore v. British Columbia (Education)*, 2012 SCC 61 at para. 30, JBOA, Tab 240.

²⁰ This is in response to the submissions of the Justice Centre for Constitutional Freedoms, the Evangelical Fellowship of Canada and Christian Higher Education Canada and the Association for Reformed Political Action Canada.

²¹ Application Decision, para. 128, RC, Tab 1, p. 37.

appropriately left for Convocation should the issue arise in the future.²²

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of March,
2016.



Guy J. Pratte
Nadia Effendi
Duncan Ault

²² Similarly, with regard to the submissions of the Justice Centre for Constitutional Freedoms, the Law Society's current practices with regard to admission of foreign individual law students are not at issue in this case. If raised in the future, this issue would appropriately be put before Convocation for determination.

SCHEDULE "A" – AUTHORITIES CITED

1. *Doré v. Barreau du Québec*, 2012 SCC 12.
2. *Trinity Western University v. Law Society of British Columbia*, 2015 BCSC 2326.
3. *Mounted Police Association of Canada v. Canada (Attorney General)*, 2015 SCC 11.
4. *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).
5. *Halpern v. Canada (Attorney General)* (2003), 65 O.R. (3d) 161 (C.A.).
6. *Moore v. British Columbia (Education)*, 2012 SCC 61.

**SCHEDULE "B" – LEGISLATION, REGULATIONS, RULES AND BYLAWS
CITED**

N/A

Court of Appeal File No.: C61116

**TRINITY WESTERN UNIVERSITY and
BRAYDEN VOLKENANT**

- and -

LAW SOCIETY OF UPPER CANADA

Applicants (Appellants)

Respondent (Respondent)

COURT OF APPEAL FOR ONTARIO

**REPLY FACTUM OF THE RESPONDENT,
LAW SOCIETY OF UPPER CANADA**

BORDEN LADNER GERVAIS LLP

Barristers and Solicitors
Scotia Plaza, 40 King Street West
Toronto, Ontario M5H 3Y4

Guy J. Pratte (LSUC #23846L)

Nadia Effendi (LSUC #49004T)

Duncan Ault (LSUC #53916R)

Tel: 416.367.6728

Fax: 416.361.2721

Lawyers for the Respondent (Respondent),
Law Society of Upper Canada