

Court of Appeal Number: C61116
Divisional Court File No.: 250/14

**IN THE ONTARIO COURT OF APPEAL
(ON APPEAL FROM THE DIVISIONAL COURT)**

B E T W E E N:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANAT

Applicants
(Appellants in Appeal)

- and -

THE LAW SOCIETY OF UPPER CANADA

Respondent
(Respondent in Appeal)

FACTUM

25 February 2016

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AND TO: The Interveners listed in Schedule "A"

PART I- OVERVIEW

1. The Respondent Law Society of Upper Canada (LSUC) denied the Appellant Trinity Western University's (TWU's) application for accreditation of its proposed law school. The Divisional Court denied TWU's application for judicial review.¹ TWU appeals this decision.
2. Lawyers Rights Watch Canada (LRWC) is a non-government organization that promotes the implementation and enforcement of international human rights standards through education, legal research and advocacy. LRWC was granted intervener status in this matter in order to make submissions with respect to Canada's obligations under International Human Rights Law (IHRL) and international jurisprudence that may assist the court in interpreting and balancing the *Charter* rights in issue.
3. LRWC submits that interpretation of the *Charter* must be consistent with Canada's IHRL legal obligations to protect the rights to equality, non-discrimination, privacy, and belief, and conform to the spirit of the "contemporary international human rights movement"².
4. The Court below found the Appellant's community covenant was discriminatory in requiring individuals to adopt and adhere to a particular belief system in order to attend TWU³, and ruled that while the community covenant would create for "many persons" a decreased opportunity to enter the legal profession⁴, secular law schools do not threaten the religious freedom of evangelical Christian students.⁵
5. LRWC submits that the Respondent was bound to and did carry out its statutory duties consistent with Canada's obligations under IHRL to ensure equal and non-discriminatory access to the education necessary to become a lawyer. Further, if the Respondent's decision limits the

¹ *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 (Div Ct) (Application Decision).

² *Reference Re Public Service Employee Relations Act (Alta)*, [1987] 1 SCR 313 at para 57.

³ Application Decision, *supra* note 1 at para. 105.

⁴ *Ibid* at para. 67.

⁵ *Ibid* at paras. 78, 122.

Appellant's rights to *manifest* its beliefs, which LRWC rejects, such limitation is justified under IHRL to protect and prevent violations of the fundamental rights and freedoms of the people who would be excluded by the covenant and to preserve equal access to the legal profession.

PART II - FACTS

6. LRWC relies on the statement of facts as set out in the factum of the Respondent.

PART III - ISSUES AND ARGUMENT

A. The interpretation and application of the human rights at issue must accord with Canada's IHRL obligations

i. Relevant Sources of IHRL

7. As a member of the United Nations (UN) and the Organization of American States (OAS), Canada is bound by the founding charters⁶ of these organizations and is expected to respect the norms articulated in Declarations, Principles and Resolutions adopted by the UN General Assembly and OAS General Assembly. Canada has binding obligations under the treaties that it has ratified, including the *International Covenant on Civil and Political Rights* (ICCPR)⁷; *International Covenant on Economic, Social and Cultural Rights* (ICESCR)⁸; *Convention on the Elimination of all Forms of Discrimination against Women* (CEDAW)⁹; *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD)¹⁰; *Convention on the Rights of the Child* (CRC)¹¹ and the *American Declaration on the Rights and*

⁶ *Charter of the United Nations*, 26 June 1945, CanTS 1945 no 7, ratified/acceded to by Canada 9 November 1945; *Charter of the Organization of American States* (as amended), 30 April 1948, CanTS no. 23, ratified/acceded to by Canada 8 January 1990.

⁷ *International Covenant on Civil and Political Rights*, 16 December 1966, 999 UNTS 171, CanTS 1976 No. 47, 6 ILM 368 (entered into force 23 March 1976, accession by Canada 19 May 1976) (ICCPR).

⁸ *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, 993 UNTS 3, Can TS 1976 No. 46, 6 ILM 360 (entered into force 3 January 1976, accession by Canada 19 May 1976) (ICESCR).

⁹ *Convention on the Elimination of All Forms of Discrimination against Women*, adopted 18 December 1979, entered into force 3 September 1981, UN Doc A/34/46, at 193 (1979) (CEDAW).

¹⁰ *International Convention on the Elimination of All Forms of Racial Discrimination*, 21 December 1965, 660 UNTS 195, 5 ILM 352 (entered into force 4 January 1969, accession by Canada 14 October 1970), (CERD).

¹¹ *Convention on the Rights of the Child*, 44/25 of 20 November 1989, (entered into force 2 September 1990) (CRC).

Duties of Man (ADRDM)¹², all of which guarantee rights to equality and non-discrimination, privacy, belief, and freedom from coercion to adopt a belief. Legal obligations are also found in principles of customary international law, which form part of the common law under the doctrine of adoption.¹³ This includes many provisions of the *Universal Declaration of Human Rights* (UDHR)¹⁴. Canada has not ratified the *American Convention on Human Rights*, but is obligated to respect the provisions of the ADRDM¹⁵ which is “recognized as a source of legal obligation for OAS member states, including in particular those states not party to the American Convention.”¹⁶ The *American Convention* is considered “an authoritative expression of the fundamental principles set forth in the *American Declaration*”¹⁷

8. Under the *Vienna Convention on the Law of Treaties*¹⁸ States Parties are bound by their treaty obligations, which must be performed in good faith (*pacta sunt servanda*).

ii. Presumption of conformity with IHRL

9. IHRL is received in Canada through the interpretative presumption that domestic law conforms with the State’s international obligations;¹⁹ through the incorporation of customary international law by the common law; and through Canada’s acceptance of its legal obligation to implement treaties by passing legislation.²⁰ In interpreting domestic law, courts must avoid constructions that contravene Canada’s international legal obligations unless the wording of the

¹² *American Declaration on the Rights and Duties of Man*, adopted by the Ninth International Conference of American States, Bogotá, Colombia, 1948..

¹³ In *R v Hape*, [2013] 3 SCR 157 (*Hape*), the Supreme Court of Canada confirmed, at para. 39, “the doctrine of adoption operates in Canada such that prohibitive rules of customary international law should be incorporated into domestic law in the absence of conflicting legislation”.

¹⁴ Lawyers Committee for Human Rights, “What Is a Fair Trial? A Basic Guide to Legal Standards and Practice” (New York, NY: March 2000) at n 7. See also *Beharry v Reno*, 183 F Supp 2d 584, 604 (EDNY 2002), noting that several international human rights agreements such as the UDHR have attained the status of customary international law because of their widespread acceptance.

¹⁵ Report No 105/09 Petition 592-07 Admissibility Hul’qumi’num Treaty Group Canada. October 30, 2009 at para. 27.

¹⁶ Report No 52/07 Petition 1490-05 Admissibility Jessica Gonzales and Others United States, July 24, 2007 at para. 56.

¹⁷ *Mary and Carrie Dann v United States* (2002), Case No 11.140, Report No 75/02, at paras. 96-98.

¹⁸ *Vienna Convention on the Law of Treaties*, 23 May 1969, CanTS No. 37, ratified/acceded to by Canada 14 October 1970.

¹⁹ *Daniels v White and the Queen*, [1968] SCR 517 at 541.

²⁰ In *Baker v Canada*, [1999] 2 SCR 817, the SCC confirmed, at paras. 69-70, that international treaties not incorporated into Canadian law by statute may inform interpretation.

statute clearly compels that result,²¹ as the legislature is presumed to act in accordance with Canada's obligations under both treaties and customary international law.

10. In *R. v. Hape*, the Supreme Court of Canada (SCC) confirmed that “[w]herever possible [the Court] has sought to ensure consistency between its interpretation of the *Charter*... and Canada’s [IHRL] obligations...”²². In *Divito v. Canada (Public Safety and Emergency Preparedness)* the SCC affirmed the principle that “the *Charter* should be presumed to provide at least as great a level of protection as is found in the international human rights documents that Canada has ratified.”²³ These principles were recently reaffirmed by the SCC in *Saskatchewan Federation of Labour v. Saskatchewan*.²⁴ In *R. v. Keegstra*, the SCC noted that:

... the international human rights obligations taken on by Canada reflect the values and principles of a free and democratic society, and thus those values and principles that underlie the Charter itself.²⁵

LRWC submits that the *Charter* rights addressed in this appeal must be interpreted and applied in accordance with Canada's obligations under IHRL.²⁶

11. Also relevant are the views and decisions of UN treaty bodies and OAS tribunals charged with interpreting particular human rights treaties. The International Court of Justice “ascribe[s] great weight to the interpretation adopted” by these independent bodies,²⁷ and Canadian courts have relied on them in determining the content and scope of Canada's international obligations.²⁸ Canada has ratified the *Optional Protocol to the International*

²¹ Ruth Sullivan, *Driedger on the Construction of Statutes*, 3rd ed. (1994) at 330, cited with approval in *Hape*, *supra* note 13 at para. 53.

²² *Hape*, *supra* note 13 at para. 55.

²³ *Divito v Canada (Public Safety and Emergency Preparedness)*, [2013] 3 SCR 157 at para. 23 (*Divito*).

²⁴ 2015 SCC 4, [2015] 1 SCR 245, at para. 64.

²⁵ *R v Keegstra*, 1990] 3 SCR 697 at 750.

²⁶ See *Suresh v Canada (Minister of Citizenship & Immigration)*, [2002] 1 SCR 3 at 46.

²⁷ *Republic of Guinea v Democratic Republic of the Congo*, Judgment of 30 November 2010, ICJ Reports 2010 at paras. 66-68. See also International Law Association, Berlin Conference (2004), *Final Report on the Impact of Findings of the United Nations Human Rights Treaty Bodies*: at para. 175.

²⁸ *Divito*, *supra* note 23 at para. 27; See also *First Nations Child and Family Caring Society of Canada v Canada (Attorney General)*, 2016 CHRT 2, 26 January 2016 at para. 431.

Covenant on Civil and Political Rights,²⁹ recognizing the competence of the HR Committee to receive and consider inter-state complaints against Canada.

B. IHRL prohibits formal and substantive discrimination

12. The application of IHRL is guided by the principles of universality and non-discrimination enshrined in Art. 1 of the *UDHR*, and the guarantees of rights to equality and non-discrimination embedded in Art. 2 and 7 of the *UDHR* and codified and incorporated into many IHRL instruments ratified by Canada including: *ICCPR*, Art. 2(1), 3, 14 and 26; *ICESCR*, Art. 2(2), 3; *CEDAW*, Art. 2; *CERD*, Art. 5, *CRC*, Art. 2 and the *ADRDM* Art. II and XII. Under the *ICCPR*, Art. 2 (1) guarantees of rights to equality and non-discrimination must be read together with all other rights in the Covenant, while Art. 26 provides a stand-alone prohibition on discrimination generally.

13. As a party to the *ICCPR*, Canada has a duty to guarantee equal access to effective remedies for human rights violations including of the rights to equality and non-discrimination on any ground (Art 26) and to freedom from arbitrary interference with privacy (Art 17(1)).

14. Under IHRL discrimination occurs when an individual or group is subject to “any distinction, exclusion, restriction or preference that is directly or indirectly based on the prohibited grounds of discrimination and which has the intention or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing”, of rights protected under international law.³⁰ Direct/formal (inequality caused by unequal treatment) and indirect/substantive (inequality caused by the equal treatment for groups with relative

²⁹ *Optional Protocol to the International Covenant on Civil and Political Rights*, adopted 16 December 1966, entered into force 23 March 1976, UN Doc A/6316, 999 UNTS 171.

³⁰ UN Committee on Economic Social and Cultural Rights General Comment No. 20, E/C.12/GC/20, 9 July 2009 (CESCR GC No, 20) at para. 7. For similar language, see CERD, Art 1.1; HR Committee, General Comment No. 18: Non-discrimination, 4 October 1990 (Vol. I)(Supp) at paras. 6-7 (HR Committee GC No. 18).

differences) discrimination³¹ are both prohibited.³²

15. As in Canadian law, treaty bodies and international courts have confirmed that the enumerated grounds in Art. 2 (1) are not exhaustive. In the landmark case *Toonen v Australia*³³ the UN Human Rights Committee (HR Committee) affirmed that the word “sex” includes sexual orientation and that adult consensual sex in private is covered by the privacy rights guaranteed at Art 17,³⁴ ruling that the prohibition of homosexual acts violated both *ICCPR* rights to equality and non-discrimination and to privacy.³⁵

16. The duty of states to prevent discrimination by non-state as well as state actors has been confirmed by the European Court of Human Rights (ECtHR)³⁶ and UN treaty bodies:

The right to equality before the law and freedom from discrimination protected by Article 26 [of the *ICCPR*] requires states to act against discrimination by private, as well as public agents in all fields.³⁷

i. fundamental nature of rights to equality and non-discrimination

17. Art 4.1 of the *ICCPR* prohibits discrimination even in “time of public emergency which threatens the life of the nation.” The Inter-American Court of Human Rights has stated

... the fundamental principle of equality and non-discrimination has entered the realm of *jus cogens*. The juridical framework of national and international public order rests on it and it permeates the whole juridical system.³⁸

ii. Special attention must be given to members of historically disadvantaged groups

³¹ UN Committee on the Elimination of Racial Discrimination, General Recommendation No. 32: , CERD/C/GC/32 at paras. 7-8 (CERD GR No. 32).

³² See, for example: HR Committee GC No. 18, U.N. Doc. HRI/GEN/I/Rev.1 at 26 (1994), paras. 8, 10; CESCR GC No. 20 at para. 8.

³³ *Toonen v Australia*, Communication No. 488/1992, U.N. Doc CCPR/C/50/D/488/1992 (1994). See also *Young v Australia*, communication No. 941/2000 (CCPR/C/78/D/941/2000), para. 10.4; *X v Colombia*, communication no. 1361/2005 (CCPR/C/89/D/1361/2005), para. 9.

³⁴ *Toonen v. Australia*, *ibid* at paras. 8.7 and 8.2.

³⁵ *Ibid* at para. 11.

³⁶ *Case of Eweida and Others v The United Kingdom* (final dec.), no. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2013, at paras. 84 and 91.

³⁷ HR Committee, General Comment 28,, UN Doc CCPR/C/21/Rev.1/Add.10 (2000), at para. 31. See also *Nahlik v Austria*, communication no. 608 / 95 (ICCPR), at para. 8.2 ; *CEDAW*, Article 2(e); *A.T. v Hungary*, Communication no. 2/200, (*CEDAW*), at para.9.2; *CERD*, *supra* note 10, Article 2(1)(d).

³⁸ *Yatama v. Nicaragua*. Preliminary Objections, Merits, Reparations and Costs, Judgment of June 23, 2005. Series C No. 127 at para 184 [*Yatama*].

17. IHRL requires states to exercise particular care to prevent discrimination against vulnerable groups such the lesbian, gay, bisexual, transvestite and transgender people (“LGBT”) excluded by the Appellant’s covenant. In spite of significant advances in recent years, members and even perceived members of these groups continue to suffer egregious human rights violations and unlawful violence at the hands of both State and non-state actors.³⁹ The UN High Commissioner for Human Rights documented two decades of discrimination and violations based on sexual orientation and gender identity which included killings, rape and physical attacks, torture, arbitrary detention, the denial of rights to assembly, expression and information, and discrimination in employment, health and education.⁴⁰

18. In 2011, the UN Human Rights Council (HRC) formally expressed its “grave concern” regarding violence and discrimination based on sexual orientation and gender identity.⁴¹ In 2012 the OAS called on member states to eliminate barriers based on sexual orientation and prevent interference with the private lives of LGBT persons.⁴²

(iii) Freedom of thought, conscience and religion

19. The HR Committee has determined that the terms “belief” and “religion” in the *ICCPR* article 18 include theistic, non-theistic, and atheistic beliefs and the right not to profess any religion or belief.⁴³ In applying the *European Convention on Human Rights* (“*ECHR*”), the ECtHR has stated that freedom of thought, conscience, and religion is not only vital to the identity of believers and their conception of life, but is “also a precious asset for atheists,

³⁹ See International Commission of Jurists, *Sexual orientation and gender identity in international human rights law: The ICJ UN compilation*, 2013, fifth updated edition, at pp. 6-7. See also UN, OHCHR, *Born Free and Equal: Sexual Orientation and Gender Identity in International Human Rights Law* (New York and Geneva, 2012).

⁴⁰ Report of the UN High Commissioner for Human Rights, “Discriminatory laws and practices and acts of violence against individuals based on their sexual orientation and gender identity”, A/HRC/19/41, at para. 1. See also *Yogyakarta Principles - Principles on the application of international human rights law in relation to sexual orientation and gender identity*, March 2007.

⁴¹ UN Human Rights Council, *Human rights, sexual orientation and gender identity*, adopted 14 July 2011, A/HRC/RES/17/19

⁴² *Human Rights, Sexual Orientation, and Gender Identity*, Adopted 4 June 2012, AG/RES.2721 (XII-O/12).

⁴³ HR Committee General Comment No 22, Article 18 (Freedom of Thought, Conscience or Religion), 30 July 1993, CCPR/C/21/Rev.1/Add.4, (HR Committee GC No. 22) at para. 2.

agnostics, sceptics, and the unconcerned.”⁴⁴

20. Holding or not holding a religion or belief a non-religious belief—in this case beliefs that allow sex between unmarried and/or same-sex people - is an absolute right under IHRL and may not be limited under any circumstances:

Article 18(2) bars coercion that would impair the right to have or adopt a religion or belief, including the use or threat of physical force or penal sanction to compel believers or non-believers to adhere to their religious beliefs and congregations, to recant their religion or belief or to convert. Policies or practices having the same intention or effect, such as, for example, those restricting access to education... are similarly inconsistent with article 18(2).⁴⁵

D. IHRL permits limitations on the right to manifest a religion or belief

21. While rights to equality and non-discrimination are non-derogable, the right to manifest one’s religion or belief may be subject to limitations⁴⁶ that are: a/ “prescribed by law”; b/ necessary to protect the rights and freedoms of others; and, c/ directly related and proportionate to the specific need on which such limitation(s) are predicated. Discriminatory limitations are not permitted, however:

Restrictions may not be imposed for discriminatory purposes or applied in a discriminatory manner. [...] limitations on the freedom to manifest a religion or belief for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition.⁴⁷

22. The HR Committee recommends that in interpreting the scope of limitations,

States parties [ICCPR] should proceed from the need to protect the rights guaranteed under the Covenant, including the right to equality and non-discrimination on all grounds specified by articles 2, 3 and 26.⁴⁸

The ECtHR, has observed that the *ECHR* Art. 9(2), which mirrors the limitation provision of the *ICCPR* article 18(2), reflects the fact that in pluralistic democratic societies:

⁴⁴ *Case of Eweida and Others v. The United Kingdom* (final dec.), no. 48420/10, 59842/10, 51671/10 and 36516/10, 27 May 2013, at para. 79.

⁴⁵ HR Committee GC No. 22, *supra* note 43, at para. 5.

⁴⁶ *UDHR*, Art. 29(2); *ICCPR*, Article 18(3); *ACHR*, Article 12(3); *ECHR*, Article 9(2); *UN Declaration on the Elimination of All Forms of Intolerance and of Discrimination based on Religion or Belief*, Article 1(3).

⁴⁷ HR Committee GC No. 22, *supra* note 43, at para. 8.

⁴⁸ *Ibid* at para. 8.

it may be necessary to place restrictions on this freedom in order to reconcile the interests of the various groups and ensure that everyone's beliefs are respected.⁴⁹

i. Legitimate aim

23. The HR Committee has affirmed that, under *ICCPR* article 18(3) “the State may restrict the freedom to manifest a religion if the exercise thereof is detrimental to the article 18(3) aims of protecting public, order, health or morals or the fundamental rights and freedoms of others.”⁵⁰

ii. Prescribed by law

24. The HR Committee has determined the “law”, in this case the *Charter*, the *Human Rights Code* and the *Law Society Act*, allowing limitations must be clear and accessible to the public.⁵¹ The test enunciated by the ECtHR to determine if a limitation is “prescribed by law”⁵² within the meaning of *ECHR* Article 9(2) is whether the limitation /a has a basis in domestic law and /b is accessible to persons concerned and clearly formulated so affected persons may regulate their conduct accordingly⁵³.

iii. Necessary and Proportionality

25. The ECtHR has ruled that “necessary in a democratic society” (*ECHR* article 9 (2)) means that any interference with a right to manifest one's religion or belief must correspond to a “pressing social need.”⁵⁴ The pressing social needs in the present case are: to promote the rule of law in recognizing and furthering equality of all persons regardless of religion, marital status, gender and sexual orientation; to prevent discriminatory access to legal education based

⁴⁹ *Case of Kokkinakis v Greece* (dec.), no. 14307/88, at para. 33.

⁵⁰ *Bikramjit Singh v France*, UN Doc CCPR/C/106/D/1852/2008, at para. 8.5.

⁵¹ HR Committee General Comment No. 34, Article 19: Freedoms of opinion and expression, 12, September 2011, CCPR/C/GC/34, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies, U.N. Doc. HRI/GEN/1/Rev.1 at 35 (1994) at para. 25.

⁵² The term “law” includes both statutory law, which includes “regulatory measures taken by professional regulatory bodies under independent rule-making powers delegated to them by Parliament” and judge-made “law”: *Leyla Şahin v Turkey* (dec.), no. 44774/98 at para. 77.

⁵³ *Case of The Sunday Times v The United Kingdom* (dec.), no. 6538/74, at para. 49.

⁵⁴ *Case of Svyato-Mykhaylivska Parafiya v Ukraine* (dec.), no. 77703/01, at para. 116.

on sexual orientation; to prevent interference with privacy; and to preserve equal access to the legal profession.⁵⁵

iv. Proportionate to the legitimate aim pursued

26. A limitation must be assessed in the light of the consequences which arise for the right holder. The Divisional Court noted, the decision of the Respondent involved two competing *Charter* rights:

On one side, there is the right of the applicants to freedom of religion.... On the other side, there are the rights of the members of the respondent, both current and future, to equal access, on a merit basis, to membership that the respondent.... Moreover, there is the statutory requirement that the respondent must comply with s.6 of the Ontario *Human Rights Code*.⁵⁶

If there is a right to operate a law school with discriminatory entrance requirements and discipline policies as a manifestation of religious belief, such right would be necessarily limited under IHRL to ensure the rights of others to equality, non-discrimination, privacy, and to hold other beliefs. The Respondent was bound to avoid the unacceptable consequence of unequal access to the legal profession by LGBTT people.

27. LRWC submits that the Respondent's decision complies with Canada's IHRL obligations to uphold and prevent violations of rights to equality and discrimination on the basis of sexual orientation and to protect privacy rights from arbitrary and unreasonable interference. IHRL does not permit state or non-state actors to discriminate on the basis of sexual orientation thereby creating inequities, or to interfere with the privacy rights of others in order to manifest a religious belief or otherwise.

V. Order Requested

28. LRWC submits that this Honourable Court should dismiss the appeal.

⁵⁵ Factum of the Respondent, para. 85.

⁵⁶ Application Decision, *supra* note 1 at para. 102.

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**Schedule “B”
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