

COURT OF APPEAL FOR ONTARIO

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

and

THE LAW SOCIETY OF UPPER CANADA

Respondent

- and -

**THE EVANGELICAL FELLOWSHIP CANADA AND CHRISTIAN HIGHER
EDUCATION CANADA; CHRISTIAN LEGAL FELLOWSHIP; JUSTICE CENTRE
FOR CONSTITUTIONAL FREEDOMS; OUT ON BAY STREET and OUTLAWS; THE
ADVOCATES' SOCIETY; CRIMINAL LAWYERS' ASSOCIATION (ONTARIO);
CANADIAN SECULAR ALLIANCE; CANADIAN BAR ASSOCIATION; CANADIAN
CIVIL LIBERTIES ASSOCIATION; LAWYERS RIGHTS WATCH CANADA;
ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA;
THE SEVENTH DAY ADVENTIST CHURCH IN CANADA;
CANADIAN CONSTITUTION FOUNDATION**

Interveners

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Overview and Facts

1. On December 16, 2015 the Honourable Hoy A.C.J.O. granted The Association for Reformed Political Action (ARPA) Canada (“ARPA Canada”) leave to intervene in this matter.
2. ARPA Canada agrees with the facts as set out in the Factum of the Appellants.
3. There is a real and wide-spread concern among Reformed Christians generally that legal developments are making it increasingly difficult to openly apply their faith in public life and even to apply their faith within their corporate and professional lives, if a decision such as the Law Society of Upper Canada (“LSUC”) Decision is upheld. The proceedings before this Honourable Court are one example of the types of recent developments generating grave concern among Reformed Christians.
4. ARPA Canada’s submissions will focus exclusively on equality rights.

Issues

5. The following issues will be addressed in this factum.
 - a. Does the LSUC Decision violate the section 15(1) equality rights of Christians?
 - b. Does the entire group need to be targeted in order for stereotyping or discrimination to occur and for the test for section 15(1) discrimination to be met?
 - c. Does section 15 specifically, and do “*Charter* values” generally, create an obligation or justification for the State to violate the equality rights or other freedoms of a member of a group listed in the enumerated grounds of section 15(1)?
 - d. What approach should the State adopt in balancing competing rights?

Argument and Analysis

6. When religious rights are implicated in a legal struggle between citizens and their civil government, the natural inclination is to look to the express protection of religious freedom

in section 2(a) of the *Charter*,¹ which protects from State interference the “fundamental” “freedom of conscience and religion”.² That is where the bulk of jurisprudence on religious freedom has been established. But legal scholar Iain Benson makes this observation:

Over the years it has been startling to see how, for example, one aspect of an equality right, such as “sexual orientation,” is hived off and played against a Section 2(a) right without any realization that there is also a corresponding equality right touching on religion within Section 15 itself.”³

7. Courts must look beyond section 2(a) to other sections of the *Charter*, including section 15(1), which protects the equality rights of, *inter alia*, religious individuals. Section 15(1) states that every individual has the right to the equal benefit of the law without discrimination based on religion.⁴ To prove a violation of section 15(1), a claimant must demonstrate three things.
8. The claimant must first prove that the *Charter* actually applies. This is demonstrated by showing that the infringer of the rights is a State actor⁵ and that the infringing action constitutes “law” within the meaning of section 15(1).⁶ It is uncontested that the LSUC is a State actor and the LSUC Decision constitutes “law” within the meaning of section 15(1).
9. If the claimant can demonstrate that the *Charter* should apply, then the claimant must pass the two-stage section 15(1) analysis:
 - (1) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?⁷
 - (2) Does the impugned law fail to respond to the actual capacities and needs of the

¹ *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 [“*Charter*”].

² *Charter*, *supra*, at s. 2(a).

³ Iain T. Benson, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” (2007) 21 *Emory Int’l L. Rev.* 111 at 148. **Joint Book of Authorities [“BoA”], TAB 102.**

⁴ *Charter*, *supra*, at s. 15(1).

⁵ *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 at 265, [“*McKinney*”], **BoA, TAB 20.**

⁶ Peter W. Hogg, *Constitutional Law of Canada, 5th Edition, Supplemented* (Toronto: Thomson Reuters Canada Ltd., 2007), loose-leaf, pp.55-10 – 55-11 [“*Hogg*”], **BoA, TAB 103.**

⁷ *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at para. 19, [“*Taypotat*”], **BoA, TAB 18.**

members of the group and instead imposes burdens or denies a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage?⁸

a. The LSUC decision violates the Section 15(1) equality rights of individuals associated with an Evangelical Christian community

10. The LSUC Decision makes a distinction between graduates of Canadian secular law schools and graduates of a Christian law school that is, in every respect, acceptable under the LSUC agreement with the Canadian Federation of Law Societies. The only objection is that TWU has a community agreement grounded on shared religious beliefs which are legal and constitutionally protected. Association with the TWU community covenant is how the LSUC distinguishes TWU graduates from graduates of all other Canadian law schools.
11. Since the law creates a distinction, it is necessary to demonstrate that the distinction creates a disadvantage: “The analysis at the second step is an inquiry into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, or [2] by stereotyping in a way that does not correspond to actual characteristics or circumstances.”⁹ The word “or” indicates that only one of the two patterns of discrimination must be demonstrated.
12. The first way substantive inequality may be established is “by showing that the impugned law, in purpose *or effect*, perpetuates prejudice and disadvantage to members of a group on the basis of personal characteristics within s. 15(1) of the *Charter*.”¹⁰
13. Already in *Trinity Western University v. British Columbia College of Teachers*,¹¹ a professional government body held TWU graduates to a different standard, not trusting them to teach children without “secular” oversight of a significant component of their education even though instruction at TWU complied with all professional and academic standards. The

⁸ *Taypotat, supra*, at para. 20, **BoA, TAB 18**. The focus here is on arbitrary or discriminatory disadvantage.

⁹ *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, [“*Withler*”] at para. 65, **BoA, TAB 101**.

¹⁰ *Withler, supra.*, at para. 35.

¹¹ *Trinity Western University v. B.C.C.T.*, [2001] 1 S.C.R. 772, [“*TWU 2001*”], **BoA, TAB 9**.

public attention showered on the TWU Law School demonstrates that many people believe students/graduates of the TWU Law School are, *ipso facto*, less qualified, or ought not to be qualified to practice law because of a tenet of their religious beliefs and practices. The LSUC Decision perpetuates this prejudice.

14. The second means of substantive inequality may be established “by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group.”¹²

15. The LSUC Decision stereotypes all TWU Law School students and graduates, and by extension all Evangelicals including Reformed Christians, as being predisposed to discriminate generally, and more particularly in the practice of law, and inclined to be intolerant of others. This stereotype is baseless.¹³

16. Importantly, the Supreme Court of Canada guides us to not only ask whether there is different treatment based on characteristics, “but also whether those characteristics are relevant considerations under the circumstances.”¹⁴ The personal views on marriage and sexuality of TWU graduates are not relevant to their ability to practice law. The moral standards by which a person governs their own life is immaterial to the LSUC. Licensed members of the LSUC are required to adhere to the professional code of conduct of the LSUC as the measure by which their practice capacity and performance will be assessed. If the characteristics of their religious beliefs are not relevant, then any discrimination is unjustified and the claimant passes the section 15(1) test.

17. The important thing to demonstrate at this stage is **impact or effect**:

We must be careful not to treat *Kapp* and *Withler* as establishing an additional requirement on s. 15 claimants to prove that a distinction will

¹² *Withler, supra*, at para. 36, **BoA, TAB 101**.

¹³ The discussion of stereotyping by Justice LeBel is helpful for understanding this point. *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61, at paras. 201-203, [“*Quebec v. A.*”], **BoA, TAB 47**.

¹⁴ *Withler, supra*, at para. 39, **BoA, TAB 101**.

perpetuate prejudicial or stereotypical attitudes towards them. [This] improperly focuses attention on whether a discriminatory attitude exists, not a discriminatory impact, contrary to *Andrews*, *Kapp* and *Withler*.¹⁵

18. In *Andrews v. Law Society of British Columbia*¹⁶, the Supreme Court of Canada applied this standard to measure the effect of the prohibition on non-citizens from practicing law in B.C. The Court concluded that “[t]he distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory.”¹⁷ The Court also noted that what made the discrimination especially problematic was that the lawyers were otherwise qualified:

[a] rule which bars an entire class of people from certain forms of employment, solely on the grounds of a lack of citizenship status and without consideration of educational and professional qualifications or the other attributes or merits of individuals in the group, would, in my view, infringe s. 15 equality rights.¹⁸

19. The unacceptable discriminatory effect for non-citizens in *Andrews* was “some delay” before being called to the bar for otherwise qualified lawyers.

20. The practical effect of the LSUC Decision will at a minimum include “some delay” for otherwise qualified lawyers to be called to the bar. The discriminatory effect is that a qualified lawyer, having completed an academically and professionally approved program of law – and admitted to be academically and professionally sound – is nevertheless effectively barred from practicing law in the province on the sole basis of his or her personal ethic on marriage and sexuality. As the Supreme Court of Canada has already stated: “There is no denying that the decision [...] places a burden on members of a particular religious group”.¹⁹

21. In *Andrews*, the Supreme Court of Canada defined discrimination as:

[...] a distinction [...] based on grounds relating to personal characteristics

¹⁵ *Quebec v. A.*, *supra*, at para. 327, **BoA, TAB 47**. See para. 325 – 334 for a fuller discussion.

¹⁶ *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, [“*Andrews*”], **BoA, TAB 21**.

¹⁷ *Andrews*, *supra*, at 183, [“*Andrews*”], **BoA, TAB 21**.

¹⁸ *Andrews*, *supra*, at p. 183, [emphasis added], **BoA, TAB 21**.

¹⁹ *TWU 2001*, *supra*, at para. 32, **BoA, TAB 9**.

of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group [...] or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination.*²⁰

22. As set out above, the LSUC Decision squarely fits this definition:

- (1) The group: TWU graduates;
- (2) The personal characteristics: “the voluntary adoption of a code of conduct based on a person’s own religious beliefs”;²¹
- (3) The disadvantage or limited access: banned or delayed from practicing law in Ontario for publicly adopting a religiously informed code of conduct;
- (4) Available to others: the adoption of a personal moral code is done by all people but the LSUC Decision does not distinguish between those moral actors and does not affect their admission to the practice of law;
- (5) Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group: The LSUC Decision specifically disadvantages those Christians (and other non-Christian graduates of TWU law school) who choose to associate with people who identify with the Christian faith by signing a personal commitment to live according to a constitutionally protected standard of moral living.

23. The *Charter* applies to the LSUC and the LSUC Decision constitutes “law” within the meaning of section 15(1). The LSUC Decision creates a distinction based on the enumerated ground of religion, and the distinction creates a discriminatory disadvantage for TWU graduates/students (Evangelical Christian law students) on the basis of religion.

²⁰ *Andrews, supra*, at p. 174, **BoA, TAB 21**.

²¹ *TWU 2001, supra*, at para. 25, **BoA, TAB 9**.

b. Discrimination need not be applied universally to a group for a claim to be made out

24. Some question the conclusion that the LSUC has violated the equality rights of Evangelical Christians since not all Evangelical Christians are effectively barred from practicing law in the province. Indeed, it is possible that many Evangelical Christians will attend secular law schools and could then apply and be accepted to practice law in Ontario. Does this fact undermine the conclusion that the LSUC has violated section 15(1)?
25. The SCC has addressed this objection directly. In *Quebec v. A.*, Justice Abella wrote that heterogeneity within a claimant group does not defeat a claim of discrimination.

[This Court] squarely rejected the idea that for a claim of discrimination to succeed, all members of a group had to receive uniform treatment from the impugned law [...] [E]ven if only some members of an enumerated [...] group suffer discrimination by virtue of their membership in that group, the distinction and adverse impact can still constitute discrimination.²²

26. The LSUC has not yet discriminated directly against Evangelical Christian law students who attend secular law schools (or who attend other Christian law schools in the United States or around the world). Nevertheless, ARPA Canada submits that unconstitutional discrimination has been demonstrated in regard to TWU graduates. Furthermore, the effect of this overt discrimination against other lawyers in the province who may hold a Biblical view of marriage and sexuality will no doubt have consequential negative effects, whether they attended TWU or not.

c. Section 15 and “Charter values” do not create a justification for the State to violate the equality rights or other constitutional freedoms of an individual

27. A second objection to a section 15(1) claim might be, “Doesn’t TWU’s Community Covenant offend *Charter* values such that the LSUC has an obligation to send a message that violations of *Charter* values are not tolerated in the legal profession?”

²² *Québec v. A.*, *supra*, at para. 354-55, **BoA, TAB 47**. See also *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, at 1288-89, **BoA, TAB 98** and *Nova Scotia (Workers’ Compensation Board) v. Martin*, [2003] 2 S.C.R. 504 at para. 76, **BoA, TAB 99**.

28. The State cannot take the shield of the *Charter* and turn it into a sword. The *Charter* does not create grounds for the State to impose the *Charter* onto private citizens and private institutions. TWU is not a public university; it is private. “To open up all private and public action to judicial review could strangle the operation of society and [...] diminish the area of freedom within which individuals can act.”²³ Neither can courts apply the *Charter* to a private institution through the back door of “*Charter* values” language. The Supreme Court of Canada in *Andrews* confirmed this when it stated that section 15(1) does not “impose on individuals and groups an obligation to accord equal treatment to others. It is concerned with the application of the law.”²⁴ The Supreme Court of Canada also spoke directly to this issue in the first *Trinity Western* case: “To state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion”.²⁵
29. Furthermore, those who advocate a “*Charter* values” approach should be reminded that freedom of conscience and religion, freedom of expression, freedom of association and the equal benefit of the law *vis-à-vis* the State are all “*Charter* values”, and that these principles are to be applied to the activity of State actors including the LSUC.

d. The State is obligated to properly balance competing rights

30. TWU has dealt thoroughly with the question of the proper balancing of rights.²⁶ ARPA Canada concurs with those arguments and limits its submission here to the discussion on delineating rights with regards to the section 15(1) equality right.
31. The first step is to delineate the allegedly competing rights to see if, in fact, there are rights in conflict. The delineation of rights for TWU Law School students should include their

²³ *McKinney, supra*, at p. 262, **BoA, TAB 20**.

²⁴ *Andrews, supra*, at 163-64, **BoA, TAB 21**.

²⁵ *TWU 2001, supra*, at para. 25, **BoA, TAB 9**.

²⁶ See the Factum of the Appellants, para. 76-86.

equality rights on the basis of the enumerated ground of religion; this Court should resist the temptation to “hive off” section 15 as a “sexual orientation” right and put it up against the “religion right” of section 2(a). Rather, it is the section 2(a), 2(b), 2(d) and section 15(1) rights of TWU graduates that must be compared in the aggregate against some other interest.

32. Here, there is no conflict because there is no *other* equality interest at stake.

33. The LSUC does not have sexual orientation equality rights and even if it did, TWU does not discriminate against the LSUC, or anyone for that matter, on the basis of sexual orientation. Only where the State itself is infringing on two competing rights simultaneously can there actually be a requirement to balance competing *Charter* rights. A true example of this would be the conflict between the right to a fair trial (section 7 and 11(d) of the *Charter*) and religious freedom (section 2(a)) as found in the *R. v. N.S.* case.²⁷ This scenario is not at play in the case at bar. By admitting TWU graduates to the practice of law in Ontario, the LSUC would not somehow be discriminating against any individual or group. On the other hand, by not admitting TWU graduates to the practice of law on the sole basis of their moral and religious view of marriage and sexuality, the LSUC discriminates against TWU graduates. There are no competing rights here. In the first scenario, no *Charter* rights are violated. In the second scenario, multiple *Charter* rights of TWU graduates are violated.

34. There is no evidence that admitting TWU graduates to the practice of law in Ontario violates the *Charter* rights of anyone. Similarly, there is no evidence that TWU graduates would discriminate against anyone on the basis of sexual orientation. Indeed, the Supreme Court of Canada has stated that absent evidence, no such conclusion should be drawn on the basis of TWU and its graduates’ view on marriage and sexuality.²⁸

²⁷ *R. v. N.S.*, [2012] 3 S.C.R. 726, especially para. 30-33, **BoA, TAB 100**.

²⁸ *TWU 2001*, *supra*, at para. 32, 35-36, **BoA, TAB 9**.

Conclusion

35. TWU is a community of individuals who govern themselves according to Christian morals as they associate with each other and study together. There is no harm in that. To refuse to recognize a qualified law school simply because its students voluntarily hold themselves to a Christian moral code is to discriminate against those students on the basis of religion.
36. Engaging in religious communal enterprise must be vigorously protected within a pluralistic society. This type of religious association has been improperly labelled as “unlawful discrimination” and/or “homophobia”. Such labels demonstrate ignorance of well-established *Charter* principles and must be rejected.
37. As the Supreme Court of Canada suggested in *Trinity Western* (2001), “if TWU’s Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church.”²⁹ ARPA Canada agrees. In order for justice to be done for all religious individuals in Canada, and to protect their place in Canada’s public square, ARPA Canada submits that the decision of the LSUC is unconstitutional.
38. ARPA Canada requests permission to present oral argument at the hearing of this matter.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 23rd day of February 2016.

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²⁹ *TWU 2001, supra*, at para. 33, **BoA, TAB 9**.

SCHEDULE A – List of Authorities

List of Citations	TAB No.
<i>Andrews v. Law Society (British Columbia)</i> , [1989] 1 SCR 143.	TAB 21
<i>Black v. Law Society of Alberta</i> [1989] 1 SCR 591.	TAB 96
<i>Eldridge v. British Columbia (Attorney General)</i> , [1997] 3 S.C.R. 624.	TAB 97
<i>Janzen v. Platy Enterprises Ltd.</i> , [1989] 1 S.C.R. 1252.	TAB 98
<i>Kahkewistahaw First Nation v. Taypotat</i> , [2015] 2 S.C.R. 548.	TAB 18
<i>McKinney v. University of Guelph</i> , [1990] 3 S.C.R. 229.	TAB 20
<i>Nova Scotia (Workers' Compensation Board) v. Martin</i> , [2003] 2 S.C.R. 504.	TAB 99
<i>Quebec (Attorney General) v. A.</i> , [2013] 1 S.C.R. 61.	TAB 47
<i>R. v. N.S.</i> , [2012] 3 S.C.R. 726.	TAB 100
<i>Trinity Western University v. B.C.C.T.</i> , [2001] 1 S.C.R. 772.	TAB 9
<i>Withler v. Canada (A.G.)</i> , [2011] 1 S.C.R. 396.	TAB 101

SCHEDULE B – Statutes and Regulations

List of Statutes and Secondary References	TAB No. (Intervener BoA / NSBS BoA)
<i>Canadian Charter of Rights and Freedoms</i> , Part I of the <i>Constitution Act, 1982</i> , being Schedule B to the <i>Canada Act 1982 (UK)</i> , 1982, c. 11.	See Schedule B – Excerpts Below
Iain T. Benson, “The Freedom of Conscience and Religion in Canada: Challenges and Opportunities” (2007) 21 <i>Emory Int’l L. Rev.</i> 111.	TAB 102
Peter W. Hogg, <i>Constitutional Law of Canada, 5th Edition, Supplemented</i> (Toronto: Thomson Reuters Canada Ltd., 2007), loose-leaf.	TAB 103

EXCERPTS :

CONSTITUTION ACT, 1982

BEING SCHEDULE B TO THE CANADA ACT 1982 (UK), 1982, c 11

PART I

CANADIAN CHARTER OF RIGHTS AND FREEDOMS

Whereas Canada is founded upon principles that recognize the supremacy of God and the rule of law:

GUARANTEE OF RIGHTS AND FREEDOMS

Rights and freedoms in Canada

1. The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

FUNDAMENTAL FREEDOMS

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.

EQUALITY RIGHTS

Equality before and under law and equal protection and benefit of law

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.

Affirmative action programs

(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

ENFORCEMENT

Enforcement of guaranteed rights and freedoms

24. (1) Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Exclusion of evidence bringing administration of justice into disrepute

(2) Where, in proceedings under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by this Charter, the evidence shall be excluded if it is established that, having regard to all the circumstances, the admission of it in the proceedings would bring the administration of justice into disrepute.

GENERAL

Multicultural heritage

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

APPLICATION OF CHARTER

Application of Charter

32. (1) This Charter applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.