

**IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL OF ONTARIO)**

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

- and -

LAW SOCIETY OF UPPER CANADA

Respondent

- and -

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PART I - OVERVIEW AND STATEMENT OF FACTS

A. OVERVIEW

1. The central issue in this appeal is whether the discretionary decision of the Law Society of Upper Canada (the “**Law Society**”) not to accredit the proposed Trinity Western University law school (“**TWU**”) given its requirement that all prospective TWU students, faculty and staff “read, understand and agree” to the Community Covenant (the “**Covenant**”), reflected a proportionate balancing of competing Canadian Charter rights and whether the balance the Law Society chose was reasonable in the ambit of the Charter.

2. The Canadian Civil Liberties Association (the “**CCLA**”) submits that the Court of Appeal and the Divisional Court correctly found that the Law Society engaged in a proportionate reconciliation of the Charter rights and values in play (freedom of religion and equality) and reached a reasonable decision in not accrediting TWU’s proposed law school. The CCLA agrees with the Court of Appeal’s conclusion that the Covenant was “deeply discriminatory to the LGBTQ community”. In considering TWU’s request for a unique and significant public good, namely accreditation, the Law Society had to consider the discriminatory aspects of the Covenant and be informed by human rights and Charter values as well as its stated objective of ensuring equal access to the legal profession.¹

3. The Covenant discriminates against groups and individuals who are protected by enumerated or analogous protected grounds under provincial human rights statutes and the Canadian Charter of Rights and Freedoms² including: sexual orientation, gender, marital status,

¹ *Trinity Western University v. Law Society of Upper Canada*, 2016 ONCA 518 (CanLii) [“**CA Decision**”] at ¶110 and ¶119, Appeal Book of the Appellants [“**AB**”], Vol III, Tab 6 at 476-479.

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 [“**Charter**”].

and religion.³ For a number of reasons, the Law Society cannot directly or indirectly discriminate by accrediting a law school that discriminates on these grounds. To accredit TWU, with its discriminatory Covenant, is to condone and promote discriminatory conduct and to diminish the rights and freedoms of those unfairly and unjustifiably burdened in a discriminatory manner by the Covenant, leading to a myriad of unresolvable privacy and “disciplinary conduct” issues for the Law Society and its members.

B. STATEMENT OF FACTS

4. The CCLA is a national, non-profit, independent, non-governmental organization that has been protecting and promoting the rights and freedoms of people in Canada for over fifty years. The CCLA adopts the facts as presented by the Law Society.

PART II - STATEMENT OF POSITION

5. The CCLA supports the submissions of the Law Society as set out in the Law Society’s factum and intervenes to focus on the following two issues from a unique perspective:

- (1) the broader public policy concerns and privacy implications associated with requiring the ongoing disclosure of one’s own and others’ sexual activity, sexual orientation and/or beliefs and/or changes in beliefs or practices through the signing and ongoing purported adherence to the Covenant, and the fact that the consequences articulated in the Covenant translate into prohibitions on private conduct and thoughts; and
- (2) the disciplinary and licensing issues that the Law Society and future members of the Law Society who graduate from the TWU’s proposed law school may face as a result of post-graduation disclosure that they had either been untruthful in affirming the Covenant, or had failed to abide by the terms of the Covenant because they are a member of the LGBTQ community and/or because the Covenant never expressed their true beliefs and/or their beliefs had changed over time at law school.

³ The various groups and individuals the Covenant discriminates against are set out at ¶24 of the Law Society’s Factum.

PART III - STATEMENT OF ARGUMENT

A. OVERARCHING PRINCIPLES

6. A long line of Canadian jurisprudence mandates that courts prohibit discrimination on prohibited grounds, such as sex, sexual orientation and religion; and that the Charter rights and human rights legislation be interpreted in a manner that recognizes that such legislation is often “the final refuge of the disadvantaged and the disenfranchised.”⁴

7. In acting in the public interest and having regard to Charter and human rights principles, the Law Society cannot discriminate indirectly by accrediting and condoning TWU’s mandatory Covenant, which directly discriminates against individuals and groups based on sexual orientation, gender, marital status and religion.

8. While law schools currently accredited by the Law Society provide equal access to all applicants in their admission processes, TWU seeks to operate counter to Canadian equality principles. In reconciling the Charter rights of equality and religious freedom in this context, the Law Society was bound to deny the public benefit of accreditation to TWU in light of the discrimination it imposed on others, especially members of the LGBTQ community.

B. INTRUSIONS ON PRIVATE CONDUCT, THOUGHTS AND PRIVACY RIGHTS IMPLICATIONS

9. While consenting adults in a private religious institution may choose to waive certain rights, including privacy and intrusions into their private thoughts and conduct, it would be an impermissible and discriminatory incursion of rights if they were effectively required to do so by a public body, or by one benefitting from a unique and significant public good. The Covenant’s intrusion into the private lives of prospective law students, graduates, faculty and staff must be

⁴ *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at ¶94.

viewed in the context of the constraints and pressures associated with pursuing a legal education (such as the number of available law school spots), democratic rights of privacy and equality, and Charter and human rights jurisprudence.

10. The substantial limitation on the number of available spots at Canadian law schools was summarized by the Divisional Court. For instance, in 2013, there were approximately 9,000 law school applicants in Canada for only 2,782 law school spots.⁵ As found by the Divisional Court, “[i]ndividuals who refuse to sign the Covenant will, perforce, be denied admission.”⁶ Consequently, a potential law student vying for a coveted spot in a Canadian law school would be faced with an unacceptable dilemma in applying to TWU’s law school – they are aware that no person can become a student unless they sign the mandatory Covenant, which purports to bind them to a set of beliefs and restrictions over their private sex lives and personal beliefs.

11. The foregoing dilemma is profound when considered in the larger context of the use of the Covenant and the fact that the commitments being asked of in the Covenant are, by democratic standards, discriminatory and an impermissible intrusion into the private lives of the individuals.

12. As recognized by the Divisional Court and Court of Appeal, in order for applicants and eventual students who do not hold the beliefs that TWU espouses, but who wish to obtain one of its coveted law school spots, are encouraged to “engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered”, or to

⁵ *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250 (Div. Ct.) (CanLii) [“**Divisional Decision**”] at ¶ 67, AB, Vol III, Tab 6 at 414-415.

⁶ *Divisional Decision*, *supra* at ¶67, AB, Vol III, Tab 6 at 414-415.

be forced to sacrifice potential access to the TWU law school and the practice of law.⁷ The “deceptive” practice itself is caused by an unfair, unwarranted, and discriminatory intrusion into their private lives and corresponding unjustified incursions into legal rights.

13. Any student who signs the Covenant, but who does not adhere to its restrictions (whether on or off campus and during or after attendance at TWU), is at risk of being expelled and other dire sanctions.⁸ TWU reserves the right to “police” current and graduated students to “question, challenge or discipline any member in response to actions that impact personal or social welfare.”⁹ It is uncertain how such “questioning or challenging” will be conducted (or could be conducted) to inquire into one’s deeply personal life, who will conduct such an inquiry, let alone what kind of “proof” will be adequate to meet the test of “non-compliance”. The Student Handbook clarifies that students may make complaints about each other, and indeed are expected and encouraged to hold each other to the undertakings in the Covenant. Failure to do so is considered inappropriate behaviour.

14. Sanctions for non-compliance with the Covenant, which are expanded upon in TWU’s Student Handbook, are severe and include: discipline, dismissal, or refusal of re-admission to the University.¹⁰ As such, the obligation to adhere to the Covenant, both in one’s actions and beliefs, appears to be an ongoing one that will somehow be “policed” by TWU and one’s fellow students in ways and means that are unclear, but which violate clear legislative and constitutionally guaranteed legal protections and rights regarding equality, privacy and interrelated human rights and civil liberties.

⁷ Divisional Decision, *supra* at ¶112-14, AB, Vol III, Tab 4 at 426-427; CA Decision, *supra* at ¶117-119, AB, Vol III, Tab 6 at 477-479.

⁸ Divisional Decision, *supra* at ¶63, AB, Vol III, Tab 4 at 413.

⁹ Divisional Decision, *supra* at ¶63, AB, Vol III, Tab 4 at 413; TWU Community Covenant, AB, Vol. IV, Tab 10C at 537.

¹⁰ Divisional Decision, *supra* at ¶63, AB, Vol III, Tab 6 at 413; TWU Student Handbook, AB, Vol. IV, Tab 10M at 591-596.

15. The inquiry into one's private sex life and the ongoing "monitoring" of one's personal life is unwarranted, discriminatory and completely divorced from the requirements of a law school education, and individuals' reasonable expectation of privacy. Such inquiries and "investigations" have no place in an institution such as TWU's proposed law school. This institution seeks to offer a coveted social good (a spot in a law school) whose value would derive in large part from the significant public benefit requested of the Law Society, namely, accreditation.

16. Applicants and students who do not truly believe in the terms of the Covenant, or who may have believed it at one time, but whose views have evolved over time, are placed in an untenable position of being seen as "deceptive" in their declarations, or of having a positive obligation to disclose their personal private beliefs and/or sexual activities to their educational institution, and in turn, face dire and broad sanctions and risks.

17. This impacts not only LGBTQ individuals and prospective applicants impacted by the various forms of discrimination in the Covenant, but also those individuals who, even if they share most of the beliefs of TWU, would be unwilling to monitor, inform, and complain about their fellow students, as an inappropriate intrusion into the privacy and other rights of their peers.

18. It follows that the Covenant, by its nature, its words, and its ongoing obligations and sanctions, constitutes in this context an impermissible discriminatory intrusion into the private lives of applicants and law students, with the most profound effect likely being on individuals who are members of the LGBTQ community.

19. From a broader public policy perspective, the mandatory signing of the Covenant also plainly contravenes individual privacy, liberty and equality rights. TWU asserts that prospective

students at TWU are granted the following purported “freedoms”: the ability to “hold and express diverse opinions on moral, ethical and religious issues”¹¹; “an environment in which sexual minorities are supported, loved and respected”¹²; and a community free of “harassment, shaming, ostracizing, contempt, humiliation and intimidation or insults” and “homophobic, disrespectful or discriminatory remarks or behaviour.”¹³ This is not realistic. Even if staff and faculty wished to express diverse opinions on moral, ethical and religious issues, how could an LGBTQ individual fully convey their beliefs about homosexuality, if forced to withhold information about their private life? How is the Covenant itself and the dire sanctions for non-compliance not direct discrimination against LGBTQ individuals, and a direct prohibition on their private conduct and thoughts?

20. If an LGBTQ individual signs the Covenant they must agree to deny or “to bury a crucial component of their very identity”.¹⁴ Charter and human rights jurisprudence has rejected the notion that sexual conduct can be separated from sexual identity.¹⁵ Further, the approach to sexuality and sexual orientation set out in the Covenant and intended to shape the educational community at TWU, is in itself denigrating to LGBTQ persons. As such, TWU’s assertions that it does “not overtly ban or prohibit admission to lesbian, gay, bisexual, or transgendered students or faculty or encourage discrimination of any kind against LGBTQ individuals” is illusory and hollow.

¹¹ Divisional Decision, *supra* at ¶9, AB, Vol III, Tab 4 at 398.

¹² Divisional Decision, *supra* at ¶15, AB, Vol III, Tab 4 at 398.

¹³ Divisional Decision, *supra* at ¶15, AB, Vol III, Tab 4 at 400.

¹⁴ Divisional Decision, *supra* at ¶113, AB, Vol III, Tab 4 at 426-427; CA Decision, *supra* at ¶117-119, AB, Vol III, Tab 6 at 477-479.

¹⁵ *TWU v. British Columbia College of Teachers*, 2001 SCC 31 at ¶69; *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, 2013 SCC 11 at ¶123.

C. POST-GRADUATION AND DISCIPLINARY DILEMMAS

21. The Covenant places individuals who do not hold the beliefs that TWU espouses, or never held such beliefs, in the untenable position of having to choose between forfeiting an opportunity to attain a coveted law school spot in a crowded field, or instead to sign the Covenant and effectively engage in “active deception, in terms of their true beliefs and their true identity.”¹⁶ This so called “active deception”, combined with the continuing nature of the obligations and sanctions in the Covenant (as detailed above), may raise serious uncertainty for TWU law students post-graduation and may have implications for the Law Society.

22. As a public actor and gatekeeper, in carrying out its functions, duties and powers, the Law Society must have regard to the public interest.¹⁷ It cannot, as iterated by the Law Society in its factum, “exercise its statutory power in respect of access to the Bar, including educational requirements, in a discriminatory manner.”¹⁸

23. The possibility of the imposition of post-graduation sanctions by TWU raises serious licensing and “disciplinary” dilemmas for the Law Society and future members of the Law Society who graduate from TWU. As a consequence of the Covenant’s outwardly ongoing obligations of accountability¹⁹, there is potential for staff, students and faculty to make disclosure, including post-graduation disclosure, against fellow TWU graduates who were in breach of the Covenant. This could affect members of the LGBTQ community, the large population of Canadians who engage in sexual relations outside of marriage, “women generally”, as recognized by the Divisional Court, “persons of any gender who might prefer, for their own

¹⁶ Divisional Decision, *supra* at ¶106 and ¶¶112-14, AB, Vol III, Tab 4 at 424-427.

¹⁷ Divisional Decision, *supra* at ¶28 AB, Vol III, Tab 4 at 403; CA Decision, *supra* at ¶108, AB, Vol III, Tab 6 at 474-475; see also: *Law Society Act*, R.S.O. 1990, c. L.8 (“*LSA*”) at ss.4.1 and 4.2 and *Groia v. Law Society of Upper Canada*, 2016 ONCA 471 (CanLii) at ¶89.

¹⁸ Law Society Factum at ¶55.

purposes to live in a common law relationship”, and “those persons who have other religious beliefs”.²⁰

24. Post-graduation “disclosure” of a TWU’s student’s activities that were inconsistent with the Covenant, carries the possibility of potential severe sanctions against the student, such as expulsion or revocation of their law degree. This means that TWU could still retain the authority to revoke a law degree if an individual was found, or believed to have been in breach of the Covenant. At minimum, this creates some serious challenges for a TWU graduate who may be cut off from their law faculty. Such a TWU graduate would be deprived of meaningful alumni networks, resources and support, which may play an integral role in future employment opportunities and a graduate’s professional life.

25. More concerning, if the Law Society was to accredit TWU’s proposed law school this could lead to a regulatory quandary for the Law Society. The Law Society may have to address how to deal with a licensee who has had their law degree “revoked” from an accredited law school for alleged acts of conduct and/or beliefs, against the Covenant, which are not unlawful, but to the contrary, are protected under the Charter, Canadian human rights laws, and equality principles, and the Law Society’s own rules that mandate an obligation not to discriminate, *inter alia*, on the grounds of sex, sexual orientation, gender identity, gender expression, and marital status.²¹

¹⁹ The Covenant encourages students, staff and faculty to hold each other accountable to the commitments made in the Covenant; TWU Student Handbook, AB, Vol. IV, Tab 10M at 593.

²⁰ Divisional Decision, *supra* at ¶104, AB, Vol III, Tab 4 at 424.

²¹ The Law Society of Upper Canada, *Rules of Professional Conduct*, Toronto: The Law Society of Upper Canada, 2014 [“*Rules*”], r.6.3.1-1, Law Society’s BOA, Tab 17.

26. The Law Society would be forced to address this situation and perhaps receive submissions based on a Covenant that violates the Charter and human rights laws, as well as its own governing principles.

27. The above licensing and disciplinary issues highlight some of the difficult practical realities that can result if the Law Society was to accredit TWU's proposed law school.


PART IV - COSTS


28. The CCLA seeks no costs and asks that no costs be awarded against it.

PART V - ORDER SOUGHT

29. The CCLA requests an order that this appeal be dismissed.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 31st day of August, 2017.



ALAN L.W. D'SILVA
 ALEXANDRA URBANSKI
Counsel for the Intervener,
Canadian Civil Liberties Association

PART VI - TABLE OF AUTHORITIES

	<u>Referred to at paras.</u>
<u>CASE LAW</u>	
<i>Trinity Western University v. Law Society of Upper Canada</i> , 2016 ONCA 518 (CanLii)	2, 12, 20, 22
<i>Canada (Attorney General) v. Mossop</i> , [1993] 1 S.C.R. 554	6
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