

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Appellants

– and –

LAW SOCIETY OF UPPER CANADA

Respondent

- and

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. Trinity Western University’s (“TWU”) proposed law school would be the first law school in Canada that places barriers to entry to students on the basis of their lesbian, gay, bisexual, transsexual, transgender and queer (“LGBTQ”) identity. The Law Society of Upper Canada (“LSUC”) was not obligated to accredit such an institution. Rather, the LSUC recognized that TWU’s admissions policy – the Community Covenant – is a code of conduct that demands the impossible from LGBTQ students, who must change an immutable aspect of their identity in order to attend TWU, or face risk of discipline and expulsion. When defining the scope of the rights at stake, the LSUC gave effect to the significant advancements in substantive equality for the LGBTQ community. The LSUC reasonably concluded that it would not fulfil the LSUC’s obligations under the *Charter* or Ontario *Human Rights Code* or be in the public interest to accredit an institution that is antithetical to the LSUC’s own stated commitments to diversity in the legal profession.

2. Start Proud and the OUTlaws adopt the facts as presented by the LSUC.

PART II – POSITION ON QUESTIONS IN ISSUE

3. Start Proud and the OUTlaws take the position that in light of the LSUC’s statutory mandate and obligations under the *Charter* and Ontario *Human Rights Code*, it was both reasonable and proportionate for the LSUC to refuse to accredit TWU’s proposed law school.

PART III – ARGUMENT

A. The Impact of the Covenant on the LGBTQ Community

4. The Covenant is not a merely aspirational document setting out TWU’s religious beliefs. Through the Covenant, TWU requires staff, student and faculty to engage in discriminatory conduct against the LGBTQ community as a formal condition of entry. As this Honourable Court held in *BCCT*, “the proper place to draw the line... is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them”.¹ The LSUC reasonably took into account the conduct-based discrimination inherent in the Covenant and the impact of this discrimination on the LGBTQ community when it refused to accredit TWU.

¹ *TWU v. BCCT*, 2001 SCC 31, [2001] 1 SCR 772 at para. 36 [*BCCT*].

5. Unlike the record before this Honourable Court in *BCCT*, the evidence in this case is clear.² The Covenant is a binding contract.³ It governs conduct both on and off campus. Admission is denied to those who cannot, or will not, sign.⁴ Of particular concern is the requirement that TWU members abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman”.⁵ The only “healthy” sexuality intimacy permitted by TWU is between a heterosexual married couple for the purpose of procreation.⁶ Like the Ontario Court of Appeal and Divisional Court,⁷ the LSUC reasonably concluded that an institution mandating (on pain of expulsion)⁸ that LGBTQ students either renounce their identity or “engage in an active deception”⁹ in order to attend school is one that discriminates against the LGBTQ community.

6. The LSUC was not obliged to condone TWU’s “hate the sin, love the sinner” approach. Although all TWU members must abstain from premarital sex, the special ban on queer sexual expression means that LGBTQ persons, married or otherwise, can never enjoy intimacy or be their authentic selves while attending TWU. This Honourable Court affirmed in *Whatcott* that “where the conduct that is the target of the speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as proxy for attacks on the group itself”.¹⁰ Regardless of whether or not TWU considers itself to be a welcoming place for LGBTQ persons, agreeing to abide by the terms of the Covenant is a price of entry to law school no LGBTQ

² Reasons of Associate Chief Justice Marrocco, Justices Then and Nordheimer, at paras. 60-68, Appeal Book of the Appellants [AB], Vol. III, Tab 4 at pp. 412-415 [Divisional Court Decision].

³ Community Covenant, Exhibit “C” to the affidavit of W. Robert Wood sworn August 22, 2014, AB, Vol. IV, Tab 10C at p. 535 [Covenant]; TWU Student Handbook, Exhibit “M” to the Wood Affidavit, AB, Vol. IV, Tab 10M, p. 593 [Handbook].

⁴ Covenant, AB, Vol. IV, Tab 10C at p. 535, 539; Handbook, AB, Vol. IV, Tab 10M, p. 592; Divisional Court Decision at para. 62, AB, Vol. III, Tab 4 at p. 413.

⁵ Covenant, AB, Vol. IV, Tab 10C at p. 537.

⁶ *Ibid* at p. 538.

⁷ Reasons of the Honourable Justices MacPherson, Cronk and Pardu at para. 119, AB, Vol. III, Tab 6 at pp. 478-9 [Court of Appeal Decision]; Divisional Court Decision at para. 105-114, AB, Vol. III, Tab 4 at p. 426-7.

⁸ Handbook, AB, Vol. IV, Tab 10M, p. 591.

⁹ Divisional Court Decision at para. 112, AB, Vol. III, Tab 4 at p. 426.

¹⁰ *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467 at para. 124 [*Whatcott*].

student should have to pay, nor a condition a regulator should have to endorse. No one should be forced to renounce their dignity and self-respect in order to obtain an education.

7. The prohibition on sexual expression is not the only discriminatory aspect of the Covenant. The Covenant goes much further. “Sexual misconduct” is a serious violation of the Covenant, akin to property damage, vandalism, aggressive behaviour and theft. Any student who breaches the Covenant’s strictures by engaging in “sexual misconduct” can be disciplined and punished with suspension or expulsion.¹¹ Further, TWU members must “hold each another [*sic*] accountable to the commitments each has made to the University”,¹² meaning there is a positive obligation on staff, students and faculty to act as guardians and enforcers of the Covenant. Indeed, TWU members *must* report infractions; the failure to do so is itself “inappropriate behaviour”.¹³ As the Divisional Court found, “TWU’s technically correct statement that it ‘does not ban or prohibit admission’ to LGBTQ students must be read and understood in this context”.¹⁴

8. The barriers imposed by the Covenant on the LGBTQ community are obvious. TWU concedes this Honourable Court’s conclusion in *BCCT* that a “homosexual student would not be tempted to apply for admission [to TWU], and could only sign the so-called student contract at considerable personal cost”.¹⁵ The Divisional Court found that unlike *BCCT*, there is evidence in this case of scarce law school positions, meaning that any barrier to entry will reduce the overall likelihood of gaining acceptance to law school.¹⁶ A barrier at the stage of entering law school represents a barrier to advancement in the profession and the opportunities that presents.¹⁷

¹¹ Handbook, AB, Vol. IV, Tab 10M, p. 596.

¹² *Ibid* at p. 593.

¹³ *Ibid*.

¹⁴ Divisional Court Decision at para. 112, AB, Vol. III, Tab 4, p. 426.

¹⁵ TWU Factum, para. 117; *TWU v. BCCT*, *supra* at para. 25.

¹⁶ Divisional Court Decision at paras. 66-7, AB, Vol. III, Tab 4, p. 414-15.

¹⁷ See, e.g. the comments of former Justice Mr. Ferrier at Convocation, who explained that as a Protestant he would not have been able to attend his Catholic law school if it had a similar Covenant as a precondition to admission, which would have denied him the opportunity to become “a lawyer, a Bencher, Treasurer of the Law Society of Upper Canada or a judge”: Convocation Transcript, April 24, 2015, AB, Vol. II, Tab 2, p. 383-4.

9. Notwithstanding the barriers to entry, LGBTQ persons do attend TWU, for reasons of faith, geography or simply because they only came to realize their true identity while already enrolled. TWU's own evidence from a gay alumnus demonstrates how LGBTQ persons at TWU will experience the stigma of not belonging and other destructive effects of regulating queer sexuality, including depression and suicidal ideation:

Compounded with the fear of social rejection has been the confusion that comes when you find your sexuality and your religious beliefs to be seemingly irreconcilable... This has been a serious cause of depression in my life because there seemed to be only two possible futures. In one, I would fall in love with another guy, but the very choice of embracing that would simultaneously be a choice to turn my back on God. In the other, I would be lonely and single for life. I felt trapped and hopeless... I'm not being melodramatic when I say that this is the type of thing that causes suicides.¹⁸

As the Ontario Court of Appeal concluded, "the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts".¹⁹ The LSUC reasonably considered the discriminatory conduct required by the Covenant and the impact that such conduct has on LGBTQ persons when it refused to accredit TWU's proposed law school.

B. The Sea Change in LGBTQ Equality Rights Since 2001

10. This Honourable Court's decision in *BCCT* was not determinative for the LSUC, given "different facts, a different statutory regime, and a fundamentally different question".²⁰ The question in *BCCT* was whether graduates of TWU's teaching program were likely to discriminate in public schools. The question now is whether the LSUC reasonably concluded it was not in the public interest to accredit a law school with discriminatory barriers to entry for LGBTQ persons.

11. Both the Divisional Court and the Ontario Court of Appeal found that this Honourable Court's views in *BCCT* on balancing freedom of religion and LGBTQ equality rights were relevant to the issues at hand.²¹ In *BCCT* this Honourable Court held that the scope of any right engaged by a decision must be clearly defined, since a proper delineation of the rights involved

¹⁸ Iain Cook, "Living the questions", 21 November 2007, Exhibit "A" to the Affidavit of Iain Cook, sworn August 19, 2014, AB, Vol. V, p. 769.

¹⁹ Court of Appeal Decision at para. 120, AB, Vol. III, Tab 6 at pp. 478-9.

²⁰ *Ibid* at para. 55-57.

²¹ *Ibid* at para. 59.

could avoid a conflict between them.²² At that time, the “unfavourable differential treatment” of LGBTQ persons at TWU did not constitute discrimination, given the institution’s Christian character and ostensibly private nature.²³ However, the LSUC appropriately relied on a modern definition of substantive equality for the LGBTQ community when it defined the scope of the rights engaged and balanced the rights of LGBTQ persons against those of TWU.

12. When this Honourable Court rendered its decision in *BCCT*, LGBTQ rights were embryonic. Sexual orientation had only just been recognized as a prohibited ground of discrimination in 1995.²⁴ While this was a watershed moment, it did not mean that centuries of discrimination were suddenly undone, or that LGBTQ persons experienced true equality in Canadian society. Indeed, transsexual, transgender and non-binary persons have only enjoyed explicit protection in the *Canadian Human Rights Act* since June 19, 2017.²⁵ Basic recognition of rights is crucially important, but it is only a first step. As Abella J noted in *Québec v. A.*, “[t]he fact that society appears to have attenuated overtly discriminatory attitudes it once held towards a group does not mean that there is no continuing discriminatory conduct, however benignly or unconsciously motivated”.²⁶ True change happens slowly. For the LGBTQ community, substantive equality is a work in progress.

13. Rights for LGBTQ persons have been characterized by an incremental but increasingly generous approach since 2001. Most obviously, same-sex couples won the legal right to marry in 2004.²⁷ Since then, several other court decisions have assisted in repairing subtle and overt forms of discrimination experienced by the LGBTQ community, including but not limited to:

- Right to include both same-sex parents on a newborn’s Statement of Live Birth [2006];²⁸
- Right for all parents of a child in LGBTQ families to be declared that child’s parents under the *Children’s Law Reform Act* [2007];²⁹

²² *BCCT*, *supra* at para. 29.

²³ *Ibid* at para. 34.

²⁴ *Egan v. Canada*, [1995] 2 SCR 513 at para. 5.

²⁵ Bill C-16, *An Act to amend the Canadian Human Rights Act and the Criminal Code* (assented to June 19, 2017) [“Bill C-16”].

²⁶ *Québec (Attorney General) v. A.*, 2013 SCC 5, [2013] 1 SCR 61 at para. 318, *per* Abella J (dissenting in the result, not on this point).

²⁷ *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698.

²⁸ *Rutherford et al v. Ontario (Deputy Registrar General)*, 2006 CanLII 19053 (ONSC).

- Religious organizations may not discriminate against LGBTQ employees when the employee’s sexual orientation is not a *bona fide* occupational requirement [2010];³⁰
- Public marriage commissioners cannot refuse to marry same-sex couples because of their religious beliefs [2011];³¹
- Transsexual persons may change the gender designation on their birth certificates without having had “transsexual surgery” [2012];³²
- Condemning same-sex sexual conduct is an attack on sexual orientation/identity [2013];³³
- Judicial recognition of the needs of gender non-conforming children [2017].³⁴

Many legislative amendments and policy reforms have also expanded LGBTQ rights since 2001:

- Criminal prohibitions on hate propaganda on the basis of sexual orientation [2003], gender expression and gender identity [2017];³⁵
- Parties who undergo assisted human reproduction should not be discriminated against on the basis of sexual orientation or marital status [2004];³⁶
- Provincial [2012] and federal [2017] prohibitions on discrimination on the basis of gender identity and gender expression;³⁷
- Conversion therapy, i.e. so-called “therapy” aimed at “converting” LGBTQ persons, is now banned for persons under 18 and deemed no longer an insurable service for adults [2015];³⁸
- The definition of “sexual harassment” in the *Occupational Health and Safety Act* has been updated to include a prohibition on harassment in the workplace on the basis of sexual orientation, gender identity and/or gender expression [2016];³⁹

²⁹ *A.A. v. B.B.*, 2007 ONCA 2 (CanLII).

³⁰ *Ontario Human Rights Commission v. Christian Horizons*, 2010 ONSC 2105 (CanLII).

³¹ *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011 SKCA 3 (CanLII).

³² *X.Y. v. Ontario (Government and Consumer Services)*, 2012 HRTO 726 (CanLII).

³³ *Whatcott*, *supra* at paras. 121-4.

³⁴ *Davies v. Murdoch*, 2017 ONSC 4763 at para. 190.

³⁵ Bill C-250, *An Act to amend the Criminal Code (hate propaganda)*; Bill C-16, *supra*.

³⁶ Bill C-6, *An Act respecting assisted human reproduction and related research*.

³⁷ Bill 33, *Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)*, 2012; Bill C-16, *supra*.

³⁸ Bill 77, *An Act to amend the Health Insurance Act and the Regulated Health Professions Act, 1991 regarding efforts to change sexual orientation or gender identity*.

³⁹ Bill 132, *Sexual Violence and Harassment Action Plan Act (Supporting Survivors and Challenging Sexual Violence and Harassment)*, 2016.

- Recognition for diverse family structures and provision of substantive equality for LGBTQ families under the *Children’s Law Reform Act* and *Vital Statistics Act* [2017];⁴⁰ and
- The ability to have an “X” gender designation on Ontario identification [2017]⁴¹ and Canadian passports [2017]⁴².

14. The LSUC correctly chose to embrace a modern definition of substantive equality. The judicial pronouncements and legislative and policy reforms that have occurred since 2001 implicitly acknowledge the homophobia and transphobia in basic areas of life that heterosexual and cisgender⁴³ persons take for granted, such as the ability to marry, have the correct gender designation on one’s identification, and be recognized as a parent. As a result, many members of the LGBTQ community (although by no means all) are able to enjoy something closer to full participation in society relative to their position in 2001.

15. The LSUC was not obliged to accept TWU’s assertion that it does not discriminate against LGBTQ persons because it is exempted from the application of the British Columbia *Human Rights Code* and arguably not subject to the *Charter*. Such an impoverished understanding of discrimination would do a disservice to the advancements made by the LGBTQ community. Rather, when defining the scope of the rights engaged, it was reasonable for the LSUC to find, as the Divisional Court did, that “discrimination is still discrimination, regardless of whether it is unlawful... [t]he Community Covenant, by its own terms, constitutes a prejudicial treatment of different categories of people”.⁴⁴

16. The LSUC’s recognition of the sea change in equality rights for LGBTQ persons since 2001 allowed the LSUC to appropriately fulfil its public interest statutory mandate and its

⁴⁰ Bill 28, *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment)*, 2016.

⁴¹ Government of Ontario, “New ‘X’ Gender Option Now Available on Ontario Driver’s Licences”, accessed on 1 September 2017 at < <https://news.ontario.ca/mto/en/2017/03/new-x-gender-option-now-available-on-ontario-drivers-licences.html>>.

⁴² Government of Canada, “Change your sex to ‘X’ (unspecified)”, accessed on 1 September 2017 at <<http://www.cic.gc.ca/english/passport/apply/new/change-sex.asp>>.

⁴³ “Cisgender” refers to persons whose gender designation aligns with the sex they were assigned with at birth, i.e. persons who do not identify as transsexual, transgender or gender non-binary.

⁴⁴ Divisional Court Decision at para. 108, AB, Vol. III, Tab 4 at p. 425.

obligations under the Ontario *Human Rights Code* (the “Code”) and the *Charter*. As an administrative decision-maker, the LSUC must consider and give effect to any relevant *Charter* and human rights values when making decisions, and proportionately balance the *Charter* values and rights at stake with its statutory mandate.⁴⁵ The LSUC had a human rights duty to avoid condoning or furthering discrimination carried out by TWU, which “would continue the life of the initial discriminatory act”.⁴⁶ Moreover, while TWU may not be subject to human rights legislation, the LSUC is, and s. 6 of the *Code* mandates that all persons have equal treatment with respect to membership in self-governing professions.⁴⁷ By ensuring it would not condone or further TWU’s discrimination against the LGBTQ community, the LSUC gave effect to *Charter* and human rights values within the context of its public interest mandate.

17. The LSUC reasonably concluded that is in the public interest to have a diverse body of lawyers and judges who can serve the needs of a diverse community. As the Court of Appeal noted, “one of the LSUC’s statutory objectives is to ensure the quality of those who practise law in Ontario. Quality is based on merit, and merit excludes discriminatory classifications”.⁴⁸ Indeed, the LSUC’s refusal to accredit TWU was a legitimate regulatory response to a more general problem of discrimination and barriers to equality LGBTQ persons experience in the legal profession, previously recognized in its earlier policy positions on equity and inclusion.⁴⁹ TWU’s treatment of vulnerable LGBTQ students is antithetical to the LSUC’s stated commitments to diversity and equal representation of marginalized groups within the legal profession. Consistent with its statutory mandate,⁵⁰ the LSUC’s decision recognizes that

⁴⁵ *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 at para. 35; *Loyola High School v. Québec (Attorney General)*, 2015 SCC 12, [2015] 1 SCR 613 at para. 47.

⁴⁶ *Payne v. Otsuka Pharmaceuticals*, 2002 CanLII 46516 (ON HRT) at p. 22.

⁴⁷ *Human Rights Code*, RSO 1990, c H.19 at s. 6; Divisional Court Decision at para. 110, AB, Vol. III, Tab 4 at pp. 425-6; Court of Appeal Decision at para. 115, AB, Vol. III, Tab 4 at pp. 476-7.

⁴⁸ Court of Appeal Decision at para. 109, AB, Vol. III, Tab 4 at p. 475.

⁴⁹ “Sexual Orientation and Gender Identity: Creating An Inclusive Work Environment, Exhibit “H” to the Affidavit of Josée Bouchard, sworn October 23, 2014, AB, Vol. VIII, Tab 23H, p. 1281 [Bouchard Affidavit].

⁵⁰ *Law Society Act*, RSO 1990, c L.8, s. 4.2.

diversity in law schools, the legal profession and the judiciary is an essential component of access to justice. It may even enhance judicial independence.⁵¹

18. Given its awareness of and on-going efforts to ameliorate the systemic barriers to the profession for equity-seeking groups, including the LGBTQ community,⁵² the LSUC was obligated to ensure that no further barriers for LGBTQ persons exist. *Charter* and human rights protections, which are remedial in nature, do not actively prevent discrimination from occurring. The LSUC's decision, on the other hand, is both remedial and prospective in nature. It has the effect of remedying past discrimination, given the underrepresentation of LGBTQ persons within the legal profession in Ontario.⁵³ It also prevents future discrimination from occurring by ensuring equal access to law schools, as the gateways to the profession, for LGBTQ persons.

19. Against the backdrop of the Covenant and the discriminatory impact it has on the LGBTQ community is the reality that no Evangelical Christian faces a discriminatory barrier to entry to any law school in Canada. Admission to all accredited law schools in Canada is merit-based; no one is forced to renounce their faith in order to attend law school. There is no risk of expulsion for the Evangelical student who wishes to openly practice their faith while studying law. The LSUC's decision neither prevents TWU from opening a law school nor precludes graduates of that law school from applying to the LSUC for individual accreditation. This is the full scope of the infringement, if any exists, of the rights of TWU. Consequently, it was reasonable for the LSUC to conclude it would not be in the public interest to accredit TWU's proposed law school when defining the scope of the rights in question, and balancing the rights of the LGBTQ community against those of TWU.

⁵¹ Sonia Lawrence, "Reflections: On Judicial Diversity and Judicial Independence", from *Judicial Independence in Context*, Adam M. Dodek and Lorne Sossin, eds. (Toronto: Irwin Law, 2010). Available online at: <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2043089>.

⁵² Bouchard Affidavit at paras. 8-26.

⁵³ Law Society of Upper Canada, "Statistical Snapshots of Lawyers in Ontario from the Lawyer Annual Report (LAR) 2015", p. 4. Accessed 1 September 2017 at <<http://www.annualreport.lsuc.on.ca/2016/common/documents/LAR-Snapshot-2015-EN-Final.pdf>>.

PARTS IV & V – SUBMISSIONS RE: COSTS AND ORAL ARGUMENT

20. Start Proud and the OUTlaws do not seek their costs and ask that no costs be awarded against them. Leave has already been granted to make oral argument for five minutes, pursuant to the Order of McLachlin CJ dated July 31, 2017.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 8TH DAY OF SEPTEMBER, 2017


MARLYS EDWARDH
PAUL JONATHAN SAGUIL
FRANCES MAHON

COUNSEL FOR THE INTERVENERS,
START PROUD and OUTLAWS

PART VI – LIST OF AUTHORITIES

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2. Davies v. Murdoch , 2017 ONSC 4763	13
3. Doré v. Barreau du Québec , 2012 SCC 12, [2012] 1 SCR 395	16
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5. Loyola High School v. Québec (Attorney General) , 2015 SCC 12, [2015] 1 SCR 613	16
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12. Saskatchewan (Human Rights Commission) v. Whatcott , 2013 SCC 11, [2013] 1 SCR 467	6, 13
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16. Government of Ontario , “New ‘X’ Gender Option Now Available on Ontario Driver’s Licences” (accessed on 1 September 2017)	13
17. Sonia Lawrence , “Reflections: On Judicial Diversity and Judicial Independence”, from <i>Judicial Independence in Context</i> , Adam M. Dodek and Lorne Sossin, eds. (Toronto: Irwin Law, 2010)	17
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21. Bill C-6 , <i>An Act respecting assisted human reproduction and related research</i>	13
22. Bill 33 , <i>Toby’s Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression)</i> , 2012	13

23.	Bill 77 , <i>An Act to amend the Health Insurance Act and the Regulated Health Professions Act, 1991 regarding efforts to change sexual orientation or gender identity</i>	13
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25.	Bill 28 , <i>All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016</i>	13
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27.	Law Society Act , RSO 1990, c L.8, s. 4.2	17