Court of Appeal File No: CA43367
No. S-149837
Vancouver Registry

IN THE COURT OF APPEAL OF BRITISH COLUMBIA

BETWEEN:

TRINITY WESTERN UNIVERSITY and
BRAYDEN VOLKENAUT

RESPONDENTS
(Petitioners)

AND:

THE LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Respondent)

BRIEF OF THE INTERVENOR
JUSTICE CENTRE FOR CONSTITUTIONAL FREEDOMS

R. JAY CAMERON

Tel.: (403) 475-3622
Fax: (587) 747-5310
Email: jcameron@jccf.ca
Counsel for the Intervenor

Justice Centre for Constitutional Freedoms
#235, 7620 Elbow Drive SW
Calgary, AB T2V 1K2

INDEX

OVERVIEW

1. The Justice Centre for Constitutional Freedoms adopts the Background[1] contained in the Appeal Factum of Trinity Western University and Brayden Volkenant ("TWU").

2. The Supreme Court of Canada has held that s. 2(d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*") protects the right to do collectively what an individual has a right to do alone.[2] The Court has found this right to be foundational to a free and democratic society, and endorsed the view that freedom of association cannot be revoked without resultant social destabilization.[3] The Court has found moreover that TWU is protected by s. 2(d) of the *Charter*,[4] and that substantially similar interference by a professional governing body (the B.C. College of Teachers) was unlawful.

3. The arguments of the Law Society of British Columbia (the "Law Society") have confirmed that freedom of association is of primary significance in the instant case. The Law Society agrees that there is nothing wrong academically with TWU's proposed law program (the "Law Program").[5] Neither does the Law Society object to the continued membership in the Law Society of the numerous lawyers who, *as individuals*, believe in the sanctity and inviolability of marriage and sexual union between one man and one woman, to the exclusion of all others. The Law Society even admits that individuals with Evangelical beliefs make "valuable contributions" to the profession.[6]

4. It is the association of like-minded individuals around a common creed, TWU's Community Covenant (the "Covenant"), that the Law Society opposes. Although the Supreme Court of Canada held in 2001 that TWU "is not for everyone",[7] the Law Society

---

[1] Respondents' Appeal Factum at pages 1-10.
[2] *Mounted Police Association v. Canada (Attorney General),* 2015 SCC 1 [*Mounted Police Association*], at para. 36.
[3] *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313 [*Alberta Reference*], para. 148.
[4] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31[*TWU v. BCCT*], at paras. 9 and 17.
[5] Joint Appeal Book ("JAB") #3, pages 833-881; Law Society's Response to Petition in the lower Court ("Response to Petition"), paras. 12, 311; *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326 [*TWU BC*], at para. 107.
[6] Response to Petition, paras. 12, 311.
[7] *TWU v. BCCT*, at para 26.

refuses to recognize the right of TWU students, staff and faculty to form an association with those who will agree to adhere to a common code of conduct while studying law. The Law Society requires TWU to implement "associational equality" prior to agreeing to accredit the Law Program. To the Law Society, "the very purpose of TWU as an institution is incompatible with an open, accepting and inclusive educational environment in which all can feel comfortable."[8] This standpoint is a direct attack on freedom of association.

5. The ominous precedential nature of the Law Society's continued opposition to the associational rights of TWU is without horizon. The Law Society defies the rule of law and the Supreme Court of Canada. The Law Society jeopardizes private associations across the country, including the professional standing of thousands who chose to associate in college or university at religious educational institutions, or perhaps with a religious congregation,[9] that may not sympathize with majoritarian beliefs or values. The result would undermine and destabilize the foundations of Canada's free and democratic society.

ISSUES

6. This factum addresses the following issues:

A. The Appropriate Standard of Review is Correctness

B. The Right to Associate Freely

i. A Collective and Individual Right

ii. The Test for Infringement of Freedom of Association under s. 2(d)

iii. The Law Society's Decision Infringes the s. 2(d) Rights of TWU and its Students

C. The Public Interest and the Duty of State Neutrality for Associations

---

[8] Law Society's Amended Response to Petition, April 27, 2015 ("Amended Response to Petition"), paras. 212-17.

[9] *TWU v. BCCT*, at para. 33: "Indeed, 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."

ARGUMENT

A. The Appropriate Standard of Review is Correctness

7. In *TWU v. BCCT*, the Supreme Court of Canada reviewed the decision not to accredit TWU's teaching program on a standard of correctness.[10] Recently, Chief Justice Hinkson of the Supreme Court of British Columbia affirmed that the standard of review in *TWU v. LSBC* was that of correctness on the three grounds considered under the Law Society's authority: jurisdiction, procedural fairness, and fettering of discretion.[11]

8. The Supreme Court of Canada has also emphasized the need for a correctness standard of review of constitutional questions that are of importance to the legal system and fall outside the administrative tribunal's area of expertise. In *Mouvement laïque québécois v. Saguenay (City)*, the Court applied the correctness standard to the issue of "the scope of the state's duty of neutrality that flows from freedom of conscience and religion".[12] The Court found this question to be of importance to the legal system, broad and general[13] in scope, and one that needed to be decided in a uniform and consistent manner.[14]

9. The regulation of TWU on the basis of its Covenant is outside of the "expertise" of the Law Society, as evidenced by the haphazard series of administrative decisions the Law Society took in finally rejecting the Law Program (the "Decision"). The Law Society approved the Law Program in April 2014, then repeatedly attempted to ascertain a way to retreat from that decision, despite two expert legal opinions that it could not do so. The

---

[10] *See New Brunswick (Board of Management) v. Dunsmuir*, 2008 SCC 9 at para 57.
[11] *TWU BC*, at paras. 90, 96, 101, respectively.
[12] *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16 [*Saguenay*] at paras 45-51.
[13] Also see *Saguenay,* at para. 47: "Another such case [where the presumption of review on a standard of reasonableness is rebutted] is where general questions of law are raised that are of importance to the legal system and fall outside the specialized administrative tribunal's area of expertise (Dunsmuir, at paras. 55 and 60)." There can be no doubt that the question of whether a religious creed in an association should bar graduates from professional standing is very much a question of general importance.
[14] *Ibid*. at para. 51.

Law Society ignored procedural requirements[15] in its latter deliberations with its members, depriving TWU of the right to make submissions.[16] The Law Society ignored the statutory waiting period of 12 months set by the B.C. *Legal Profession Act (*"*LPA*"),[17] and excuses its violation of the *LPA* on the pretext of "sensibility".[18] The Law Society ultimately abdicated its responsibility by referring the question of approval of the Law Program to its members, thereby washing its hands of its legal responsibility, and binding itself to the will of the members, whatever that will might be.[19] Even if it could be said that the Law Society had the expertise to deny TWU's Law Program on the basis of the Covenant (which is denied), it is absolutely certain that the *members* of the Law Society had neither the expertise nor the legislative authority to do so.

10. Since the Law Society was clearly not acting within its "specialized expertise," the presumption of deference is rebutted.[20] The standard of review for the Law Society's Decision in its various respects is that of correctness.

B. <u>The Right to Associate Freely</u>

11. In the *Alberta Reference,* Justice McIntyre noted that a conquering power's first act is to restrict freedom of association.[21] The learned Justice also noted that, with the restoration of national sovereignty and the reinstatement of the democratic state, immediate steps are taken to restore associative freedoms.[22] Freedom of association is thus an integral part of Canada's free and democratic society.

12. In *Mounted Police,* McLachlin C.J. and Lebel J. took guidance from the reasons of Chief Justice Dickson in the *Alberta Reference,* affirming that the guarantee of freedom of association under s. 2(d) protects, 1) the right to join with others and form associations,

---

[15] See *TWU BC* at paras. 122 and 123. The Law Society goes so far as to suggest that it owed TWU little or no duty of procedural fairness, a concerning contention from the guardian of the legal profession.
[16] *TWU BC*, at paras. 122-125.
[17] *LPA*, s. 13.
[18] See, for example, Appellant's Factum, page iii, Opening Statement paragraph 3.
[19] *TWU BC*, at paras. 119 and 120.
[20] *Doré,* at para. 30.
[21] *Alberta Reference,* at para. 148.
[22] *Ibid.*

2) the right to join with others in the pursuit of other constitutional rights, and 3) the right to join with others to meet on more equal terms the power and strength of other groups or entities.[23] All three of these principles apply to TWU's association.

13. In the *Alberta Reference*, Justice McIntyre stated the simple proposition necessitating freedom of association: "the attainment of individual goals, through the exercise of individual rights, is generally impossible without the aid and cooperation of others."[24] For this reason, the Supreme Court of Canada has adopted "a generous approach" to freedom of association "centred on the purpose of encouraging the individual's self-fulfillment and the collective realization of human goals, consistent with democratic values, as informed by 'the historical origins of the concepts enshrined' in s. 2(*d*). . ."[25] In the case at bar, TWU's collective goal, that of operating a denominational and provincially accredited degree granting institution, has long been upheld by the province of British Columbia,[26] and was upheld by the Supreme Court of Canada in *TWU v. BCCT* in 2001.

14. McLachlin C.J. and Lebel J. held that s. 2(d) must be interpreted in light of its context and historical origins.[27] In this regard, they noted that "[t]he historical emergence of association as a fundamental freedom … has its roots in the protection of religious minority groups."[28] They further emphasized that "[a]ssociation has always been the means through which political, cultural and racial minorities, religious groups and workers

---

[23] *Mounted Police*, at paras. 52, 53, 62 and 66.
[24] *Ibid,* para. 152.
[25] *Mounted Police*, at para 46.
[26] *TWU BC*, at para. 3. The Province of British Columbia codified TWU's right to operate a Christian post-secondary institution in 1962, and renewed that codification consistently through the decades by subsequent legislation since the school's commencement. B.C. has granted accreditation for 46 separate degrees issued by TWU. Moreover, in *TWU v. BCCT* at paragraph 35, the Supreme Court of Canada noted that, "[i]n this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985."
[27] *Mounted Police*, at para. 47 (quoting *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295 [*R v. Big M Drug Mart*], at p. 344).
[28] *Mounted Police,* at para. 56.

have sought to attain their purposes and fulfil their aspirations."[29]

15. In the *Alberta Reference*, Dickson C.J. noted the relevance of, *inter alia,* religious freedom and educational rights to the freedom of association, noting Canada's history of "giving special recognition to collectivities or communities of interest" in areas such as denominational schools, language rights, aboriginal rights and our multicultural heritage.[30]

16. It is apparent that the history and purpose of the protection of associative freedoms directly apply to TWU in the instant case. TWU is operated as a religious denominational school in a Canadian social environment that increasingly requires the protection of minority beliefs and associations. The characteristics of TWU in this case bring it within the heart of s. 2(d)'s protection of associations as established by the Court.

i. A Collective and Individual Right

17. The guarantee of freedom of association under s. 2(d) of the *Charter* protects both collective and individual associational rights. The Supreme Court of Canada has recently stated that "the *Charter* does not exclude collective rights. While it generally speaks of individuals as rights holders, its s. 2 guarantees extend to groups."[31]

18. In regard to s. 2(d) specifically, the Court stated:

> It has also been suggested that recognition of a collective aspect to s. 2(d) rights will somehow undermine individual rights and the individual aspect of s. 2(d). We see no basis for this contention. Recognizing group or collective rights complements rather than undercuts individual rights, as the examples just cited demonstrate. It is not a question of either individual rights or collective rights. Both are essential for full *Charter* protection.[32]

19. Freedom of association "has its roots in the protection of religious minority groups".[33] Freedom of association is the means by which minority religious groups seek to "attain their purposes and fulfill their aspirations." While freedom of association is not

---

[29] *Mounted Police,* at paras. 35, 57 (quoting *Alberta Reference,* at p. 366).
[30] *Alberta Reference*, at pp. 364-65.
[31] *Mounted Police*, at para. 64.
[32] *Mounted Police*, at para. 65 [emphasis added].
[33] *Mounted Police*, at para. 56 [emphasis added].

a derivative right and stands on its own, with its own protected content,[34] it often works for the furtherance and protection of associations formed in the exercise of other *Charter* freedoms, such as expression or religion. Thus, it is doubtless the case that TWU has the corporate right to associate on the basis of the Covenant, and that there are *Charter* protections for its association.[35]

ii. The Infringement of Freedom of Association under s. 2(d)

20. By rescinding approval of TWU's Law Program, the Law Society intentionally and expressly[36] pressures and coerces TWU to change the nature of its association in order to please people who disagree with TWU's beliefs.[37] The Law Society requires the implementation of "associational equality" prior to reinstating the accreditation of the Law Program. The Law Society's conduct constitutes a substantial interference with freedom of association in both its purpose and its effects, thus meeting the test for a finding of a breach of s. 2(d).[38]

---

[34] *Mounted Police*, at para. 48: "Freedom of association is not derivative of these other rights. It stands as an independent right with independent content, essential to the development and maintenance of the vibrant civil society upon which our democracy rests."

[35] Some have asserted there is no collective right to freedom of religion;there is only an individual right to freedom of religion. We think this reasoning must be rejected: there is no such thing as a religion of one. We also note that Chief Justice Hinkson appears to have found that the Decision violated TWU's collective right to freedom of religion. *See TWU BC*, at para. 138: "Although the LSBC contends that the Decision does not infringe TWU's right to freedom of religion, the evidence in this case and the relevant precedents conclusively establish that the Decision does infringe the petitioners' Charter right to freedom of religion: *TWU v BCCT* at para. 32, *TWU v. LSUC* at para. 81, *TWU v. NSBS* at para. 237."

[36] Amended Response to Petition, at para. 253.

[37] The Law Society's infringement of TWU's and its students' associational rights mirrors the conclusion of the Court in *TWU v. BCCT* at para. 32: "There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and <u>associating</u> to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system." [Emphasis added]

[38] *Mounted Police Association*, at paras. 111, 72, 121

iii. The Law Society's Decision Infringes the s. 2(d) Rights of TWU and its Students

21. The guarantee of freedom of association "functions to protect individuals against more powerful entities."[39] The need for oversight is apparent in the case at bar: the Law Society is a powerful entity exercising its authority improperly. It thwarted the "legitimate goals and desires"[40] of TWU (to have a law school) by capriciously reversing its approval on the basis of majority sentiment and perception rather than law. This is a "substantial interference" with the freedom of association.[41]

22. The Law Society violates the "fundamental purpose of s. 2(*d*) to protect the individual from 'state-enforced isolation in the pursuit of his or her ends'"[42] by preventing the formation of, and attendance at, an Evangelical Christian law school.[43] This is clearly within the "broad range of associational activity" that the Court has declared that s. 2(d) protects.[44] The Law Society denies TWU law graduates the "right of full participation in society"[45] solely because those graduates chose to join the association at TWU while studying law.

23. There is only a small step between refusing entrance to a profession based on association and rescinding professional status based on association. The Law Society's logic leads to a Canada where professional bodies attempt to scrutinize the religious and political beliefs of institutions and individuals (lawyers, teachers, dentists, accountants and physicians, and many more). The result is social destabilization through a loss of independence and personal rights. Upholding the Decision sets a precedent for the

---

[39] *Mounted Police Association,* at para. 58.
[40] *Ibid*.
[41] Freedom of association is a right of individuals and associations. *Mounted Police Association*, at para. 62.
[42] *Mounted Police Association,* at para. 58 (quoting Dickson C. J. in the *Alberta Reference,* at p. 365).
[43] The importance to Evangelical Christians of having a law school that incorporates a Christian worldview can be seen in the numerous Evangelical Christian law schools in the United States, including Trinity Law School, Regent University School of Law, Liberty University School of Law, Pepperdine University, and Oak Brook College of Law, to name just a few.
[44] *Mounted Police Association* at para. 60.
[45] *See TWU v. BCCT*, at para. 35.

establishment of state scrutiny based on majoritarian beliefs and values, and the eventual "rooting out" of "non-conformists" from all professions.

C. <u>The Public Interest and the Duty of State Neutrality</u>

24. The Court must consider the "place of private institutions in our society".[46] The existence of the panoply of private associations is in the public interest; a free and democratic society cannot exist without them. Government entities such as the Law Society are not permitted to compel or coerce voluntary associations to amend their associations as a *quid pro quo* for accreditation.

25. As a government entity, the Law Society must be neutral: it is not entitled to take a position on an associational religious requirement such as the Covenant. The Supreme Court has held that, "…the state must neither encourage nor discourage any form of religious conviction whatsoever."[47] In violation of its duty of neutrality, the Law Society first attempted to coerce TWU to change the Covenant. When TWU refused, the Law Society sought to compel compliance using the withdrawal of accreditation. This is a textbook case of state oppression and overreach.

26. The reason for state neutrality is simple: society is divided and fragmented on a multitude of issues, including the issue of same-sex sexuality. The Law Society does not uphold the public interest by taking sides in a societal debate. Only through neutrality can the Law Society truly uphold the interests of the public at large.

27. There is another reason for government neutrality in circumstances such as the instant case: individuals appointed to regulatory bodies, such as the Benchers appointed to the Law Society, come and go. They are motivated by different principles and beliefs, and the "flavour" of majoritarian sentiment in the regulatory body shifts with the new appointees. What does not, and must not, change are the constitutional principles and obligations that govern such bodies. While the pendulum of society and culture swings back and forth between liberal and conservative, and between religious and secular, it is incumbent on all regulatory bodies—whatever their composition at the time—to uphold

---

[46] *TWU v. BCCT*, at para. 34.
[47] *Saguenay*, at para. 78.

the rule of law and the fundamental freedoms that protect individuals from the tyranny of the majority. "There should be a law to the people beside its own will."[48] In Canada, this ultimate law is the *Charter*.

CONCLUSION

28. The mandatory and coercive secularization of a religious group attempted by the Law Society is the same type of antiquated mischief (though from the reverse angle) caused by the *Lord's Day Act*, which forced mandatory observance of religious days on everyone. *The Lord's Day Act* was overturned 30 years ago in *R. v. Big M Drug Mart.* Irrespective of whether secularists, religionists, liberals or conservatives hold governmental power, this type of coercive oppression has been rejected by the Supreme Court of Canada and must continue to be rejected for the preservation of liberty in a free society.

Date: April ___, 2016

R. Jay Cameron
Counsel for the Justice Centre for Constitutional Freedoms

[48]Lord Acton, http://www.acton.org/research/lord-acton-quote-archive

LIST OF AUTHORITIES

1. *Trinity Western University v. B.C. College of Teachers*, 2001 SCC 31
2. *Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326
3. *Mouvement laïque québécois v. Saguenay (City)*, 2015 SCC 16
4. *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1
5. *Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 S.C.R. 313
6. *Professional Institute of the Public Service of Canada v. Northwest Territories (Commissioner)*, [1990] 2 S.C.R. 367
7. *R. v. Oakes*, [1986] 1 S.C.R. 103
8. *Doré v. Barreau du Québec*, 2012 SCC 12
9. *R. v. Big M Drug Mart Ltd.,* [1985] 1 SCR 295, 1985