

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

B E T W E E N :

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

- and -

LAW SOCIETY OF UPPER CANADA

Respondent

- and -

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Interveners

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PART I – OVERVIEW OF POSITION AND STATEMENT OF FACTS

1. Admission to a proposed law school at Trinity Western University (**TWU**) is available only to those who sign the school's Community Covenant (**Admissions Policy**). Under the Admissions Policy, students must abstain from same-sex intimacy, married or not. As a result, lesbian, gay, bisexual, transgender and queer (**LGBTQ**) people are excluded from these law school seats. TWU nonetheless wants to compel the Law Society of Upper Canada (**LSUC**) to accredit its proposed law school.
2. Equality rights matter. They are important because the harms that flow from discrimination are real and have severe consequences in the lives of LGBTQ people. In this case, those consequences will be felt most acutely by LGBTQ students who want to go to law school. LGBTQ equality was central to LSUC's decision. LSUC acted to preserve equal access to LSUC-accredited law schools, for all people. Equality remains central in this Honourable Court's review. It is especially relevant when weighing the deleterious effects that would result from accrediting a law school that discriminates against LGBTQ people.
3. Lesbians, Gays, Bisexuals, and Trans People of the University of Toronto (**LGBTOUT**) is Canada's oldest LGBTQ student organization. LGBTOUT's members are among the annual applicants to Canadian law schools. It is these students whose equality interests will suffer.
4. LGBTOUT was granted leave to intervene to make submissions on the harms of discrimination to LGBTQ university students raised in this appeal, and the place of the harm in the legal analysis.
5. LGBTOUT accepts the facts as set out in the Respondent's factum.

PART II – POSITION ON THE ISSUES

6. This appeal asks if TWU can compel LSUC to sanction its discriminatory Admissions Policy through accreditation. LGBTOUT submits that the answer is "No".

PART III – STATEMENT OF ARGUMENT

7. All statutory decision makers must act consistently with the Constitution and the values underlying the grant of discretion, including the *Charter*.¹ Where an administrative decision implicates the *Charter*, a decision maker must balance the *Charter* values at stake – *all* the *Charter* values at stake – against their statutory objectives.

8. As this Court explained in *Doré* and *Loyola*,² reviewing Courts determine whether an administrative decision reflects a proportionate balance – one “that gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate.”³ This requires a Court to proceed in two stages. It must first determine whether a decision engages the *Charter*.⁴ If the *Charter* is engaged then at the second stage, the Court must engage in a “proportionality exercise.”

9. However, this case involves two competing sets of *Charter* protections – TWU’s religious freedom and LGBTQ equality rights. LGBTQOUT submits that in such cases, proportionate balancing necessarily engages both sets of *Charter* interests throughout the analysis, and requires the reviewing Court to engage in an express balancing of salutary and deleterious effects in the spirit of the final stage of *Oakes*⁵ and *N.S.*⁶ The harms to LGBTQ people are especially relevant when weighing the deleterious effects in this final balancing.

STAGE ONE: THE CHARTER IS ENGAGED

10. In *Loyola*, this Court found that “[t]he preliminary issue is whether the decision engages the *Charter* by limiting its protections.”⁷ LSUC’s decision would have triggered this analysis no

¹ *Doré v Barreau du Québec*, [2012] 1 SCR 395 at para 24 [*Doré*]; *Vancouver Sun (Re)*, [2004] 2 SCR 332 at para 31; *Slight Communications Inc v Davidson*, [1989] 1 SCR 1038 at 1081; *Rodgers (Re)*, [2006] 1 SCR 554 at para 20

² *Loyola High School v Quebec (Attorney General)*, [2015] 1 SCR 613 [*Loyola*]

³ *Ibid* at 39

⁴ *Ibid* at 37

⁵ *R v Oakes*, [1986] 1 SCR 103 at paras 70-71 [*Oakes*]

⁶ *R v N.S.*, [2012] 3 SCR 726 at paras 34-35 [*N.S.*]

⁷ *Loyola* at para 39

matter what it decided: accreditation would have engaged LGBTQ equality interests, and LSUC's refusal of accreditation engages TWU's religious freedom interests. To the extent that this stage merely alerts the reviewing Court that it must assess reasonableness using the *Doré* analysis, nothing turns on this. But to the extent that stage one frames the *Charter* interests that must be proportionately balanced for a decision to be upheld on judicial review, both sets of interests must be expressly identified.

STAGE TWO: DID LSUC STRIKE A PROPER BALANCE?

11. Under *Doré*, the Court must examine the statutory objective, how best to protect the *Charter* protections at stake, and assess whether a proper balancing was reached. In an ordinary case, where only one set of *Charter* protections is engaged, this proportionality analysis works two “justificatory muscles” – minimal impairment and balancing – which together illuminate whether the decision impaired the *Charter* protections as little as possible in light of the relevant statutory objectives.⁸ In this context, where there is a competing *Charter* claim, the balancing must include both sets of *Charter* protections, with a final express weighing of salutary and deleterious effects in the spirit of the final stage of *Oakes* and *N.S.*

I. The Statutory Objective

12. The Respondent LSUC discusses its statutory objective in depth.⁹ LBGTOUT makes three further submissions with respect to LSUC's statutory public interest mandate.¹⁰

13. *First*, “public interest” includes the prevention of direct harm to vulnerable minorities, including LGBTQ people. LSUC prevented an equality infringement by ensuring that heterosexual and LGBTQ people have access to the same number of seats at LSUC-accredited

⁸ *Doré* at paras 55-56

⁹ *Factum of the Respondent, Law Society of Upper Canada*, at paras 15-24

¹⁰ *Law Society Act*, s. 4.2(3), RSO 1990, c. L. 8

law schools. *Second*, even where LSUC cannot prevent direct harm to a minority community, the public interest is engaged where it is asked to condone that harm. Any endorsement of a policy of exclusion will reproduce many of the conditions that have led to deleterious consequences for LGBTQ people, discussed below. *Third*, public interest includes safeguarding the integrity and reputation of the legal profession. The legal profession has a “special role to recognize and protect the dignity of individuals and the diversity” of the profession.¹¹

II. How to Best Protect *Charter* Interests

14. By accrediting a law school, LSUC endorses the school and its policies, and provides the students of that school with a simplified path to practice in Ontario. By refusing accreditation, LSUC merely acted to ensure that the number of seats at Canadian law schools *with a simplified path to practice in Ontario* remains equal for heterosexual and LGBTQ people. This result fulfills LSUC’s statutory objectives, and absent accreditation, TWU students are still left “with a meaningful choice to follow [their] religious beliefs and practices.”¹²

15. The analysis does not end there. The decision maker must consider how best to protect **both** sets of competing *Charter* interests. This necessarily includes consideration of the equality protections for LGBTQ people who would be negatively affected by accreditation. Respectfully, this Court cannot conclude that LSUC unreasonably limited TWU’s religious rights without considering whether the opposite decision would have unreasonably limited LGBTQ equality rights. Otherwise, this Court risks minimally impairing one set of rights by maximally impairing another.¹³ If this Court does not consider both sets of rights in tandem, the LSUC decision is

¹¹ *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518 at para 131 [TWU ONCA], quoting Brian Dickson, “Legal Education” (1986) 64:2 Can Bar Rev 374 at 377

¹² *Alberta v Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 SCR 567 at para 88

¹³ Gonthier J. dissenting on other grounds: *Dagenais v Canadian Broadcasting Corp.* [1994] 3 SCR 835 at 923

vulnerable at this stage *no matter which decision it makes*, leaving open the absurd possibility that *neither* accrediting nor refusing to accredit would satisfy this branch of the test.

III. Balancing Competing *Charter* Interests

16. There are two types of balancing contemplated at this stage. First, there is the kind of balancing between the infringed *Charter* protection and the statutory objectives contemplated by *Doré*. LSUC's factum covers this type of balancing in detail, and LGBTOUT adopts those submissions.¹⁴ Second, there is balancing between *Charter* protections, which both the Divisional Court¹⁵ and the Court of Appeal¹⁶ recognized. Both Courts considered the severe deleterious effects of accreditation on LGBTQ people.¹⁷ They considered competing *Charter* protections, weighed them, and found LSUC's decision reasonable. This balancing as between *Charter* protections amounts to a weighing of salutary and deleterious effects, in the spirit of the final stage of *Oakes* and the final stage of *N.S.* LGBTOUT offers the following additional submissions on this final balancing analysis.

a) Benchers properly considered submissions on deleterious effects

17. LSUC Benchers had before them submissions on the harms which directly flow from TWU's Admissions Policy.¹⁸ The Policy offends the equality of LGBTQ people. It is deeply discriminatory, and this is most acutely felt by prospective law students, such as LGBTOUT's members. LGBTOUT adopts the submissions by the Interveners Start Proud and Outlaws on this point. No offence against equality should be taken lightly.

¹⁴ *Factum of the Respondent, Law Society of Upper Canada*, at paras 103-129

¹⁵ *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at para 102 [TWU Div Crt]

¹⁶ *TWU ONCA* at para 115

¹⁷ *TWU Div Crt* at paras 104-116; *TWU ONCA* at paras 115-119 and 130-138

¹⁸ See, e.g. AB, Vol VIII, Tab 26 at 1312. The direct and immediate harm is the exclusion of LGBTQ people from the TWU law school seats.

18. Benchers were also entitled to consider submissions on the larger harms which arise from social exclusion, including: heteronormativity in the workforce;¹⁹ increased difficulties in securing articling positions;²⁰ being closeted at work;²¹ employment-based discrimination, including diminished incomes compared to similarly situated heterosexuals;²² systemic discrimination, exclusion, and hatred related to sexual orientation;²³ bullying in schools;²⁴ a LGBTQ suicide rate three times the national average;²⁵ discrimination in the legal profession and legal education;²⁶ harms to personal confidence and self-esteem from being closeted;²⁷ and historic stereotyping, ridicule, assault, chemical castration, imprisonment and execution because of their identity.²⁸

19. Benchers also considered the historical context, including submissions that until very recently, same-sex relationships were criminalized, and many Canadians lost jobs, family and housing if their sexuality was discovered by others. LGBTQ people were denied the right to marry, to share benefits or to adopt children. Being outed as a sexual minority exposed a person to allegations of mental illness and to being construed as a threat to national security. Their historical position exposed, and continues to expose, LGBTQ people to actual physical violence.²⁹

¹⁹ *Ibid* at p. 175, submission of Western Law Diversity Committee

²⁰ *Ibid*

²¹ *Ibid* at p. 175

²² *Ibid* at p. 1149, submission CUPE Legal Branch

²³ *Ibid* at p. 774, submission of Out on Bay Street

²⁴ *Ibid* at p. 175, submission of Western Law Diversity Committee

²⁵ *Ibid* at p. 779, submission of I. Loui Dallas; *ibid* at p. 857, submission of David Bronskill; *ibid* at p. 175, submission of Western Law Diversity Committee

²⁶ *Ibid* at p. 863, submission of the Ontario Bar Association

²⁷ *Ibid* at p. 124, submission of the Canadian Bar Association

²⁸ *Ibid* at p. 1033, submission of Criminal Lawyers' Association

²⁹ *Ibid* at p. 1117, submission of Prof. Angela Cameron et al.

b) This Court can take notice of deleterious effects where equality is offended

20. This Court is also entitled to take judicial notice that LGBTQ people have faced historical social, political and economic exclusion, and that they face such disadvantage to this day.³⁰ In *Withler*, this Court held that in assessing the deleterious effect of an impugned law or program, “evidence that goes to establishing a claimant’s historical position of disadvantage or to demonstrating existing prejudice against the claimant group, as well as the nature of the interest that is affected, will be considered.”³¹

21. In *Egan*, this Court recognized that disadvantages to LGBTQ people are pervasive in social, political and economic spheres. LGBTQ discrimination includes public harassment and verbal abuse, violence and victimization, unequal access to employment and services, and exclusion from public life. This Court further acknowledged that stigmatization and hatred have resulted in the closeting of LGBTQ people, which imposes unacceptable costs on them.³²

22. Despite the hard-fought gains in legal rights, LGBTQ people remain a vulnerable group. They were among the last groups to be added to human rights legislation in Canadian jurisdictions, and they have lived under those policies’ protections for shorter periods of time than other historically disadvantaged groups. As a result, LGBTQ people still live in social and economic contexts characterized by lack of family support, vulnerability to harassment, violence, negative social attitudes, and diminished opportunities.³³

c) Accreditation would offend LGBTQ equality and increase deleterious effects

23. Had LSUC accredited TWU, it would have condoned TWU’s discriminatory Admissions Policy and its deleterious effects on LGBTQ people. Condoning inequality perpetuates inequality.³⁴ LSUC’s imprimatur for TWU would have widened the gap between a marginalized

³⁰ *Egan v Canada*, [1995] 2 SCR 513 [*Egan*] at pp 600-601; *Vriend v Alberta*, [1998] 1 SCR 493 at pp 543- 544; *M. v H.*, [1999] 2 SCR 3 at para 69; *R v Find*, [2001] 1 SCR 863 at para 48

³¹ *Withler v Canada (Attorney General)*, [2011] 1 SCR 396 at para 38

³² *Egan* at 600-601

³³ *Ibid* at 600-602

³⁴ *TWU Div Crt* at para 116

group and the rest of society, and perpetuated the disadvantage that LGBTQ people have suffered and continue to suffer to this day.³⁵

24. When an institution like LSUC sanctions, condones, or replicates discrimination, it amplifies the physical, psychological and social effects associated with that discrimination.³⁶ LSUC's accreditation would impose a form of institutionalized shame and social exclusion that harms sexual minorities, and society generally, and turns back the clock on hard fought equality gains. Exclusion of a historically disadvantaged group from public opportunities conveys the denigrating message that those who are not part of the dominant group are not equal members of society.³⁷

25. In *Marriage Commissioners Appointed Under The Marriage Act (Re)*, the Saskatchewan Court of Appeal considered proposed legislation that would exempt certain civil marriage officials from conducting same-sex marriages on religious grounds.³⁸ The Court concluded that the harmful effects of permitting such refusals outweighed any negative impact on freedom of religion.³⁹ It could not condone such discrimination, and it recognized the particular toll caused by refusing to recognize same-sex relationships:

[The proposed legislation] would perpetuate a brand of discrimination which our national community has only recently begun to successfully overcome. It would be a significant step backward if, having won the difficult fight for the right to same-sex civil marriages, gay and lesbian couples could be shunned by the very people charged by the Province with solemnizing such unions.⁴⁰

26. This Court must consider the distinctive nature of a legal education, which renders barriers to access particularly problematic. Exclusion in the context of legal education is

³⁵ “If the state conduct widens the gap between the historically disadvantaged group and the rest of society rather than narrowing it, then it is discriminatory”: *Quebec v A*, [2013] 1 SCR 61 *per* Abella J. at para 332

³⁶ *TWU Div Crt* at para 116

³⁷ Denise G. Réaume, "Discrimination and Dignity" (2003) 63 La. L. Rev. 645 at 686, cited in *Quebec v A* . at para.198, per Lebel J.; *Egan* at 567

³⁸ 2011 SKCA 3 [*Marriage Commissioners*].

³⁹ *Ibid* at paras 92-99

⁴⁰ *Ibid* at para 94

insidious because it undermines the ethical underpinnings of the legal profession, and has the potential to undermine public confidence in the profession.⁴¹ This form of exclusion debases the core legal principle that all people should have equal access to publicly available opportunities, including the opportunity to earn a law degree, practice law and to become a candidate for the judiciary.

27. The harms are not only felt by those directly excluded. The harms accrue to the LGBTQ community writ large, and to society in general, as seen in the proportionality analysis in *Re: Marriage Commissioners*:

Second, and more concretely, allowing marriage commissioners to deny services to gay and lesbian couples would have genuinely harmful impacts.[...]

Negative effects of this sort would not be restricted to those gay and lesbian individuals who are directly denied marriage services. *A more generalized version of it would obviously be felt by the gay and lesbian community at large and, indeed, there is no doubt it would ripple through friends and families of gay and lesbian persons and the public as a whole.* Simply put, it is not just gay and lesbian couples themselves who would be hurt or offended by the notion that a governmental official can deny services to same-sex couples. Many members of the public would also be negatively affected by the idea.⁴² [Emphasis added]

28. If TWU sought to exclude a different historically marginalized group from accessing legal education – for example, inter-racial couples – there can be little doubt that LSUC and other government actors would categorically refuse to approve or accredit the institution.⁴³

29. The Admissions Policy not only excludes sexual minorities from a law school, but does so based on highly stigmatizing and prejudicial attitudes.⁴⁴ This exacerbates the prejudice and

⁴¹ *TWU ONCA* at paras 130-132

⁴² *Marriage Commissioners* at paras 95-96

⁴³ See e.g., *Bob Jones University v United States*, 461 US 574 (1983); *TWU v British Columbia College of Teachers*, [2001] 1 SCR 772 at 70-71; *TWU ONCA* at paras 136-138

⁴⁴ The Community Covenant refers to certain acts, including sexual intimacy outside of heterosexual marriage, as being “destructive”, and deems such conduct illicit and non-virtuous: Affidavit of Pamela Klassen sworn 23 October 2014, AB, Vol VIII, Tab 24 at 1312

harms to LGBTQ dignity.⁴⁵ In *R v Kapp*, this Court identified human dignity as “an essential value underlying the s. 15 equality guarantee”.⁴⁶ Human dignity is crucial because it provides a group with self-respect and self-worth:

It is concerned with physical and psychological integrity and empowerment. *Human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities, or merits...* Human dignity is harmed when individuals and groups are marginalized, ignored, or devalued, and is enhanced when laws recognize the full place of all individuals and groups within Canadian society.⁴⁷ [Emphasis added]

CONCLUSION

30. This Court must assess whether LSUC struck a proportionate balance when it refused to accredit TWU’s proposed law school. This Court must apply *Doré* while remaining alive to the competing *Charter* interests at stake. The equality interests of LGBTQ people must weigh heavily in the balance, especially at the final stage of its analysis. Equality rights matter, and the harms of discrimination have real and severe consequences in the lives of LGBTQ people. A profession whose most senior and respected members – Benchers – have condoned discrimination contributes to a social and political climate of subtle and understated homophobia, and its associated harms.

PART IV – COSTS and PART V – ORDERS SOUGHT

31. LGBTQOUT does not seek costs and asks that no costs be awarded against it. Leave was granted to make oral argument for five minutes in the Order of McLachlin C.J. of July 31, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at Ottawa, this 11th day of September, 2017.

Angela Chaisson and Marcus McCann, Lawyers for LGBTQOUT

⁴⁵ *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467 at paras 121-124

⁴⁶ *R v Kapp*, [2008] 2 SCR 483 at para 21

⁴⁷ *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53

PART VI: TABLE OF AUTHORITIES

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