

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO
AND THE BRITISH COLUMBIA COURT OF APPEAL)

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

LAW SOCIETY OF UPPER CANADA

RESPONDENT
(Respondent)

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

RESPONDENTS
(Respondents)

FACTUM OF THE INTERVENER,
INTERNATIONAL COALITION OF PROFESSORS OF LAW
(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada*)

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APPELLANTS
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-and-

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AND BETWEEN:

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-and-

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OVERVIEW

1. Since the International Coalition filed its request to intervene in June, the stakes in this appeal have become even higher. The Law Society of Upper Canada (LSUC) now asserts that the *Charter* and Canadian human rights law prevent LSUC from *ever* accrediting a school which holds itself out as religious.¹ The Law Societies admit that but for Trinity’s religious purpose and policies, its proposed program would in fact provide students with the training they need to be competent Canadian lawyers.² Yet so long as Trinity continues to be what it is—that is, a “distinctly Christian” community—the Law Societies will continue to reject its program.³

2. LSUC’s factum could not make this point clearer. LSUC highlights in bold the parts of Trinity’s community covenant it found to “impose discriminatory burdens.” The first two highlighted words were “**Jesus Christ**.”⁴ Trinity admits students of *all* faiths and none, but nevertheless, according to LSUC, Trinity’s “distinctly Christian” environment is discriminatory to all who do not share its religious worldview.⁵ In LSUC’s view, “accreditation of TWU would have amounted to . . . exhibiting a preference for the religious tenets of Evangelical Christianity.”⁶ According to LSUC, accrediting an otherwise-qualified religious institution violates the state’s duty of religious neutrality.⁷

3. This position is remarkable not least for its parochialism. Around the world, thousands of

¹ Factum of Respondent Law Society of Upper Canada (“LSUC”), para 59.

² Factum of Appellant Law Society of British Columbia (“LSBC”), para 94; LSUC, para 46.

³ LSUC, para 24(e).

⁴ LSUC, para 23.

⁵ LSUC, para 24(e).

⁶ LSUC, para 59.

⁷ LSUC, paras 57, 59. Perhaps sensing that it has gone too far, LSUC hints that it would consider an alternative process for individual Trinity graduates who apply to become Ontario lawyers. LSUC, paras 110–11. But since LSUC admits that Trinity’s proposed law school would prepare competent lawyers, the only outstanding issue is whether any particular applicant agrees with Trinity’s community standards. LSUC is apparently suggesting that this Court empower it to examine Trinity graduates to see if they hold the beliefs LSUC condemns. This kind of examination would be a significant violation of individual graduates’ rights to freedom of thought, belief, and conscience under both the *Charter* and international law.

religious universities and graduate programs—and thousands more colleges, high schools, and elementary schools—enjoy state recognition and accreditation; indeed, there are more than 1,800 Catholic institutions of higher learning alone.⁸ In LSUC’s view, government accreditation of these sometimes quite ancient institutions is a flagrant violation of state neutrality towards religion.

4. In fact, the opposite is true. It is LSUC’s position which violates international law. As a number of international tribunals have held, excluding qualified institutions from government benefits programs because of their religious identity violates the fundamental right of freedom of religion.⁹ This reflects the general consensus in international law that religious liberty has a collective dimension, which is often expressed through the establishment of religious educational institutions that enjoy state recognition, accreditation, and in many cases, support.

5. Although LSBC’s factum is ostensibly more limited—LSBC objects to Trinity’s adherence to traditional Christian teachings about marriage, sex, and the sanctity of life—the implications of its position are no less sweeping. Like LSUC, LSBC claims that it has the right to evaluate Trinity’s religious policies, and the obligation to reject Trinity’s application if any of them differ from its own norms.¹⁰ It thereby seeks to establish its own moral views as orthodox, authoritative, and exclusive.

6. LSBC articulates no limits on its position that accrediting a religious institution constitutes impermissible “approval” of any “discrimination” engaged in by the institution in maintaining its code of conduct.¹¹ And a moment’s reflection confirms that if this position were to be adopted by other Canadian professional organizations, the potential grounds for rejecting qualified graduates of international institutions would be endless. It is not difficult to foresee a day when one Canadian professional organization rejects medical students trained at the Université Catholique de Louvain because of the Catholic Church’s opposition to abortion and assisted suicide, while another Canadian organization refuses to recognize degrees granted by

⁸ Congregatio de Institutione Catholica, *Index Universitates et alia Instituta Studiorum Superiorum Ecclesiae Catholicae* (Vatican 2005) at 393 (“*Index Universitates*”).

⁹ *Metropolitan Orthodox Church of Bessarabia and Others v Moldova*, App. No 45701/99, ECtHR, 13 Dec. 2001, § 118; *Trinity Lutheran Church v Comer*, (2017) 137 SCt 2012, 2025.

¹⁰ LSBC, paras 25–27, 207.

¹¹ LSBC, paras 25–26.

Israeli universities because of the Israeli government's policies, and yet another rejects petroleum engineers trained at Al-Azhar University in Egypt because of its adherence to Muslim sexual norms.

7. Adoption of the Law Societies' extreme positions in this case would move Canada far outside the international mainstream—and would have an obvious and tangible impact on International Coalition members. Like other law societies, LSUC requires individual assessments of bar candidates educated outside of Canada.¹² Thus if the Law Societies were to prevail, International Coalition members and their students who have studied at religiously-affiliated law schools could expect additional scrutiny, if not outright rejection, by the Law Societies. And because the Law Societies' arguments have no ascertainable limits, International Coalition members and their students would have no way to predict in advance whether a particular school will be deemed “too discriminatory” to qualify for Canadian recognition. The Law Societies' position would thus unjustifiably punish individual graduates and put Canada far outside the mainstream of international law and practice.

PART I - STATEMENT OF FACTS

8. The Coalition includes recognized legal scholars from members of the Commonwealth, Council of Europe states, and the United States, some of whom are former judges.¹³

9. Many members of the International Coalition are now or have in the past been affiliated with religious academic institutions outside of Canada. LSUC requires “internationally-educated individuals” to go through an individual assessment before receiving a license to practice law in Canada.¹⁴ LSUC regards it as a violation of its own obligations under the *Charter* to recognize degrees granted by religiously-affiliated schools in Canada.¹⁵ LSBC refuses to recognize degrees granted by religious schools with internal religion-based policies it regards as discriminatory.¹⁶ As a result, International Coalition members reasonably expect that they or their students could be denied professional opportunities in Canada because they have been affiliated with religious schools.

¹² LSUC, para 14.

¹³ A representative list of Coalition members is attached as an appendix to this Factum.

¹⁴ LSUC, para 14(f), fns. 12, 13.

¹⁵ LSUC, paras 24, 59.

¹⁶ LSBC, para 118.

10. The Law Societies' position has the potential to have an impact on many other international law graduates as well. Worldwide, thousands of religious higher education institutions provide both religious and professional training. Al-Azhar University in Egypt is the largest university in the world, with 500,000 students.¹⁷ It has faculties of medicine, religion, engineering, and law.¹⁸ The Index of Catholic Higher Education identifies 1,800 Catholic institutions of higher education, including dozens of law schools in the U.S., Australia, and around the world.¹⁹ There are many other universities that are associated with other religions, including Buddhism, Judaism, Hinduism, Sikhism, and other faiths.

11. The Law Societies' arguments apply in principle to all of Canada's accrediting bodies and professional associations. Thus, if those arguments are adopted by this Honourable Court, qualified international applicants from an array of professions could find themselves shut out of Canada because they graduated from religious schools. To take one example, Canada "ranks 26th among 34 developed countries in terms of physician-to-population ratio;" this gap is particularly acute in rural areas where 20% of Canadians live but only 2% of medical specialists practice.²⁰ Programs that encourage international medical graduates to serve in rural areas have been key to addressing this gap, and in provinces like Saskatchewan, international graduates now make up as much as 46% of the physician workforce.²¹ Today South Africa and India are the top two source countries for international medical graduates working in Canada.²² Yet the Law Societies would have gatekeepers reject qualified candidates from schools like the top-ranked Christian Medical College in Vellore, India, because they were trained in a religious school.²³

PART II – POSITION WITH RESPECT TO THE QUESTIONS IN ISSUE

12. While the Coalition supports the relief requested by Trinity, it focuses on three points:

A. Freedom of religion includes the right to seek government recognition and the right to

¹⁷ Al-Azhar University's Biography 2017 at 2, 5.

¹⁸ Al-Azhar University, Campuses and Faculties.

¹⁹ *Index Universitates* at 393.

²⁰ Nazrul Islam, "The Dilemma of Physician Shortage and International Recruitment in Canada" (2014) 3:1 Int'l J Health Pol'y Mgmt 29-32 ("Islam, 'The Dilemma of Physician Shortage'").

²¹ *Id.*; Julia Belluz, "Is Canada Discriminating Against Foreign-Trained Doctors?", *Macleans* (April 20, 2012).

²² Islam, "The Dilemma of Physician Shortage."

²³ India Today, India's Best Medical Colleges 2016.

- participate in government programs on an equal basis;
- B. Freedom of association includes the right to establish organizational codes of conduct based on shared principles; and
- C. Freedom of religion and freedom of association are necessary components of a free and democratic society.

PART III – STATEMENT OF ARGUMENT

13. The Law Societies err in two fundamental and related ways. LSUC would impute the *government's* duty of religious neutrality to all the many private institutions that the government licenses, accredits, or otherwise recognizes.²⁴ Similarly, LSBC would reject any school that had codes of conduct inconsistent with the nondiscrimination norms applicable to *government* actors.²⁵ These arguments would effectively eliminate pluralistic religious education in Canada and put Canada out of step with the strong international legal norms that protect freedom of religion and freedom of association worldwide.

A. Freedom of Religion Includes the Right to Seek Government Recognition and Participate in Government Programs.

14. LSUC argues that it would violate the government's duty of religious neutrality for LSUC to accredit a religious law school.²⁶ In fact, the opposite is true: there is a general consensus in comparative and international law that excluding a qualified religious institution from a government program because of its religious nature, or refusing to grant a religious organization official recognition, violates fundamental guarantees of religious freedom.²⁷

²⁴ LSUC, paras 57–61.

²⁵ LSBC, paras 109, 118.

²⁶ LSUC, paras 57–61. LSUC unaccountably relies on *Mouvement laïque québécois v Saguenay (City)*, 2015 SCC 16, [2015] 2 SCR 3. But *Saguenay* is a legislative prayer case involving prayers offered by government officials while they were carrying out their government duties. Cf. *Town of Greece, New York v Galloway*, (2014) 134 SCt 1811, 1822.

²⁷ Both Law Societies concede that the *Charter* right of freedom of belief extends to Trinity. LSBC, paras 144–80; LSUC, paras 79–92. This is correct: there is a general consensus in comparative and international law that freedom of religion extends to religious communities.

15. The 2014 guidelines from the Organization for Security and Cooperation in Europe summarize the minimum international standard: “religious or belief organizations must be able to exercise the full range of religious activities and activities normally exercised by registered non-governmental legal entities.”²⁸ Systematically excluding qualified religious schools from accreditation imposes a unique disability on religious communities and violates international law.

16. Consistent with that standard, in *Trinity Lutheran Church & School v Comer*, the United States Supreme Court ruled 7-2 that a church-operated preschool could not be excluded from a state program simply because it was a religious organization. The Court held that “expressly denying a qualified religious entity a public benefit solely because of its religious character” could not be justified by the state’s asserted interest in maintaining religious neutrality.²⁹

17. *Trinity Lutheran* and the OSCE guideline exemplify the longstanding consensus in comparative and international law that religious communities have the right to establish educational and charitable institutions without undue state interference.³⁰ This consensus is based on, among other things, the right to provide religious education and the right to be free from religious discrimination, both of which are protected in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights.³¹

Universal Declaration of Human Rights, GA Res 217A (III), UNGAOR, 3rd Sess, Supp No 13, UN Doc A/810 (1948) 18 [UDHR] (religious freedom includes person’s right “to manifest his religion or belief in teaching, practice, worship and observance,” “either alone or in community with others and in public or private”).

²⁸ OSCE, Office for Democratic Institutions and Human Rights, Guidelines on Legal Personality of Religious or Belief Communities (2014), para 23.

²⁹ *Trinity Lutheran*, 137 SCt at 2024-25.

³⁰ *Savez Crkava “Riječ Života” and Others v Croatia*, App. No. 7798/08 (ECtHR 2011); *In re Act no. 3/2002 Coll.*, 2002/11/27 - Pl. ÚS 6/02: Religious Freedom (Cz. Const. Ct.), Part IV, para 5; *Obligation of Loyalty Case*, Bundesverfassungsgericht [Federal Constitutional Court], BVerfGE 70/138 (Germany); *Bethel*, Bundesverfassungsgericht [Federal Constitutional Court], BVerfGE 57/220 (Germany).

³¹ UDHR 18; *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171, Can TS 1976 No 18 (entered into force 23 March 1976) [ICCPR].

B. Freedom of Association Includes the Right to Establish Organizational Codes of Conduct.

18. LSBC argues that Trinity’s proposed school must be rejected because Trinity has a religious code of conduct that is inconsistent with nondiscrimination laws from which Trinity is exempt. LSBC casually suggests that what students “in torts class” do in their private lives can be of no religious significance.³² Yet there is an emerging consensus in comparative and international law that freedom of association includes the freedom to establish codes of conduct based on shared principles, and that this right extends not just to religious organizations but also to secular ones that are organized around a shared ideological mission.

19. The Court of Appeals of Paris has ruled that “entreprises de conviction” organized around a shared mission have the right to establish codes of conduct and hold their employees to them. Thus, a crèche organized around the shared value of laïcité was entitled to ban its employees from wearing ostentatious religious symbols.³³ The Spanish Constitutional Court has held that employees of “ideological” institutions—i.e., political parties or trade unions—have a duty of loyalty to their employer’s system of beliefs, and may not act in a way that undermines that ideology, even outside of the workplace.³⁴

20. These general associational rights have been held to be heightened in the context of religious institutions, which under the *Charter* and other human rights documents enjoy both the right of association and the right of freedom of religion.³⁵

21. In *Hosanna-Tabor*, a religious school that fired a teacher after she violated the religious community’s code of conduct could not be sued under disability nondiscrimination law, because

³² LSBC paras 157, 169. Relatedly, LSBC argues that Trinity Western’s students have no religious-freedom right to avoid “exposure to [the] practices” of others. *Id.* at 153. But this argument forgets that the religious-freedom right at issue here is not just the right of Trinity Western’s *students* to join others in a likeminded community but the right of Trinity Western *itself* to establish and maintain the community covenant in the first place.

³³ *Laaouej c. Association Baby-Loup*, S. 13/02981 (27 Nov. 2013) (C.A. Paris) (France).

³⁴ *La libertad de cátedra y la Ley Orgánica del Estatuto de Centros Escolares*, Spain Const. Ct. Ruling 5/1981, Feb. 13 (legal basis 11th); see also *In re: constitutionality of law no. 4831-2002*, Spain Const. Ct. Ruling 38/2007, Feb. 15.

³⁵ *Hosanna-Tabor Evangelical Lutheran Chur & Sch v EEOC*, (2012) 565 US 171, 194-95.

the state was obliged to respect the school's right to require its teachers to uphold its principles.³⁶ The United States Supreme Court rejected the government's argument that the church enjoyed no more rights than trade unions, holding that the express textual protection for freedom of religion in the United States Constitution required the government to demonstrate "special solicitude" for the right of religious communities to establish codes of conduct for religious teachers at religious schools.³⁷

22. Similarly, in *Fernández-Martínez*, the Grand Chamber of the European Court of Human Rights held that a teacher of Catholic religion could be dismissed after he spoke publicly about his status as a priest who was married and had five children, notwithstanding employees' general right to be free from marital status discrimination.³⁸ And in *Sindicatul "Păstorul cel Bun"*, the Grand Chamber held that the Romanian Orthodox Church could not be required to allow its priests to unionize and engage in collective bargaining with the bishops of the church, notwithstanding employees' general right to collective bargaining.³⁹

23. Establishing religious institutions that reflect shared principles—and running them in a way that reflects those principles—is a recognized aspect of the international law of freedom of association and freedom of religion. These religious and associational rights have been repeatedly vindicated, even in the difficult cases where they are alleged to conflict with labour rights or the rights of individual employees to be free from discrimination. They are even stronger here, where what is at stake is whether "[s]tudents attending TWU are free to adopt personal rules of conduct based on their religious beliefs" without fear that they will be "deni[ed]" the "right of full participation in society" as a result.⁴⁰

³⁶ *Hosanna-Tabor*, 565 US at 194-95.

³⁷ *Hosanna-Tabor*, 565 US at 189; see also *Corp of the Presiding Bishop v Amos*, (1987) 483 US 327, 342-44 (church-operated gymnasium); *Nat'l Labor Relations Bd. v Catholic Bishop of Chicago*, (1979) 440 US 490 (church-operated elementary and secondary schools).

³⁸ *Fernández-Martínez v Spain*, App. No. 56030/07 (ECtHR, 12 June 2014).

³⁹ *Sindicatul "Păstorul cel Bun" v Romania*, App. No. 2330/29 (ECtHR, 9 July 2013).

⁴⁰ *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 35, [2001] 1 SCR 772 (*Trinity I*).

C. Freedom of Religion and Freedom of Association are Necessary Components to a Free and Democratic Society.

24. According this kind of freedom to religious institutions is at times challenging, but it is also necessary in a free and democratic society. Indeed, it is at the very heart of the liberal order.

As Justices Alito and Kagan wrote in *Hosanna-Tabor*:

In a case like the one now before us—where the goal of the civil law in question, the elimination of discrimination against persons with disabilities, is so worthy—it is easy to forget that the autonomy of religious groups, both here in the United States and abroad, has often served as a shield against oppressive civil laws. To safeguard this crucial autonomy, we have long recognized that the Religion Clauses protect a private sphere within which religious bodies are free to govern themselves in accordance with their own beliefs.⁴¹

In a liberal polity, the government must be neutral as to religion, but the private organizations that comprise civil society need not be. Religious identity is part of cultural pluralism and should be welcomed in a diverse and inclusive society.

25. The Court’s “safeguarding” role is especially important in cases like this one, where the codes of conduct in question differ from contemporary secular norms. Protection of this right, the Czech Constitutional Court has recognized, is at the heart of what it means to have “a liberal state.”⁴² And it becomes more important, not less, when the principles that make a community different attract intense disapproval from some quarters of society.

26. The way that this intense disapproval was expressed in this case is particularly troubling: the effect of the Law Societies’ decision is to exclude individual Trinity graduates from the practice of law, thus preventing them from obtaining employment due to their religious beliefs. This is contrary to the protection of religious freedom under Article 18 of the *International Covenant on Civil and Political Rights*, which “bars coercion that would impair the right to have or adopt a religion or belief, including . . . [p]olicies . . . restricting access to education [or] employment.”⁴³

27. The Law Societies have not yet excluded applicants from the practice of law based on

⁴¹ *Hosanna-Tabor*, 565 US at 199 (Alito, J., joined by Kagan, J., concurring).

⁴² *In re Act no. 3/2002*, Coll. 2002/11/27 - Pl. ÚS 6/02: Religious Freedom (Cz. Const. Ct.), Part IV, para 5.

⁴³ U.N. Human Rights Committee, CCPR General Comment No. 22: Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, para 5.

their membership in particular religious communities other than Trinity. But the arguments they advance would allow them to do so at any time. As this Honourable Court recognized in 2001, “if [Trinity’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.”⁴⁴

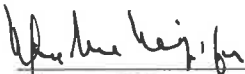
28. Around the world, LGBT people continue to suffer severe limitations on their civil rights—including, in some countries, imprisonment and death—for publicly embracing their sexual identity.⁴⁵ As changes to the laws in these places are debated, many wonder whether granting rights to LGBT people will have the unintended result of taking rights away from traditional religious believers. The answer should be no, but the Law Societies say the answer must be yes. Their position turns equality into an instrument of exclusion.

29. This Honourable Court has the opportunity to forge a better path forward, by holding that religious institutions like TWU can *peacefully coexist* with full equality for LGBT Canadians. This Court can do this by reaffirming that the *Charter* as well as international law protect the ability of Canadians to voluntarily join together in an educational community that reflects a distinctive religious character and seeks to participate in the common good.

PART IV – COSTS

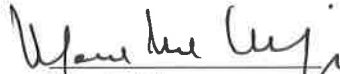
30. Parties should bear their own costs related to the Coalition’s intervention.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 5th day of September, 2017.



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Marie-France Major

⁴⁴ *Trinity I*, para 33.

⁴⁵ International Lesbian, Gay, Bisexual, Trans, and Intersex Association, *State-Sponsored Homophobia* (2017) at 8.

PART VI: TABLE OF AUTHORITIES

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3rd Sess, Supp No 13, UN Doc A/810 (1948).....14, 17

APPENDIX

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