SCC File No. 37209 & 37318

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, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA

(Pursuant to Rule 42 of the *Rules of the Supreme Court of Canada)*

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TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

APPELLANTS
(Appellants)

-and-

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INTERVENERS

AND BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

APPELLANT
(Appellant)

-and-

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

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PART I: OVERVIEW

1. The Association for Reformed Political Action Canada ("ARPA Canada") agrees with the facts set out in the Facta of Trinity Western University and Brayden Volkenant ("TWU").

2. There is widespread concern among Reformed Christians that legal developments are making it more difficult to openly apply their faith in public life and to their professional lives. The proceedings before this Honourable Court are an example of the types of developments generating grave concern among Reformed Christians.

PART II: ISSUES

3. These submissions focus exclusively on equality rights and address the following issues:

a) The Law Society of British Columbia and Law Society of Upper Canada Decisions ("The Decisions") violate the section 15(1) equality rights of Evangelical Christians.

b) "*Charter* values" do not create an obligation or justification for the State to violate the equality rights or other constitutional freedoms of a member of a group listed in the enumerated grounds of section 15(1).

c) The State is obligated to balance competing rights with a proper delineation of rights.

PART III: ARGUMENT

4. When religious rights are implicated in a legal struggle between citizens and their civil government, the natural inclination is to look to the express protection of religious freedom in section 2(a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*"), which protects from State interference the "fundamental" "freedom of conscience and religion". The bulk of jurisprudence on religious freedom lies there. But as legal scholar Iain Benson observes, "it has been startling to see how, for example, one aspect of an equality right, such as 'sexual orientation,' is hived off and played against a Section 2(a) right without any realization that there is also a corresponding equality right touching on religion within Section 15 itself."[1]

[1] Iain T. Benson, "The Freedom of Conscience and Religion in Canada: Challenges and Opportunities" (2007) 21 *Emory Int'l L. Rev.* 111 at p. 148 **[ARPA's Book of Authorities ("ARPA BoA"), Tab 1]**.

A. The Decisions violate the section 15(1) equality rights of individuals associated with an Evangelical Christian community

5. Section 15(1) of the *Charter* protects the equality rights of, *inter alia*, religious individuals. It states that every individual has the right to the equal benefit of the law without discrimination based on religion. Proving a violation of section 15(1) requires demonstrating three things.

STEP 1: Does the Charter apply?

6. The claimant must first prove that the *Charter* applies.[2] This is demonstrated by showing that the infringer of the rights is a State actor[3] and that the infringing action constitutes "law" within the meaning of section 15(1).[4] It is uncontested that LSBC and LSUC are State actors and their Decisions constitute "law" within the meaning of section 15(1).

7. If the claimant can demonstrate that the *Charter* applies, then the claimant must pass the two-stage section 15(1) analysis:

(1) Does the impugned law, on its face or in its impact, create a distinction on the basis of an enumerated or analogous ground?

(2) Does the impugned law fail to respond to the actual capacities and needs of the members of the group and instead impose burdens or deny a benefit in a manner that has the effect of reinforcing, perpetuating or exacerbating their disadvantage?[5]

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[2] While this may seem trite, it bears mentioning because the Ontario Court of Appeal (*Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518[***TWU ONCA***]) failed to apply this step. While the Ontario Court of Appeal spent 21 paragraphs (80-101) of legal analysis to come to a conclusion on whether section 2(a) was infringed, it merely declares that TWU "discriminates against the LGBTQ community on the basis of sexual orientation contrary to section 15 of the *Charter*" (at para. 115, repeated in para. 119), without any legal analysis whatsoever.

[3] *McKinney v. University of Guelph*, [1990] 3 S.C.R. 229 [**M*cKinney***] at para. 265.

[4] Peter W. Hogg, *Constitutional Law of Canada, 5th Edition, Supplemented* (Toronto: Thomson Reuters Canada Ltd., 2007), loose-leaf, [**Hogg**] at pp. 55-10 – 55-11, **[ARPA BoA, Tab 3]**.

[5] *Kahkewistahaw First Nation v. Taypotat*, [2015] 2 S.C.R. 548, at paras. 19-20.

STEP 2: Does the impugned law create a distinction on the basis of a listed ground?

8. The Decisions make a distinction between graduates of Canadian secular law schools and graduates of a Christian law school – TWU – solely because TWU has a community agreement grounded on shared religious beliefs articulated in a "community covenant".[6] These shared religious beliefs are constitutionally protected. Association with the TWU community covenant provokes the differential treatment by the law societies.

STEP 3: Does the distinction create a disadvantage?

9. Since the law creates a distinction, the Court must inquire "into whether the law works substantive inequality by [1] perpetrating disadvantage or prejudice, or [2] by stereotyping in a way that does not correspond to actual characteristics or circumstances."[7] The word "or" indicates that only one of the two patterns of discrimination must be demonstrated.

10. The first way substantive inequality may be established is "by showing that the impugned law, in purpose *or effect*, perpetuates prejudice and disadvantage to members of a group based on personal characteristics within s. 15(1) of the *Charter*."[8]

11. In *Trinity Western University v. British Columbia College of Teachers*,[9] a professional government body held TWU graduates to a different standard, not trusting them to teach children even though instruction at TWU complied with all professional and academic standards. This was not based on evidence, but prejudice.[10] Today, the public attention showered on the TWU Law School shows that many people believe students/graduates of the TWU Law School are, *ipso facto*, less fit, or ought not to be certified to practice law because of a tenet of their religious beliefs and practices. The Decisions perpetuate this prejudice.

12. The second means of substantive inequality may be established "by showing that the disadvantage imposed by the law is based on a stereotype that does not correspond to the actual circumstances and characteristics of the claimant or claimant group."[11]

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[6] TWU Appellant Factum at paras. 12-16; TWU Respondent Factum at paras. 11-17.
[7] *Withler v. Canada (A.G.)*, [2011] 1 S.C.R. 396, [***Withler***] at para. 65.
[8] *Withler*, *supra.*, at para. 35, emphasis added.
[9] *Trinity Western University v. B.C.C.T.*, [2001] 1 S.C.R. 772 [***TWU 2001***].
[10] *TWU 2001*, *supra*, at para 32.
[11] *Withler*, *supra*, at para. 36.

13. The Decisions stereotype all TWU Law School students and graduates, and by extension all Evangelicals, including Reformed Christians, as intolerant of others and unfit for regulated professions. This stereotype is baseless.

14. Nor are The Decisions neutral as both LSUC and the Ontario Attorney General argue.[12] Whereas the section 15(1) claim in *Hutterian Brethren*[13] was based on a neutral policy choice concerning security measures and did not arise out of any demeaning stereotype, the same cannot be said of The Decisions. The latter denied a benefit precisely because of an individual's religious convictions or their association with a particular religious community.

15. The important thing to demonstrate at this stage of the section 15(1) test is discriminatory **effect**. In *Andrews v. Law Society of British Columbia*,[14] the Supreme Court of Canada applied this standard to measure the effect of the prohibition on non-citizens from practicing law in B.C. The Court concluded that "[t]he distinction therefore imposes a burden in the form of some delay on permanent residents who have acquired all or some of their legal training abroad and is, therefore, discriminatory." The Court also noted that what made the discrimination especially problematic was that the lawyers were otherwise qualified:

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

16. The unacceptable discriminatory effect for non-citizens in *Andrews* was "some delay" before being called to the bar for otherwise qualified persons. The discriminatory effect in the present case is that a qualified person, having completed an academically and professionally approved program is nevertheless effectively barred from practicing law in the province solely because she or he associated with a religious community that shares a Christian ethic on marriage and sexuality. As this Court has already stated: "There is no denying that the decision […] places a burden on members of a particular religious group".[16]

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

> […] a distinction […] based on grounds relating to personal characteristics

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[12] LSUC Factum at para. 96; the Attorney General of Ontario Factum at para. 23.
[13] *Alberta v. Hutterian Brethren of Wilson Colony*, [2009] 2 S.C.R. 567 at paras. 105-108.
[14] *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143 [***Andrews***].
[15] *Andrews*, *supra*, at 183.
[16] *TWU 2001*, *supra*, at para. 32.

> of the individual or group, which has the effect of imposing burdens, obligations, or disadvantages on such individual or group […] or which withholds or limits access to opportunities, benefits, and advantages available to other members of society. *Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination*.[17]

18. As set out above, the LSBC and the LSUC Decisions squarely fit this definition:

(1) The group: Evangelical Christians generally and TWU graduates specifically;

(2) The personal characteristics: "the voluntary adoption of a code of conduct based on a person's own religious beliefs;"[18]

(3) The disadvantage or limited access: excluded from practicing law by LSBC and LSUC;

(4) Available to others: the adoption of a moral code is done by all people, but The Decisions single out for exclusion only those who adopted an Evangelical sexual ethic;

(5) Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group: The Decisions specifically disadvantage those who choose to associate with a Christian university by signing a personal commitment to live according to constitutionally protected beliefs.

19. Importantly, this Honourable Court guides us to not only ask whether there is different treatment based on protected personal characteristics, "but also whether those characteristics are relevant considerations under the circumstances."[19] The choice of some students to study law in a community devoted to living according to a Christian ethic is not relevant to their ability to practice law. And that choice poses no threat to the legal profession or the public interest in an ethical and competent bar, as LSUC concedes.[20] TWU students promise to abide by a Christian ethic as TWU students. As lawyers they, like graduates of any school, must abide by the law society's rules. If their religious beliefs are not relevant to the practice of law, then any discrimination is unjustified and the claimant passes the section 15(1) test. As philosophers Sherif Girgis and Ryan Anderson argue,

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[17] *Andrews*, *supra*, at 174.
[18] *TWU 2001*, *supra*, at para 25.
[19] *Withler*, *supra*, at para. 39.
[20] See *TWU ONCA*, *supra*, at para. 58, "LSUC accepts that TWU graduates would not be at any more risk of discriminating… than graduates of other law schools." The B.C. Court of Appeal concurs *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423 [***TWU BCCA***] at para. 149.

> [W]e bring no one to ruin by allowing religious schools to foster a milieu supportive of their values: to require teachers to share their … ethic or to make rules against nonmarital sexual activity (straight or gay) or to refuse to recognize groups that reject their ethical commitments. These measures are not gratuitous or controlling. They empower students and scholars by giving them the freedom – the live option – to join a community that offers support for living by a demanding moral vision of their own choice. And they welcome anyone who shares that vision.[21]

20. Of course, not all Evangelical Christians are barred from practicing law in B.C. and Ontario. Some will attend secular law schools and apply and be accepted to practice law, while some would rather or only attend TWU. This heterogeneity within the Evangelical community does not defeat a claim of discrimination. In *Quebec v. A.*, Justice Abella explained that this Court has "squarely rejected the idea that for a claim of discrimination to succeed, all members of a group had to receive uniform treatment from the impugned law."[22]

B. "Charter values" do not create a justification for the State to violate the equality rights or other constitutional freedoms of an individual

21. The State cannot take the shield of the *Charter* and turn it into a sword. The State cannot impose the *Charter* on private citizens and private institutions. "To open up all private and public action to judicial review could strangle the operation of society and […] diminish the area of freedom within which individuals can act."[23] Neither can courts apply the *Charter* to a private institution through the back door of "*Charter* values" language.

22. The Ontario Court of Appeal recently issued a corrective of sorts on the misuse of "*Charter* values" in *Gehl v. Canada (Attorney General)*. The majority argued for restraint:

> [T]here is good reason to maintain a modest role for *Charter* values in judicial reasoning generally and in statutory interpretation specifically. *Charter* values lend themselves to subjective application because there is no doctrinal structure to guide their identification or application. Their use injects a measure of indeterminacy into judicial reasoning because of the irremediably subjective – and value laden – nature of selecting some *Charter* values from among others, and of assigning relative priority among *Charter* values and competing constitutional

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[21] Ryan T. Anderson and Sherif Girgis, "Against the New Puritanism: Empowering All, Encumbering None" In John Corvino, Ryan T. Anderson, and Sherif Girgis, *Debating Religious Liberty and Discrimination* (New York: Oxford University Press, 2017) 108 [**Anderson**] at pp. 116-117 **[ARPA BoA, Tab 4]**.

[22] *Quebec (Attorney General) v. A.*, [2013] 1 S.C.R. 61 [***Quebec v A***], at paras. 354-55.

[23] *McKinney*, *supra*, at para. 262.

> and common law principles. The problem of subjectivity is particularly acute when *Charter* values are understood as competing with *Charter* rights.[24]

23. The Ontario Court of Appeal ruling in the case at bar, however, exemplifies the problems arising from the misuse of "*Charter* values". The bald declaration that TWU "discriminates […] contrary to section 15 of the *Charter*"[25] is a blatant error of law. It is an example, *par excellence*, of prioritizing the equality "*Charter* value" over enumerated *Charter* rights.

24. Furthermore, those who advocate a "*Charter* values" approach should be reminded that freedom of conscience and religion, expression and association are all "*Charter* values".

25. This Honourable Court stated in *Andrews* that section 15(1) does not "impose on individuals and groups an obligation to accord equal treatment to others. It is concerned with the application of the law."[26] This Court also spoke to this issue directly in the first *Trinity Western* case: "To state that the voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion".[27] It would also be inconsistent with section 32 of the *Charter*.

C. The State is obligated to properly balance competing rights

26. TWU has dealt thoroughly with the question of the proper balancing of rights.[28] ARPA Canada concurs with those arguments and limits its submission here to the discussion on delineating the section 15(1) equality right.

27. The first step is to delineate allegedly competing rights to see if, in fact, there are rights in conflict. This Court must not "hive off" section 15 as a "sexual orientation" right and put it up against the "religion right" of section 2(a). Rather, it is the section 2(a), 2(b), 2(d), and section 15(1) rights of TWU graduates that must be compared in the aggregate against some other legitimate, intelligible State interest.[29]

28. Here, there is no conflict because there is no *other* equality right at stake.

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[24] *Gehl v. Canada (Attorney General)*, 2017 ONCA 319 [***Gehl***] at para. 79. We commend paras. 76 – 83 for a careful critique of "*Charter* values."
[25] *TWU ONCA*, *supra*, at para. 115.
[26] *Andrews*, *supra*, at 163-64.
[27] *TWU 2001*, *supra*, at para. 25.
[28] TWU Appellant Factum at paras 101-132; TWU Respondent Factum at paras 54-69.
[29] See *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, at para. 56.

29. LSBC and LSUC do not have sexual orientation equality rights. And TWU does not unlawfully discriminate against anyone on the basis of sexual orientation.[30] Only where the State is infringing on two competing rights simultaneously is it necessary to balance competing *Charter* rights. A true example would be the conflict between the accused's right to a fair trial (s. 7 and 11(d) of the *Charter*) and a witness's religious freedom (s. 2(a)) as in *R. v. N.S.*[31]

30. By admitting TWU graduates to the practice of law, LSBC and LSUC would not be discriminating against any individual or group. On the other hand, by not admitting TWU graduates on the sole basis of their association with a commonly held and sensible view of marriage and sexuality,[32] LSBC and LSUC discriminate against TWU graduates.

31. There is no evidence that admitting TWU graduates to the practice of law in British Columbia and Ontario violates the *Charter* rights of anyone. Similarly, there is no evidence that TWU graduates would discriminate against anyone on the basis of sexual orientation. Indeed, the Supreme Court of Canada has stated that absent evidence, no such conclusion should be drawn on the basis of TWU and its graduates' view on marriage and sexuality.[33]

Conclusion: Individuals are free to study in religious universities in preparation for professional and public life

32. TWU is a community of individuals who govern themselves according to Christian morals as they associate with each other and study together. There is no harm in that. To refuse to accept qualified graduates simply because they held themselves to a Christian moral code as students is to discriminate against them on the basis of religion. Justice Wilson said it well: "Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue."[34]

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[30] *TWU BCCA*, *supra*, at para. 151: "TWU's admissions policy… is not 'unlawful discrimination'. That is not to say that it does not have an impact on LGBTQ individuals that must be considered, but the lawfulness of TWU's policy is significant to the balancing exercise."

[31] *R. v. N.S.*, [2012] 3 S.C.R. 726, especially at para. 30-33.

[32] Even if one disagrees with the position, it is a reasonable one to hold. See, for example, this published argument: Sherif Girgis, Robert P. George, & Ryan T. Anderson, "What Is Marriage?" *Harvard Journal of Law & Public Policy*, Vol. 34, No. 1 pp. 245-287, Winter 2010 **[ARPA BoA, Tab 5].**

[33] *TWU 2001*, *supra,* at paras. 32, 35-36.

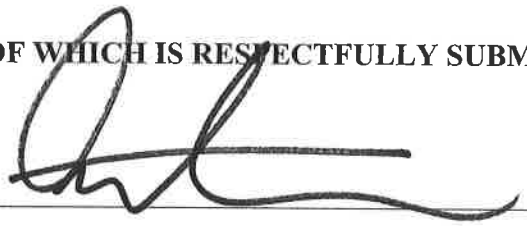
33. Engaging in a religious communal enterprise must be vigorously protected within a pluralistic society. This type of religious association has been improperly labelled as "unlawful discrimination". Well-established *Charter* principles refute this characterization.

34. As the Supreme Court of Canada suggested in *Trinity Western* (2001), "if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church."[35] ARPA Canada agrees.

PART IV: COSTS

35. ARPA Canada does not seek costs and requests that no award of costs be made against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED, this 1st day of September 2017.



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[34] *R. v. Morgentaler*, [1988] 1 S.C.R. 30, at para. 288.
[35] *TWU 2001*, *supra,* at para. 33.

PART V: TABLE OF AUTHORITIES

Authorities	Paragraph(s)
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Other Sources	**Paragraph(s)**
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Sherif Girgis, Robert P. George, & Ryan T. Anderson, "What Is Marriage?" Harvard Journal of Law & Public Policy, Vol. 34, No. 1 pp. 245-287, Winter 2010.	30