

**ONTARIO**  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants

and

THE LAW SOCIETY OF UPPER CANADA

Respondent

and

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

Interveners

**FACTUM OF THE INTERVENERS,  
THE EVANGELICAL FELLOWSHIP OF CANADA and  
CHRISTIAN HIGHER EDUCATION CANADA**

**VINCENT DAGENAIS GIBSON LLP/s.r.l.**  
260 Dalhousie Street, Suite 400  
Ottawa, Ontario K1N 7E4

**ALBERTOS POLIZOGOPOULOS /  
KRISTIN MARIE BARSOUM DEBS**  
(613) 241-2701  
(613) 241-2599 (fax)  
Solicitors for the Interveners,  
The Evangelical Fellowship of Canada and  
Christian Higher Education Canada

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

**Robert W. Staley**

Email: [staley@bennettjones.com](mailto:staley@bennettjones.com)

**Derek J. Bell**

Email: [bell@bennettjones.com](mailto:bell@bennettjones.com)

**Ranjan K. Agarwal**

Email: [agarwal@bennettjones.com](mailto:agarwal@bennettjones.com)

Tel: (416) 863-1200

Fax: (416) 863-1716

Lawyers for the Applicants, Trinity Western University and Brayden Volkenant

**AND TO:** **BORDEN LADNER GERVAIS LLP**  
Scotia Plaza, 44<sup>th</sup> Floor  
40 King Street West  
Toronto, Ontario M5H 3Y4

**Guy J. Pratte**

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

**Nadia Effendi**

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

**Duncan Ault**

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

Tel: (416) 367-6728

Fax: (416) 361-2721

Lawyers for the Respondent, the Law Society of Upper Canada

**AND TO:** **DEPARTMENT OF JUSTICE CANADA**  
Ontario Regional Office  
130 King Street West, Suite 3400  
P.O. Box 36  
Toronto, Ontario M5X 1K6

**Roy Lee**

Email: [roy.lee@justice.gc.ca](mailto:roy.lee@justice.gc.ca)

Tel: (416) 952-2946

Fax: (416) 973-4328

Lawyers for the Intervener, the Attorney General of Canada

**AND TO: ROCHON GENOVA LLP**  
121 Richmond Street West, Suite 900  
Toronto, Ontario M5H 2K1

**Peter R. Jervis**

Email: [pjervis@rochongenova.com](mailto:pjervis@rochongenova.com)

**Derek B.M. Ross**

Email: [derekrossclf@gmail.com](mailto:derekrossclf@gmail.com)

Tel: (416) 363-1867

Fax: (416) 363-0263

Lawyers for the Intervener, Christian Legal Fellowship

**AND TO: DOUCETTE BONI SANTORO FURGIUELE**  
11 – 20 Dundas Street West  
Toronto, Ontario M5G 2G8

**Daniel Santoro**

Email: [santoro@dbsfcounsel.com](mailto:santoro@dbsfcounsel.com)

**John Carpay**

Email: [jcarpay@jccf.ca](mailto:jcarpay@jccf.ca)

Tel: (416) 922-7272

Lawyers for the Intervener, The Justice Centre for Constitutional Freedoms

**AND TO: PALIARE ROLAND ROSENBERG ROTHSTEIN LLP**  
155 Wellington Street West, 35<sup>th</sup> Floor  
Toronto, Ontario M5V 3H1

**Chris G. Paliare**

Email: [chris.paliare@paliareroland.com](mailto:chris.paliare@paliareroland.com)

**Joanna Radbord**

Email: [joanna@mccarthyco.ca](mailto:joanna@mccarthyco.ca)

Tel: (416) 646-4300

Fax: (416) 646-4301

Lawyers for the Intervener, The Advocates' Society

**AND TO: JOHN NORRIS**  
116 Simcoe Street, Suite 100  
Toronto, Ontario M5H 4E2

**John Norris**

Email: [john.norris@simcoechambers.com](mailto:john.norris@simcoechambers.com)

Tel : (416) 596-2960

Fax : (416) 596-2598

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

**AND TO: SACK GOLDBLATT MITCHELL LLP**  
20 Dundas Street West, Suite 1100  
Toronto, Ontario M5G 2G8

**Marlys Edwardh**

Email: [medwardh@sgmlaw.com](mailto:medwardh@sgmlaw.com)

**Vanessa Payne**

Email: [vpayne@sgmlaw.com](mailto:vpayne@sgmlaw.com)

**Frances Mahon**

Email: [fmahon@sgmlaw.com](mailto:fmahon@sgmlaw.com)

**Paul Jonathan Saguil**

Email: [paul.jonathan.saguil@gmail.com](mailto:paul.jonathan.saguil@gmail.com)

Tel: (416) 977-6070

Fax: (416) 591-7333

Lawyers for the Interveners, Out on Bay and OUTlaws

# Contents

<b>PART I – OVERVIEW</b> .....	1
<b>PART II – FACTS</b> .....	2
<b>PART III – ISSUES</b> .....	2
<b>PART IV – ARGUMENT</b> .....	3
<b>A. What is the standard of review of the LSUC’s decision as it relates to the <i>Charter</i>?</b> .....	3
<b>B. Does the LSUC’s decision violate section 15 of the <i>Charter</i>?</b> .....	3
Can the LSUC exclude Christians from the practice of law because of their religious beliefs?.....	4
Space for religion in a secular society .....	6
<b>C. Did the LSUC reasonably balance its amandate with the <i>Charter</i> rights of TWU?</b> .....	8
Section 2(a) of the <i>Charter</i> – Freedom of Religion and Conscience .....	9
<i>Religious communities, such as TWU, have the right to maintain their religious identity</i> .....	11
Section 2(b) of the <i>Charter</i> – Freedom of Thought, Belief, Opinion and Expression .....	12
Section 2(d) of the <i>Charter</i> – Freedom of Association.....	12
<i>Did the LSUC reasonably balance its mandate with the Charter rights and values at play?</i> .....	13
<b>PART V – ORDER SOUGHT</b> .....	15
<b>PART VI – LIST OF AUTHORITIES</b> .....	16
<b>PART VII – TEXTS OF STATUTES, REGULATIONS AND BY-LAWS</b> .....	17

## **PART I – OVERVIEW**

1. Can a lawyer who was trained at a Christian law school and who holds to a Biblical definition and understanding of the nature of marriage and sexuality be barred from the practice of law on the sole basis of his or her sincerely held religious beliefs? That is the question that this Honourable Court is asked to answer in this application for judicial review.
2. Trinity Western University (“TWU”) has applied for judicial review of the Law Society of Upper Canada’s (the “LSUC”) decision dated April 24, 2014 where it voted to not admit TWU graduates to the practice of law in Ontario. This decision is based on the LSUC’S view that TWU’s Community Covenant, is discriminatory, not on TWU’s academic standards.
3. The LSUC argues that its mandate requires it to not approve TWU’s proposed law school because doing so would limit access to the study of law for members of the LGBT community, women and non-Evangelical Christians. In rendering this decision, the LSUC has attempted to broaden its reach and its authority to regulate the practice of law in Ontario to that of the regulator of the *study of law* and *access to the study of law* in British Columbia.
4. The LSUC argues that TWU’s law school provides preferential treatment or favour to Evangelical Christians. However, it denies that its decision not to approve TWU’s law school discriminates against or results in differential treatment of Evangelical Christians. As such, the LSUC is attempting to have it both ways.
5. The question of whether individuals trained in an Evangelical Christian university can be barred from engaging in a specific profession has already been adjudicated in Canada.
6. In *Trinity Western University v. British Columbia College of Teachers Association*<sup>1</sup>, the Supreme Court of Canada dealt with an appeal arising out of an application for judicial review

---

<sup>1</sup> *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772 [“*TWU v. BCCT*”], **Book of Authorities of the Intervenors, the EFC and CHEC [“BOA”], at Tab 1.**

of the British Columbia College of Teachers' ("BCCT") decision not to accredit TWU's proposed teachers' college because of TWU's Biblical understanding of marriage and sexuality. In that case, the Supreme Court of Canada concluded that the BCCT's decision violated the religious freedom of TWU as an institution, as a community and of its graduates.

7. Recently, the Nova Scotia Supreme Court ruled that the Nova Scotia Barristers' Society's decision not to approve TWU's proposed law school because of its Community Covenant was unreasonable and ought to be set aside.

## **PART II – FACTS**

8. The Evangelical Fellowship of Canada (the "EFC") and Christian Higher Education Canada ("CHEC") accept the facts as set out in the factum of the Applicants. The EFC and CHEC repeat and reiterate however, the following facts regarding TWU.
9. TWU's staff, faculty and students voluntarily choose to join the TWU community. In voluntarily joining the TWU community, staff, faculty and students commit themselves to signing the Community Covenant, a promise or pledge which they make to each other.
10. The Community Covenant does not prohibit or ban anyone from working at or attending TWU, rather, it seeks to foster an environment where members all seek to live their lives according to Christian teaching and principles.

## **PART III – ISSUES**

11. The EFC and CHEC make submissions on the following issues:
  - a. What is the standard of review of the LSUC's decision as it relates to the *Canadian Charter of Rights and Freedoms* (the "Charter")?
  - b. Does the LSUC's decision violate section 15 of the *Charter*?
  - c. Did the LSUC reasonably balance its mandate with the *Charter* rights of TWU?
    - i. Section 2(a) of the *Charter*
    - ii. Section 2(b) of the *Charter*
    - iii. Section 2(d) of the *Charter*

## **PART IV – ARGUMENT**

### **A. What is the standard of review of the LSUC’s decision as it relates to the *Charter*?**

12. Courts reviewing an administrative decision which implicates *Charter* rights and freedoms must consider whether the administrative decision maker(s) properly and proportionately balanced the relevant *Charter* rights with the statutory objectives of the statute at issue.
13. The LSUC’s decision was grounded in its interpretation of its mandate to set qualifications for admission to the practice of law in Ontario and the application of the *Charter*. The LSUC’s balancing of TWU’s *Charter* rights, *Charter* values and the statutory objectives of the *Law Society Act*<sup>2</sup> are therefore subject to review on the reasonableness standard.<sup>3</sup>

### **B. Does the LSUC’s decision violate section 15 of the *Charter*?**

14. In addition to benefiting from freedom of religion as guaranteed by section 2(a) of the *Charter*, as set out below, TWU as an institution and a community and TWU graduates, are entitled to equal treatment under the law. Indeed, section 15(1) of the *Charter* guarantees that “every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination” based on religion<sup>4</sup>.
15. The LSUC’s decision was discriminatory in that it was based solely on the religious beliefs and religious practices of TWU and its future graduates. As such, it treats TWU and its future graduates, and any individual who is otherwise qualified to practice law in Ontario but who holds to a Biblical understanding of marriage and sexuality, unequally. In the alternative, the LSUC’s decision was based on TWU and its future graduates’ association with each other.
16. In either case, the decision results in unequal and discriminatory treatment based on TWU and its future graduates’ religion or association with a religious community.

---

<sup>2</sup> *Law Society Act*, R.S.O. 1990, c. L.8, at s. 4.1 [“*LSA*”].

<sup>3</sup> *Doré v. Barreau du Québec*, 2012 SCC 12, at paras. 57, 58 [“*Doré*”] **BOA, at Tab 2.**

<sup>4</sup> *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (UK)*, 1982, c 11, at s. 15 [“*Charter*”],



Can the LSUC exclude Christians from the practice of law because of their religious beliefs?

17. The LSUC suggests that its religious discrimination against TWU and its future graduates is justified because it is necessary to protect women, non-Evangelical Christians and members of the LGBT community from discrimination at the hands of TWU<sup>5</sup>. Indeed, conduct like the LSUC's has already been rejected by the Supreme Court of Canada<sup>6</sup>.
18. Recently, the Nova Scotia Supreme Court rejected the idea that TWU's Community Covenant was "unlawful" or that it violates any human rights code<sup>7</sup>.
19. If the LSUC is right, and it is appropriate to exclude people from the practice of law on the basis of their sincerely held religious beliefs and practices because allowing TWU graduates to practice law in Ontario would be "corrosive of confidence in the legal profession"<sup>8</sup>, then the rationale follows that it would be appropriate to exclude all people holding similar beliefs from any public function to ensure public confidence in the function. Such a suggestion however, has been clearly rejected by the Supreme Court of Canada.
20. Indeed, in the *Reference Re: Same-Sex Marriage*<sup>9</sup>, the Supreme Court of Canada was clear that simply holding to a Biblical understanding of marriage and sexuality cannot exclude individuals from engaging in the officiating of marriages. It stated:

The right to same-sex marriage conferred by the *Proposed Act* may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(a). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

---

<sup>5</sup> See LSUC Factum, at para. 2.

<sup>6</sup> *TWU v. BCCT*, *supra*, at para. 42 **BOA, at Tab 1.**

<sup>7</sup> *Trinity Western University v. Nova Scotia Barristers' Society*, 2015 NSSC 25, at paras. 10, 245 ["*TWU v. NSBS*"] **BOA, at Tab 3.**

<sup>8</sup> See LSUC Factum, at para. 80.

<sup>9</sup> *Reference re Same-Sex Marriage* [2004] 3 S.C.R. 698 ["*Re: Same-sex marriage*"] **BOA, at Tab 4.**

The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist<sup>10</sup>.

21. In fact, the *Civil Marriage Act*<sup>11</sup> (the “*CMA*”) also specifically recognizes the right of individuals to hold to a Biblical understanding of marriage and sexuality. It reads:

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage<sup>12</sup>;

22. The *CMA* goes on to confirm these statements in the body of the *Act*:

**Freedom of conscience and religion and expression of beliefs**

**3.1** For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom<sup>13</sup>.

23. Neither the Supreme Court of Canada nor Parliament ever intended for those holding to a Biblical view of marriage to be deprived of any benefit under the law.

24. The rationale of the Supreme Court of Canada in *TWU v. BCCT* was in line with its rationale in *Re: Same-sex marriage* and with the rationale of Parliament in enacting the *CMA*. The language used in the *CMA* makes it clear that Parliament, in modifying the civil definition of marriage, did not consider that holding a different view of marriage was contrary to the public

---

<sup>10</sup> *Re: same-sex marriage, supra*, at paras. 52-53 **BOA, at Tab 4**.

<sup>11</sup> *Civil Marriage Act*, S.C. 2005, c. 33 [“*CMA*”].

<sup>12</sup> *CMA, supra*, at preamble [“*CMA*”].

<sup>13</sup> *CMA, supra*, at s. 3.1.

interest or should cause those individuals holding a different view of marriage to forfeit state benefits, protection or opportunities.

25. What is contrary to the public interest and what could cause individuals to lose or forfeit state benefits, protection or opportunities is engaging in activities or conduct which violate the law or go against the public interest. Simply holding a contrary view does not constitute discrimination and of course, there is no evidence to suggest that Christian lawyers are unable to practice law without discriminating. Indeed, the Supreme Court of Canada stated:

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society<sup>14</sup>.

26. In the case at hand it is the LSUC who is attempting to exclude or discriminate against individuals, not the TWU community or future TWU graduates. In going into the realm of religion, the LSUC's decision is unreasonable. Further, the decision is *ultra vires* the LSUC and the powers granted to it under the *Law Society Act*.

#### Space for religion in a secular society

27. TWU and its graduates ought not to be excluded from the public sphere because of their religious beliefs and practices. The State (or in this case the LSUC), in a secular society, has the obligation to welcome and accept religious individuals in the public sphere.
28. While the term "secular" is often used to mean non-religious, the Supreme Court of Canada found, in *Chamberlain v. Surrey School District No. 36*<sup>15</sup>, that the common usage of "secular"

---

<sup>14</sup> *TWU v. BCCT, supra*, at para. 36 **BOA, at Tab 1**.

<sup>15</sup> *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710 [*Chamberlain*] **BOA, at Tab 5**.

to mean “non-religious” is erroneous. Specifically, Gonthier J. commented (and was concurred with by McLachlin C.J. and Lebel J. for unanimity of the Court on this point):

In my view, Saunders J. below erred in her assumption that “secular” effectively meant “non-religious”. This is incorrect since nothing in the Charter, political or democratic theory, or a proper understanding of pluralism demands that atheistically based moral positions trump religiously based moral positions on matters of public policy [...] According to the reasoning espoused by Saunders J., if one’s moral view manifests from a religiously grounded faith, it is not to be heard in the public square, but if it does not, then it is publicly acceptable. The problem with this approach is that everyone has “belief” or “faith” in something, be it atheistic, agnostic or religious. To construe the “secular” as the realm of the “unbelief” is therefore erroneous. Given this, why, then, should the religiously informed conscience be placed at a public disadvantage or disqualification? To do so would be to distort liberal principles in an illiberal fashion and would provide only a feeble notion of pluralism.<sup>16</sup> [emphasis added]

29. A secular State then, does not interfere with the beliefs or practices of a religious group, does not support or prefer the practices of one group over those of another and allows communities with different values and practices to peacefully co-exist<sup>17</sup>. A secular State remains neutral with respect to religious issues<sup>18</sup>.

30. The LSUC argues that its position is religiously neutral, but as the Supreme Court of Canada has confirmed, state neutrality can only be assured if the state does not favour or hinder a specific religious belief or tradition<sup>19</sup>. Here, the LSUC violated the principles of secularism and its duty of neutrality by favouring and adopting a position which is anything but neutral. The LSUC adopts the position that the study of law and religion have no place together and that the Biblical view of marriage and sexuality is wrong. The LSUC concludes that those who hold a Biblical view of marriage and sexuality and who study law at an Evangelical Christian university ought not be permitted to practice law in Ontario. In adopting such a

---

<sup>16</sup> Chamberlain, *supra*, at 137 **BOA**, at **Tab 5**.

<sup>17</sup> *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12, at paras. 43, 45 [“*Loyola*”] **BOA**, at **Tab 6**.

<sup>18</sup> *Loyola*, *supra*, at paras. 44, 45 **BOA**, at **Tab 6**.

<sup>19</sup> *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235, at paras. 31-32 [“*S.L.*”] **BOA**, at **Tab 7**.

position, the LSUC violates its secular nature and its duty to remain neutral by favouring those groups and individuals who hold differing views while being hostile to Evangelical Christians.

As the Supreme Court of Canada recently stated, pursuing a free and democratic society

“requires the state to encourage everyone to participate freely in public life regardless of their beliefs. The state may not act in such a way as to create a preferential public space that favours certain religious groups and is hostile to others. It follows that the state may not, by expressing its own religious preference, promote the participation of believers to the exclusion of non-believers or vice-versa<sup>20</sup>”.

31. The LSUC has created an environment in which Evangelical Christians wishing to study law in an Evangelical Christian university and practice law in Ontario are not welcomed. Doing so violated the LSUC’s secular nature and its obligation to remain neutral which seeks “to ensure that the state is, and appears to be, open to all points of view<sup>21</sup>”.

**C. Did the LSUC reasonably balance its mandate with the *Charter* rights of TWU?**

32. In considering the *Charter* rights of TWU as an institution and a community and of TWU’s future graduates, the *Charter* rights and values engaged by the LSUC’s decision, the LSUC was required to first identify and consider its objectives. The *Law Society Act* clearly sets out the LSUC’s function which is to ensure that all persons who practice law in Ontario meet appropriate standards of learning, professional competence and professional conduct and to ensure that such standards are applied equally in Ontario<sup>22</sup>.
33. In carrying out its function of setting these standards of learning, the LSUC was required to go through a two-step analysis. The first step was to determine whether graduates of TWU’s proposed law school met the standards developed by the LSUC for the qualification to practice law. The second step was to consider how freedom of religion, freedom of expression

---

<sup>20</sup> *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, at para. 75 [“*Saguenay*”] **BOA**, at **Tab 8**.

<sup>21</sup> *Saguenay*, *supra*, at para. 137 **BOA**, at **Tab 8**.

<sup>22</sup> *LSA*, *supra*, at s. 4.1.

and freedom of association are best protected in view of its objectives. Because there are several *Charter* rights and values at play here, we must consider each one individually.

Section 2(a) of the *Charter* – Freedom of Religion and Conscience

34. There is no meaningful difference between the religious freedom of the individuals that establish, operate and attend a faith-based university community and that of the university community itself. Faith-based universities are, by their very nature, religious. They are confessional. They are founded on religious principles by religious individuals, leaders or organizations for expressly religious purposes. Faith-based universities such as TWU and those represented by CHEC and the EFC are extensions of the Church and manifestations of a religious community.
35. Religion is by definition and in practice, a personal commitment manifest in and through community. In the Christian tradition, for example, this communal dimension of belief is manifest in the very concepts of being members of the body of Christ, being brothers and sisters one with and other, and the concept of church. Other world religions also manifest their beliefs in and through communal ways of life.
36. The Supreme Court’s jurisprudence makes it clear that freedom of religion has individual and collective aspects to it. In *R. v. Edwards Books and Art Limited*<sup>23</sup>, Dickson C.J. confirmed that freedom of religion has both individual and collective aspects<sup>24</sup> and Wilson J. argued that an interpretation of s. 2a) of the *Charter* that protects the religious freedoms of individuals but not the groups they belong to is precluded by s. 27 of the *Charter*<sup>25</sup>.
37. In *Alberta v. Hutterian Brethren of Wilson Colony*<sup>26</sup>, the Supreme Court of Canada further

---

<sup>23</sup> *R. v. Edwards Books and Art Limited*, [1986] 2 S.C.R. 713 [“*Edwards Books*”] **BOA, at Tab 9.**

<sup>24</sup> *Edwards Books, supra*, at 781 **BOA, at Tab 9.**

<sup>25</sup> *Edwards Books, supra*, at 808 and 809 **BOA, at Tab 9.**

<sup>26</sup> *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 [“*Hutterian Brethren*”] **BOA, at Tab 10.**

recognized that freedom of religion has collective aspects<sup>27</sup>. More recently, the Supreme Court of Canada confirmed that freedom of religion includes not only the “right to hold religious opinions but also an individual right to establish communities of faith<sup>28</sup>” While TWU is an accredited university, it is much more than that. It is a religious community through which:

- a. TWU the institution, carries-out its religious mission;
- b. TWU faculty and staff carry-out their ministry;
- c. TWU faculty and staff worship and practice their faith in community; and,
- d. TWU students worship and practice their faith in community.

38. Faith-based universities are made up of a community of individuals who all share the same religious beliefs for the purpose of either providing or receiving a faith-based education as part of their mission and religious worship<sup>29</sup>. Indeed, TWU’s mission is to develop godly Christian leaders with thoroughly Christian minds who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life<sup>30</sup>. TWU then, while an institution, is also a religious community. Indeed, in *TWU v. BCCT*, the Supreme Court of Canada recognized TWU as a religious community<sup>31</sup>. TWU as a community then, benefits from freedom of religion.

39. For an Evangelical Christian, and a Christian university, the provision of education and the shaping of individuals who follow Christ is a religious calling and a form of worship<sup>32</sup>. The Christian university then, is the mechanism through which some Evangelical Christians carry-out their faith and benefit from their *Charter* right to freedom of religion. Indeed, Bastarache J. recognized that the protection of individual freedoms is best realized by ensuring the

---

<sup>27</sup> *Hutterian Brethren, supra*, at paras. 31, 32, 130, 131 and 182 **BOA, at Tab 10.**

<sup>28</sup> *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1, at para. 64 **BOA, at Tab 11.**

<sup>29</sup> *Loyola, supra*, at paras. 32, 61, 62 **BOA, at Tab 6.**

<sup>30</sup> Trinity Western University Mission, **Exhibit “C” to the Affidavit of W. Robert Wood**, sworn August 22, 2014.

<sup>31</sup> *TWU v. BCCT, supra*, at paras. 3, 23, 24, 73 **BOA, at Tab 1.**

<sup>32</sup> *TWU v. NSBS, supra*, at para. 230 **BOA, at Tab 3.**

existence of communities through which individuals can manifest their individual freedoms<sup>33</sup>.

40. Similarly, the existence of the Christian university is the means through which religious individuals, such as Christian professors and other individuals who work in or administer Christian universities, carry-out their faith and worship God by providing Christian education. For Christians, the operation of a Christian university is the manifestation of their faith, a mechanism through which to minister to God's people and a means to worship God.

***Religious communities, such as TWU, have the right to maintain their religious identity***

41. The Supreme Court of Canada's jurisprudence recognizes the right of a religious community, to determine their own religious and moral identities<sup>34</sup>. Indeed, in *Caldwell v. Stuart*<sup>35</sup>, the Supreme Court of Canada recognized that faith-based institutions (in that case a Catholic school), had the right to insist that its employees (in that case a teacher), adhere to the religious teachings and principles of the institution.

42. In *TWU v. BCCT*, the Supreme Court recognized that religious communities and institutions have the right to set behavioural standards of for its members<sup>36</sup>. The Supreme Court of Canada confirmed that the mere prescription of conduct by a religious community does not constitute discrimination<sup>37</sup>. The Community Covenant is a means of maintaining TWU's religious character and is part of what makes TWU a distinctly Evangelical Christian university<sup>38</sup>.

43. On this basis, the educational institutions the EFC and CHEC represent implement policies on teaching, materials and behaviour of their staff and/or students. For example, a Christian university such as TWU will not hold examinations on Sundays, the Christian Sabbath.

---

<sup>33</sup> *R. v. Beaulac*, [1999] 1 S.C.R. 768, at paras. 16 and 20 **BOA, at Tab 12.**

<sup>34</sup> *Loyola, supra*, at paras. 67, 73 **BOA, at Tab 6.**

<sup>35</sup> *Caldwell v. Stuart*, [1984] 2 SCR 603 **BOA, at Tab 13.**

<sup>36</sup> *TWU v. BCCT, supra*, at paras. 33-35 **BOA, at Tab 3.**

<sup>37</sup> *TWU v. BCCT, supra*, at para. 33 **BOA, at Tab 1.**

<sup>38</sup> *TWU v. NSBS, supra*, at para. 232 **BOA, at Tab 3.**



Section 2(b) of the Charter – Freedom of Thought, Belief, Opinion and Expression

44. The LSUC’s decision violates the section 2(b) *Charter* right to freedom of thought, belief, opinion and expression of the TWU community. As a religious community, TWU also benefits from the freedom of thought, belief, opinion and expression. The TWU community is made-up of students, staff and faculty who come together with other Christian individuals so that they can teach, work, live, study and learn in community.
45. Signing and adhering to the Community Covenant is a religious practice for the TWU community, but it is much more than that. The Community Covenant permits and allows the TWU community to define itself and to set out its religious and moral identity publicly and in community.
46. By rejecting TWU graduates because of TWU’s Community Covenant, the LSUC stepped out of the role of setting professional and academic standards to qualify for the practice of law in Ontario, and into the role of setting moral, social, political and religious standards to qualify for the practice of law in Ontario. By doing so, the LSUC violated the freedom of thought, freedom of belief, freedom of opinion and freedom of expression of TWU as an institution and a religious community and of each member of the TWU community<sup>39</sup>.

Section 2(d) of the Charter – Freedom of Association

47. In making its decision the LSUC also violated the TWU community’s, as well as each TWU graduate’s, right to freedom of association as guaranteed by section 2(d) of the *Charter*. As set out above, freedom of religion is exercised in community in a number of ways.
48. In *Reference Re Public Service Employee Relations Act (Alta.*<sup>40</sup>), the Supreme Court recognized the importance of freedom of association to freedom of religion. It stated:

---

<sup>39</sup> *TWU v. NSBS, supra*, at para. 235 **BOA, at Tab 3**.

<sup>40</sup> *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313, 1987 [“*Re: Public Service*”] **BOA, at Tab 14**.

It is, I believe, equally clear that, in accordance with the second approach, freedom of association should guarantee the collective exercise of constitutional rights. Individual rights protected by the Constitution do not lose that protection when exercised in common with others. People must be free to engage collectively in those activities which are constitutionally protected for each individual. [...] religious groups would receive protection if their activities constituted the collective exercise of freedom of religion. Thus, the principal purposes or values of freedom of association would be realized by interpreting s. 2(d) as protecting the collective exercise of the rights enumerated in the *Charter*<sup>41</sup>.

49. As such, since teaching and studying in a Christian University in community with others under a common faith and belief system is considered to be a form of exercise of freedom of religion, and since the existence of a Christian University by definition implies the “association”, or gathering of many individuals, then it follows that teaching and studying in such a university would constitute a collective exercise of freedom of religion.
50. Those teaching and studying at TWU’s proposed law school are exercising their freedom of religion in association with one another. Indeed, the Nova Scotia Supreme Court recently accepted that studying at TWU is itself a religious practice<sup>42</sup>. The LSUC’s decision then, failed to reasonably balance the purpose of the LSUC with the right to freedom of association of the TWU community, including all TWU graduates.
51. Furthermore, by rejecting TWU graduates because of TWU’s Community Covenant, the LSUC is in effect attempting to constrain TWU’s freedom of religion and freedom of association, and coercing would-be members of that community to either attend a different law school, or be barred from practicing law in Ontario<sup>43</sup>.

***Did the LSUC reasonably balance its mandate with the Charter rights and values at play?***

52. The EFC and CHEC submit that the best and only way to protect the *Charter* values and TWU’s *Charter* rights to freedom of religion and conscience, freedom of thought, belief,

---

<sup>41</sup> *Re : Public Service, supra*, at 407 **BOA**, at **Tab 14**.

<sup>42</sup> *TWU v. NSBS, supra*, at para. 230 **BOA**, at **Tab 3**.

<sup>43</sup> *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, at 336-337 **BOA**, at **Tab 15**.

opinion and expression, and freedom of association, in view of the LSUC's objectives, would have been to approve graduates of TWU for the practice of law in Ontario.

53. Indeed, in *TWU v. BCCT*, the Supreme Court of Canada concluded that the British Columbia College of Teachers had failed to balance the alleged discrimination resulting from TWU's Community Covenant with the freedom of religion of the TWU community<sup>44</sup>.

54. The Supreme Court of Canada's further guidance in *Doré v. Barreau du Québec*<sup>45</sup> requires the LSUC to have properly and proportionately balanced TWU's *Charter* rights to and the *Charter* values of freedom of religion, expression and association with the statutory objectives of the LSUC. Indeed, the Supreme Court stated:

[57] On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, "[t]he issue becomes one of proportionality" (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a "margin of appreciation", or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives<sup>46</sup>.

55. The LSUC was required to properly and proportionately balance TWU's *Charter* rights and the *Charter* values of freedom of religion, freedom of expression and freedom of association with its statutory objectives. The LSUC failed to balance them at all.

56. Indeed, the LSUC's failed to even consider TWU's *Charter* rights and to and the *Charter* values of freedom of religion, expression and association. This constitutes an error in its exercise of its statutory discretion and is unreasonable. It is also unconstitutional.

---

<sup>44</sup> *TWU v. BCCT*, *supra*, at para. 33 **BOA, at Tab 1.**

<sup>45</sup> *Doré*, *supra* **BOA, at Tab 2.**

<sup>46</sup> *Doré*, *supra*, at para. 57 **BOA, at Tab 2.**

57. In *Doré*, the Supreme Court concluded that disciplinary bodies must not only consider and balance the expressive rights at issue, but must demonstrate that they did so.<sup>47</sup>

58. In refusing to even consider TWU's *Charter* rights and freedoms the LSUC failed to demonstrate that it gave due regard to the importance of rights at issue, both those of TWU as well as TWU's individual members' *Charter* rights.

59. The LSUC's conclusion that holding to a Biblical understanding of marriage and sexuality is a bar to the practice of law in Ontario was not reasonable in that the LSUC refused to even consider the *Charter* values and *Charter* rights at issue. Their decision did not involve a proportionate balance of *Charter* values with the LSUC's objectives or its statutory mandate of establishing standards for the qualification to practice law in Ontario<sup>48</sup>

#### **PART V – ORDER SOUGHT**

60. As it was in the Supreme Court of Canada's decision in *TWU v. BCCT* and *TWU v. NSBS*, so it should be here. This Court should not send TWU's application back to the LSUC to be reconsidered, but rather, should supplement the LSUC's decision with its own.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 1<sup>st</sup> day of May, 2015.



---

**Vincent Dagenais Gibson LLP/s.r.l.**  
260 Dalhousie Street, Suite 400  
Ottawa, Ontario K1N 7E4

**Albertos Polizogopoulos**  
**Kristin Marie Barsoum Debs**  
Tel : 613-241-2701  
Fax : 613-241-2599  
Lawyers for the Intervenors,  
the Evangelical Fellowship of Canada and  
Christian Higher Education Canada

---

<sup>47</sup> *Doré, supra*, at para. 66 **BOA, at Tab 2.**

<sup>48</sup> *Doré, supra*, at para. 67 **BOA, at Tab 2.**

## *Schedule “A”*

### **PART VI – LIST OF AUTHORITIES**

1. *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 SCR 772
2. *Doré v. Barreau du Québec*, 2012 SCC 12
3. *Trinity Western University v. Nova Scotia Barristers’ Society*, 2015 NSSC 25
4. *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698
5. *Chamberlain v. Surrey School District No. 36*, [2002] 4 S.C.R. 710
6. *Loyola High School v. Quebec (Attorney General)*, 2015 SCC 12
7. *S.L. v. Commission scolaire des Chênes*, [2012] 1 SCR 235
8. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
9. *R. v. Edwards Books and Art Limited*, [1986] 2 S.C.R. 713
10. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567
11. *Mounted Police Association of Ontario v. Canada*, 2015 SCC 1
12. *R. v. Beaulac*, [1999] 1 S.C.R. 768
13. *Caldwell v. Stuart*, [1984] 2 SCR 603
14. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313
15. *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295

*Schedule "B"*

**PART VII – TEXTS OF STATUTES, REGULATIONS AND BY-LAWS**

**1. *Law Society Act, R.S.O. 1990, c. L.8***

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.

**2. *Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c 11***

2. Everyone has the following fundamental freedoms:

(a) freedom of conscience and religion;

(b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;

(c) freedom of peaceful assembly; and

(d) freedom of association.

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

**3. *Civil Marriage Act, S.C. 2005, c. 33***

WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;

WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage.

**3.1** For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience and religion guaranteed under the *Canadian Charter of Rights and Freedoms* or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.

**TRINITY WESTERN UNIVERSITY et al.**

**and**

**THE LAW SOCIETY OF UPPER CANADA**

Applicants

Respondent

Court File No. 250/14

**ONTARIO  
SUPERIOR COURT OF JUSTICE  
DIVISIONAL COURT**

Proceedings commenced at Toronto

**FACTUM OF THE INTERVENERS,  
THE EVANGELICAL FELLOWSHIP OF CANADA  
and CHRISTIAN HIGHER EDUCATION CANADA**

**VINCENT DAGENAIS GIBSON LLP/s.r.l.**  
260 Dalhousie Street, Suite 400  
Ottawa, Ontario K1N 7E4

**ALBERTOS POLIZOGOPOULOS /  
KRISTIN MARIE BARSOUM DEBS**  
Solicitor for the Interveners,  
The Evangelical Fellowship of Canada and  
Christian Higher Education Canada  
(613) 241-2701 (Tel.)  
(613) 241-2599 (Fax)  
[albertos@vdg.ca](mailto:albertos@vdg.ca) / [kristin@debslaw.ca](mailto:kristin@debslaw.ca)