

COURT OF APPEAL FOR ONTARIO

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Applicants
(Appellants)

and

LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent)

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
CONSTITUTIONAL FOUNDATION and CANADIAN BAR ASSOCIATION**

Interveners

FACTUM OF THE INTERVENER, THE ADVOCATES' SOCIETY

February 26, 2016

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PART I. OVERVIEW

1. The Advocates' Society intervenes in support of the Law Society of Upper Canada (the "Law Society")'s decision not to accredit the proposed school of law at Trinity Western University ("TWU") (the "Decision").
2. The key issue in this appeal is whether the Law Society reasonably exercised its discretion in making the Decision. TWU's Community Covenant Agreement (the "Covenant"), requires all staff and students to pledge their "commitment to the person and work of Jesus Christ" and forbids sexual intimacy outside of heterosexual marriage. The Law Society and the Divisional Court recognized the discriminatory impact of this admission requirement.
3. Considering the nature of the question before the Law Society, the statutory and factual context, and the competing and wide-ranging considerations raised by TWU's application to accredit, the Law Society's Decision was reasonable, and correct. The Divisional Court did not err in dismissing TWU's application for judicial review. The Appeal should be dismissed.

PART II. SUMMARY OF FACTS

4. The Advocates' Society represents over 5,000 advocates across Canada. Its mandate includes advocacy education, legal reform, the protection of the rights of litigants, and the promotion of access to, and improvement of, the administration of justice.
5. The Advocates' Society adopts the summary of facts set out in Part II of the factum of the Law Society.

PART III. STATEMENT OF ISSUES, LAW & AUTHORITIES

6. The Advocates' Society makes the following submissions: (1) the applicable standard of review of the Decision is reasonableness; (2) the Law Society is not required to privilege one

religious group's access to legal education to maintain religious neutrality; (3) the Decision promotes the value of diversity in legal education; and (4) the Law Society exercised its discretion regarding accreditation reasonably in light of its statutory mandate and the significant, multi-faceted competing interests and considerations at play.

A. *The Applicable Standard of Review is Reasonableness*

7. The Decision not to accredit was an exercise of the Law Society's discretion, informed by its specialized expertise. It was a contextual decision, concurrently balancing benefits and costs in light of its statutory objectives. The Law Society's assessment of the public interest raised polycentric considerations including:

- (a) its obligations – to all stakeholders - under the *Canadian Charter of Rights and Freedoms*¹ and the *Ontario Human Rights Code*;²
- (b) its duty as a state actor to avoid privileging access to the legal profession for certain religious groups to the detriment of others;
- (c) the prospective impact of religiously-defined law school classrooms on the profession and the public;
- (d) current and anticipated supply-demand for legal education and lawyers' services;
- (e) the maintenance of public confidence in the legal system; and
- (f) its duty to promote access to justice and advance the rule of law through a diverse, representative bar and bench.

8. Accordingly, the Decision deserves considerable deference.

9. In an effort to rebut the presumption of reasonableness of decisions made by the Law Society within its specialized area of expertise, TWU mischaracterizes three aspects of the Decision as "jurisdictional" or as involving general questions of law that are of importance to the

¹ *Canadian Charter of Rights and Freedoms*, s. 2, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K)*, 1982, c.11("Charter").

² R.S.O. 1990, c. H.19 ("Code").

legal system.³ TWU's attempts to transform aspects of the Decision into questions that would attract a correctness standard should be rejected.⁴

10. TWU asserts that the Law Society had no jurisdiction to consider issues beyond training and competence as part of its public interest mandate. Questions of true jurisdiction which attract a standard of correctness are rare,⁵ and are restricted to determining whether a tribunal's "statutory grant of power gives it the authority to decide a particular matter."⁶ Considerable deference must be accorded by reviewing courts regarding both the exercise of discretion and the determination of the scope of the decision-maker's jurisdiction.⁷

11. There is no dispute that the Law Society had an express statutory grant of power to make discretionary decisions to accredit law schools from which graduates may seek access to the bar in Ontario.⁸ The Court should give considerable deference to the Law Society's conclusion that its public interest mandate obliged it to consider issues beyond training and competence.⁹

12. The Decision did not engage the issue of the scope of state neutrality as a general legal question. Rather, the Law Society had to consider its specific statutory mandate, in a contextualized manner having regard to the application of the principle most recently confirmed

³ Factum of the Appellants, dated December 1, 2015 ("Appellants' Factum"), paras. 46, 49, 51, 52. TWU also asserts that the correctness standard applies for other reasons. The Advocates' Society adopts the submissions of the Law Society on these points.

⁴ *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16, paras. 46-48 ("*Saguenay*"), Joint Book of Authorities ("JBA") Tab 3.

⁵ *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association ("ATA")*, 2011 SCC 61, paras. 33-34, 39, JBA Tab 152; *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57, para. 39, JBA Tab 16.

⁶ *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9, para. 59, JBA Tab 8.

⁷ *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, para. 53, JBA Tab 153; *ATA*, *supra*, paras. 34, 39, JBA Tab 152.

⁸ See *Law Society Act*, R.S.O. 1990, C. L.8 ("*LSA*"), and on accreditation specifically: ss. 27(3), 62 (0.1), (4.1); By-Law 4, Licensing, made under ss. 62 (0.1) and (1) of the *LSA*, JBA Tab 168.

⁹ *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37 at para. 49, JBA Tab 22; *Doré v. Barreau du Québec ("Doré")*, 2012 SCC 12, paras. 35-36, 43-48, 54, JBA Tab 10; *Loyola High School v. Quebec*, 2015 SCC 12 ("*Loyola*"), paras. 37-39, JBA Tab 49.

in *Saguenay* that state actors shall remain religiously neutral.¹⁰ Given the nature of the question, the expertise of the tribunal and the context of the decision being made, the Law Society's obligation of religious neutrality cannot be segmented from the interrelated public interest issues that squarely engage the Law Society's core expertise.

13. The Law Society's consideration of whether the Covenant was discriminatory, notwithstanding any exemptions or defences TWU might have in relation to discrimination under the human rights regime in British Columbia, is also subject to deference. The Law Society's conclusion that accreditation would condone a discriminatory admissions policy is inextricably linked to its public interests obligations, and in particular, the promotion of equal access to legal education and the maintenance of public confidence in the legal profession.¹¹

B. No Right to Religiously-Segregated Legal Education

14. TWU asserts that the Law Society failed to act in a neutral fashion on matters of religion because its Decision disclosed a "profound disrespect" for TWU's religious beliefs.¹² This argument is fundamentally flawed. Respect for all postures towards religion does not require accreditation of religiously-segregated legal education which excludes those unwilling or unable to pledge to an exclusionary oath.¹³

15. The Decision instead respects state neutrality, and reconciles both religious freedom and equality, by refusing a religious preference in the context of legal education.¹⁴ Many religious

¹⁰ *Saguenay*, *supra*, paras. 1, 4, 72, 76-78, JBA Tab 3.

¹¹ As noted by Divisional Court, *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250 ("Divisional Court Decision"), paras. 97-98, 100, 110, 116-118, Appeal Book and Compendium ("Appeal Book"), Tab 4, pp. 45-46, 48-49, 50-51.

¹² Appellants' Factum, para 54.

¹³ *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7 ("S.L."), para. 40, JBA Tab 69.

¹⁴ The Supreme Court has avoided a hierarchical approach to *Charter* values, favouring rights reconciliation that is acutely sensitive to context. See *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at para. 72, JBA

and non-religious people could not sign the Covenant in good conscience. Accreditation would increase the number of law school positions available to those willing to sign the Covenant, giving them preferential access to a licence to practice law in Ontario, to the detriment of those who could not sign due to their own religious or ethical beliefs.¹⁵

16. If the Law Society is required to accredit TWU's proposed law school, the Law Society will also be required to accredit future faith-based law schools. The Law Society might next be forced to sanction a law school with a religious-based prohibition against another historically disadvantaged group such as women or a racialized community.¹⁶ The Law Society, given its statutory mission and legal obligations, cannot sanction a model of separate and unequal access to legal education.

17. Religious freedom must be understood "in the context of a secular, multicultural and democratic society with a strong interest in protecting dignity and diversity, promoting equality, and ensuring the vitality of a common belief in human rights."¹⁷ 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; it advances the cause of justice and shows respect for all postures toward religion.¹⁸

18. In *Loyola*, the Supreme Court held that the government could reasonably require a private Catholic high school to teach other religions and ethics in a neutral and objective fashion; it was

Tab 161. The Law Society reasonably had regard to the broad, contextualized impact of all *Charter* values at play in light of its statutory objectives, and by adopting a posture of neutrality, reasonably reconciled all *Charter* rights.

¹⁵ *Saguenay, supra*, para. 76, JBA Tab 3. See also R.E. Charney, "Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?" 34:2 *N.J.C.L.* 173, JBA Tab 43.

¹⁶ *Bob Jones University v. United States*, 461 US 574 (1983), JBA Tab 154.

¹⁷ *Loyola, supra*, para. 47, JBA Tab 49.

¹⁸ *S.L., supra*, para. 32, JBA Tab 69.

not free to teach at all times through its Catholic religious lens.¹⁹ It was in the public interest that high school students learn that other religious ethics are not only worthy to the extent they align with their own faith tradition, but are also worthy of respect in their own right.²⁰ In the context of legal education, the Law Society acted reasonably by considering the benefits of law schools having a fully diverse faculty, staff and student body.

C. The Benefits of Diversity in Legal Education

19. Law students are our future lawmakers, leaders, public servants, and judges. As the gateway to the legal profession, law schools should foster student engagement with professors and peers of diverse backgrounds, experiences, and wide-ranging points of view. This promotes students' professionalism; their collaboration, problem-solving, and critical-thinking skills; and collegiality. A representative bar and bench, reflective of the society it serves, enhances public confidence in the administration of justice.

20. A diverse student body and faculty improves the educational experiences of law students, with a majority reporting that diversity has a strongly positive impact.²¹ Classrooms which are broadly reflective of our society foster cultural competency, facilitate new ways of looking at problems, and allow greater insight into alternate perspectives and experiences.²² Law school is appropriately a site of thoughtful conflict and contestation. Law students should fully consider all sides of an issue and be challenged in their established views by peers and teachers.

¹⁹ *Loyola, supra*, paras. 71-78, JBA Tab 49.

²⁰ *Loyola, ibid*, JBA Tab 49.

²¹ G. Orfield & D. Whitla, "Diversity and Legal Education: Student Experiences in Leading Law Schools" in G. Orfield & M. Kurlaender, eds, *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge: Harvard Education Publishing Group, 2001) 143, generally and at 160, JBA Tab 155.

²² D. Black, "The Case for the New Compelling Government Interest: Improving Educational Outcomes" (2001-2002) 80 N.C. L. Rev. 923 at 943-950, 954-963, JBA Tab 156; K. R. Johnson, "The Importance of Student and Faculty Diversity in Law Schools: One Dean's Perspective" (2011) 96 Iowa L. Rev. 1549 at 1550-1553, 1556-1561, 1563, JBA Tab 157; T. Farrow, "Ethical Lawyering in a Global Community" (2013-2014) 37 Man. L.J. 61 at 63-64, 67, 69-82, JBA Tab 158.

Legal education does not further these difficult conversations by students' self-segregation with like-minded others; critical thinking is advanced when students of different perspectives and backgrounds share the same law school classroom, dedicated to the common cause of justice.

21. In making its Decision, the Law Society rightfully considered its special obligation to prevent and remedy discrimination.²³ Diverse law school classrooms reduce bias, enhance intergroup collaboration, and strengthen a collective commitment to justice.²⁴ The multicultural imperative requires a diverse classroom body, particularly attuned to the inclusion of historically marginalized groups, so as to better reflect the composition of the wider community.

22. A law school which reflects the broader community trains better, more competent, lawyers. This is not an argument that TWU graduates would be incompetent, or that the Law Society made its Decision based on the future incompetence of TWU graduates. Rather, the Law Society was entitled to recognize, as a factor in the balancing of its statutory objectives and reconciling all *Charter* and human rights values, that the accreditation of inclusive, non-discriminatory law schools furthers professionalism, judgment and practice skills.

23. Dedication to dialogue across differences, in service of our common rule of law, begins with diversity in legal education and continues into practice. Judicial impartiality, excellence in advocacy, and skills as negotiators and problem-solvers are furthered by the ability to appreciate different standpoints arising from specific and concrete social and economic realities.²⁵ This is a

²³ Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.1-1 [4.1], r. 6.3.1-1 [1-2].

²⁴ *Grutter v. Bollinger*, 539 U.S. 306 (2003) at 330-333, JBA Tab 159; S. Bryant, "Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession" (1992-1993) 17 Vt. L. Rev. 459 at 460-462, 472-491, JBA Tab 165; C. Overholt, "Diversity and Professionalism in the Practice of Law" (2011) 44 UBC L. Rev. 91, JBA Tab 160.

²⁵ S. Lyon & L. Sossin, "Data and Diversity in the Canadian Justice Community", (2014) 11 JL & Equality 85 at 91, 94-95, JBA Tab 162; C. R. Calleros, "Training a Diverse Student Body for a Multicultural Society," (1995) 8 La

matter of substantive equality foundational to the rule of law and a fair, impartial, and independent judiciary.

D. The Law Society's Assessment of Competing Considerations

24. The Divisional Court correctly concluded that the Law Society was required to do more than simply weigh potentially competing *Charter* values (or rights) against one another in a contextual vacuum.²⁶ The Law Society was obliged to consider the impact of accreditation on its public interest objectives, balance the *Charter* values with its statutory objectives and determine how the *Charter* values at issue would best be protected in view of those objectives.²⁷

25. As the Divisional Court noted, the balancing of these *Charter* values must include an assessment of the nature and scope of any interference with TWU's freedom of religion.²⁸ Here, TWU did not establish that declined accreditation threatens actual religious beliefs or conduct of prospective students' ability to act in accordance with their religious beliefs.²⁹

26. Religious activity may occur on site, but the proposed law school, *qua* law school, is not fundamentally engaged in religious activity in furtherance of religious purposes; it seeks to undertake the commercial purpose of training prospective lawyers to provide secular legal services to the public at large, including LGBTQ clients, persons of varied faiths, persons living in a common law relationship and those with no religious beliefs. Evangelical Christians are welcome to attend accredited law schools in Ontario (or elsewhere) or may attend TWU's private

Raza L.J. 140, JBA Tab 163; E. M. Chen, "The Judiciary, Diversity, and Justice for All," (2003) 10 Asian Am. L.J. 127 at 133-142, JBA Tab 164.

²⁶ Divisional Court Decision, para. 92, 116, Appeal Book, Tab 4, pp. 44, 50-51.

²⁷ *Doré*, *supra*, paras. 6-7, 55-58, JBA Tab 10; *Loyola*, *supra*, paras. 4, 32, 35-42, JBA Tab 49; *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80, paras. 38, 66, leave to appeal denied Feb. 18, 2016, JBA Tab 166.

²⁸ Divisional Court Decision, paras. 73-75, Appeal Book, Tab 4, pp. 39-40.

²⁹ Divisional Court Decision, para 122, Appeal Book, Tab 4, p. 52.

law school and take further steps to secure the right to practice in this province. The Decision does not significantly impair the religious freedom of prospective TWU students.³⁰

27. The Law Society's Decision reflects a reasonable balance of this minimally impairing consequence against significant competing public interest objectives. The Law Society's public interest mandate requires it to consider interlocking issues and considerations, its obligations under the *Code* and the *Charter*, the deleterious effects of accreditation on other stakeholders, and the salutary effects of declining accreditation.

28. In this nuanced assessment, the public interest considerations clearly militated against accreditation: if the Law Society had been complicit in discrimination, indirectly applying a discriminatory admissions policy affecting access to the bar, it would have itself engaged in discriminatory conduct, contrary to the *Charter* and the *Code*.³¹ A decision to accredit would run contrary to the Law Society's commitment to equal access to the legal profession in Ontario and to its efforts to promote diversity. Condoning the use of the Covenant would damage the public's confidence in the profession and its regulator. Moreover, accrediting TWU would privilege one religious group's access to a law licence over those of other religions and ethical beliefs, contrary to the principle of religious neutrality.

29. The Law Society's balancing was reasonable in light of these public interest considerations. Given the Law Society's public interest mandate and *Charter* obligations, it reasonably exercised its discretion in favour of religious neutrality and the promotion of non-discrimination, rather than condoning TWU's exclusion of non-adherents from its law school.

³⁰ *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567, paras. 98-99, JBA Tab 68; *Heintz v. Christian Horizons*, 2010 ONSC 2105 (Div. Ct.), paras. 103-105, JBA Tab 167.

³¹ See Factum of the Respondent, Law Society of Upper Canada, paras. 54-62.

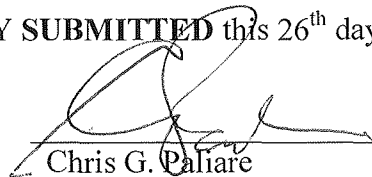
E. Conclusion


30. As found by the Divisional Court, the Decision was a reasonable exercise of the Law Society's discretion. The Decision engaged the regulator's specialized expertise in a contextual assessment of multi-faceted considerations, in light of its statutory objectives. The applicable standard of review of the Decision is reasonableness. As a state actor, the Law Society considered seriously its obligation to maintain religious neutrality; it could not privilege one religious group's access to legal education at the expense of those of other faiths, ethical beliefs, and ways of living. Instead, the Law Society promoted diversity, with all its salutary effects to classroom environments, and to the profession as a whole. This was consistent with its duty to act in the public interest, to promote access to justice and to advance the rule of law. Given its statutory mandate, the *Charter* values at play, and myriad context-specific factors within the expertise of the regulator, the Law Society reasonably, and correctly, exercised its discretion.

PART IV. ORDER REQUESTED

31. The Advocates' Society asks that the Court dismiss the appeal.³²

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 26th day of February, 2016


Chris G. Paliare


Joanna Radbord

Lawyers for the intervener The Advocates' Society

³² Pursuant to the order of Associate Chief Justice Hoy granting intervenor status on December 11, 2015, The Advocates' Society does not seek costs and no costs are to be ordered against it.

TAB A

SCHEDULE “A”

1. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
2. *Alberta (Information and Privacy Commissioner) v. Alberta Teachers’ Association*, 2011 SCC 61
3. *Canadian Broadcasting Corp. v. SODRAC 2003 Inc.*, 2015 SCC 57
4. *Dunsmuir v. New Brunswick (Board of Management)*, 2008 SCC 9
5. *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817
6. By-Law 4, Licensing, made under ss. 62 (0.1) and (1) of the *Law Society Act*, R.S.O. 1990, C. L.8
7. *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, 2001 SCC 37
8. *Doré v. Barreau du Quebec*, 2012 SCC 12
9. *Loyola High School v. Quebec*, 2015 SCC 12
10. *S.L. v. Commission scolaire des Chênes*, 2012 SCC 7
11. *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835
12. R.E. Charney, “Should the Law Society of Upper Canada Give Its Blessing to Trinity Western University Law School?” 34 *N.J.C.L.* 173
13. *Bob Jones University v. United States*, 461 US 574 (1983)
14. G. Orfield & D. Whitla, “Diversity and Legal Education: Student Experiences in Leading Law Schools” in G. Orfield & M. Kurlaender, eds, *Diversity Challenged: Evidence on the Impact of Affirmative Action* (Cambridge: Harvard Education Publishing Group, 2001)
15. D. Black, “The Case for the New Compelling Government Interest: Improving Educational Outcomes” (2001-2002) 80 *N.C. L. Rev.* 923
16. K. R. Johnson, “The Importance of Student and Faculty Diversity in Law Schools: One Dean’s Perspective” (July 2011) 96 *Iowa L. Rev.* 1549
17. T. Farrow, “Ethical Lawyering in a Global Community” (2013-2014) 37 *Man. L.J.* 61
18. Law Society of Upper Canada, *Rules of Professional Conduct*, r. 2.1-1 [4.1], r. 6.3.1-1[1-2]
19. *Grutter v. Bollinger*, 539 U.S. 306 (2003)

20. S. Bryant, "Collaboration in Law Practice: A Satisfying and Productive Process for a Diverse Profession" (1992-1993) 17 Vt. L. Rev. 459
21. C. Overholt, "Diversity and Professionalism in the Practice of Law" (2011) 44 UBC L. Rev. 91
22. S. Lyon and L. Sossin, "Data and Diversity in the Canadian Justice Community", (2014) 11 JL & Equality 85 – 131
23. C. R. Calleros, "Training a Diverse Student Body for a Multicultural Society," (1995) 8 La Raza L.J. 140
24. E. M. Chen, "The Judiciary, Diversity, and Justice for All," (2003) 10 Asian Am. L.J. 127
25. *Bonitto v. Halifax Regional School Board*, 2015 NSCA 80
26. *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567
27. *Heintz v. Christian Horizons*, 2010 ONSC 2105 (Div. Ct.)

TAB B

SCHEDULE "B"

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K), 1982

Fundamental Freedoms

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.

Law Society Act, R.S.O. 1990, C. L.8

Licensing

Classes of licence

27. [...]

Duty to issue licence

(3) If a person who applies to the Society for a class of licence in accordance with the by-laws meets the qualifications and other requirements set out in this Act and the by-laws for the issuance of that class of licence, the Society shall issue a licence of that class to the applicant.
2006, c. 21, Sched. C, s. 23 (1).

By-laws

62. (0.1) Convocation may make by-laws,

[...]

4.1 governing the licensing of persons to practise law in Ontario as barristers and solicitors and the licensing of persons to provide legal services in Ontario, including prescribing the qualifications and other requirements for the various classes of licence and governing applications for a licence;

Law Society of Upper Canada, *Rules of Professional Conduct*

2.1-1 A lawyer has a duty to carry on the practice of law and discharge all responsibilities to clients, tribunals, the public and other members of the profession honourably and with integrity.

Commentary

[...]

[4.1] A lawyer has special responsibilities by virtue of the privileges afforded the legal profession and the important role it plays in a free and democratic society and in the administration of justice, including a special responsibility to recognize the diversity of the Ontario community, to protect the dignity of individuals, and to respect human rights laws in force in Ontario.

6.3.1-1 A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

Commentary

[1] The Law Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.

[2] This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

TRINITY WESTERN UNIVERSITY et al.
Applicants (Appellants)

-and- LAW SOCIETY OF UPPER CANADA
Respondent (Respondent)

Court File No. C61116

**COURT OF APPEAL FOR ONTARIO
PROCEEDING COMMENCED AT
TORONTO**

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