SCC No. 37318

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

BETWEEN:

LAW SOCIETY OF BRITISH COLUMBIA

Appellant

- and -

TRINITY WESTERN UNIVERSITY and BRAYDEN VOLKENANT

Respondents

- and -

LAWYERS' RIGHTS WATCH CANADA, NATIONAL COALITION OF CATHOLIC SCHOOL TRUSTEES, INTERNATIONAL COALITION OF PROFESSORS OF LAW, CHRISTIAN LEGAL FELLOWSHIP, CANADIAN BAR ASSOCIATION, THE ADVOCATES' SOCIETY, ASSOCIATION FOR REFORMED POLITICAL ACTION (ARPA) CANADA, CANADIAN COUNCIL OF CHRISTIAN CHARITIES, CANADIAN CONFERENCE OF CATHOLIC BISHOPS, CANADIAN ASSOCIATION OF UNIVERSITY TEACHERS, LAW STUDENTS' SOCIETY OF ONTARIO, SEVENTH-DAY ADVENTIST CHURCH IN CANADA, BC LGBTQ COALITION, EVANGELICAL FELLOWSHIP OF CANADA, CHRISTIAN HIGHER EDUCATION CANADA, BRITISH COLUMBIA HUMANIST ASSOCIATION, EGALE CANADA HUMAN RIGHTS TRUST, FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC ARCHDIOCESE OF VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM ALLIANCE, CANADIAN SECULAR ALLIANCE, WEST COAST WOMEN'S LEGAL EDUCATION AND ACTION FUND, WORLD SIKH ORGANIZATION OF CANADA

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PART I – OVERVIEW AND STATEMENT OF FACTS

1. The BC LGBTQ Coalition (composed of the LGBTQ students' societies of the three existing British Columbia Law Schools, and QMUNITY, BC's foremost LGBTQ services organization) advances the perspective of those persons most adversely affected by the creation and public sanction of a law faculty that excludes students on the basis of sexual orientation.

2. Admission to TWU's Law School is available exclusively to those who agree to be bound by the school's Community Covenant (the "Admission Policy"). The Community Covenant includes a requirement that one abstain from same-sex intimacy, whether married or not (the "Covenant"). Failure to agree to the Covenant bars admission. Breach of the Covenant can result in expulsion.

3. The question raised in these appeals is not whether a religious institution or person can do or believe whatever it or he or she wants, but whether the British Columbia Law Society, a public body regulating the legal profession, must accredit a proposed law school purportedly available to the public and purportedly offering a secular law degree, which seeks to marshal religious beliefs in a way that creates two classes of prospective law students in Canada: LGBTQ persons, who have access to only some schools because of their sexual orientation, and everyone else, who has access to every school.

4. As a public institution that governs the legal profession, the Law Society must both respect *Charter* values including non-discrimination, and live up to its statutory mandate and stated values of tolerance, diversity and accessibility in the legal profession. None of those values could be upheld were the Law Society to approve of a law school that expressly denounces persons on the basis of their sexual orientation, even if that denunciation were religiously motivated.

5. The BC LGBTQ Coalition submits that the BC Court of Appeal fell into error by incorrectly framing the discriminatory scope of TWU's Admission Policy as limited to

a failure to “recognize same-sex marriage” rather than an explicit ban on LGBTQ persons generally. By narrowly framing the issue in this case as a religious refusal to recognize same-sex marriage, the Court failed to apprehend the severity of harm to the LGBTQ community from approving the law school. This error skewed the Court’s assessment of what constitutes a reasonable balance between the religious and equality interests at stake. The Court improperly turned the case into one about competing discrimination, wrongly concluding that the LGBTQ community was now a majority group (having achieved legal recognition of their relationships) impairing the rights of the minority TWU community to pursue its own values (to exclude the LGBTQ community from the study of law).

6. In fact, the LGBTQ community remains an oppressed and marginalized group despite having achieved legal recognition of their relationships. At stake in this case is still the bare recognition of equality on the basis of sexual orientation. The right at stake for the TWU community, by contrast, is to exclude the LGBTQ community from the study of law. Far from being discriminated against, members of the TWU community are free to express their views, and to join religious clubs and churches on all university campuses. They have access to every law school position on offer in the country. Indeed, by banning a class of people who would otherwise apply, members of the TWU community have greater odds of attaining a position in a highly competitive market.

7. The BC LGBTQ Coalition adopts the facts as stated by the Law Society of BC.

PART II – POSITION ON QUESTION IN ISSUE

8. It is reasonable and proportionate for the Law Society to refuse to approve TWU’s proposed law school.

PART III – ARGUMENT

The Court of Appeal Improperly Narrowed the Issue to a Religious Right to Refuse to Recognize Same-Sex Marriage Rather than an Institutional Ban on LGBTQ Persons

9. When exercising discretion an administrative decision maker is required to take *Charter* rights and the values they reflect into proper account, and to balance the *Charter* guarantees with applicable statutory objectives.[1] This task requires a two-stage decision making process. First, the decision maker must delineate what rights are implicated by the decision.[2] Second, the decision maker must engage in a "proportionality exercise" by considering the statutory objectives and asking how the delineated *Charter* guarantees are best protected in view of these objectives. This requires the decision maker to balance the severity of the *Charter* interference with the fulfillment of statutory objectives.[3]

10. In this case, the BC Court of Appeal incorrectly narrowed the scope of the interference with the *Charter* rights of LGBTQ persons. The Court acknowledged that "LGBTQ persons are treated unequally" because the Covenant recognizes only heterosexual marriages and thus expressions of sexual intimacy between same-sex married couples "remain prohibited".[4] However, in the Court's view, the harm to the LGBTQ community was limited to TWU's denial of "the validity of same-sex marriage."[5] In concluding that the tension between the religious interests of TWU and the equality interests of sexual minorities is a function of the Covenant's failure to "recognize same-sex marriage", the BC Court of Appeal erred, and led the court to minimize the effect of the approval of the law faculty on LGBTQ persons.[6]

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[1] *Doré v Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12 [*Doré*] at paras 55-56.
[2] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 [*BC Teachers*] at para. 29.
[3] *Doré* at paras 55-56.
[4] *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423 [BCCA Decision] at para 170.
[5] BCCA Decision at para 176.
[6] BCCA Decision at para 1.

11. This case is not about marital status, and is not about a religious group choosing not to allow religious marriage ceremonies for same-sex couples, reserving those solemnizations for men and women (although this too violates the human rights of same-sex couples)[7]. Indeed, the Covenant makes no reference to same-sex marriage.

12. Instead, the Covenant bans persons from attending law school who engage in same-sex intimacy, whether or not they are married.[8] The Covenant requires students to promise not to engage in same-sex sexual intimacy and cites biblical scripture condemning it.[9] The Covenant is clear in its intent to prohibit "homosexual behavior" by TWU community members. Its ban existed long before the Courts, and ultimately the government of Canada, recognized the constitutional right to same-sex marriage.

13. Contrary to the BC Court of Appeal's overly-narrow analysis, the issue is whether it is reasonable for the Law Society to decline to accredit a law school that bans LGBTQ persons on the basis that their sexual orientation is a moral failing deserving divine condemnation – that it is "vile", "against nature," and "unseemly".[10] As discussed below, by mischaracterizing the issue, the Court diminished the severity of the harm to the LGBTQ community.

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[7] *Marriage Commissioners Appointed Under the Marriage Act (Re)*, 2011 SKCA 3.
[8] TWU members are required to promise to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman": Appellant's Record, Vol 3, Part 3, Tab 15(C) at 403.
[9] Appellant's Record, Vol 3, Part 3, Tab 15(C) at 403.
[10] Appellant's Record, Vol 3, Part 3, Tab 15(C) at 403, citing Romans I: 26-27, which states: For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet.

Narrowing the Issue to a Religious Right to Refuse to Recognize Same-Sex Marriage Incorrectly Diminished the Harm to LGBTQ Equality Rights

14. The decision by the Law Society not to accredit the proposed Law School was driven by TWU's mandatory Covenant's prohibition of same-sex intimacy – and thus LGBTQ persons themselves – a prohibition which discriminates on the basis of sexual orientation.[11] This was a proper consideration, and given due weight by the Law Society in its refusal to approve the proposed Law School. As stated above, the Court of Appeal wrongly characterized this issue as a refusal on the part of the Law Society "to approve TWU's proposed law school because TWU's Community Covenant does not recognize same-sex marriage."[12]

15. Unlike the concept of same sex marriage (which some sexual minorities embrace, and some reject), same-sex intimacy is inextricably connected to LGBTQ identity.[13] As this Court found in Whatcott, one cannot "condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood". Thus, the impact on the dignity of sexual minorities flowing from accreditation of an institution with a ban on same-sex intimacy is profoundly different than the impact of accrediting a university with a policy that fails to "recognize same-sex marriage".

16. Bans on same-sex intimacy,[14] regardless of whether they are religiously motivated, represent a broad and fundamental denunciation of LGBTQ individuals and communities. They are direct and profound and must not be conflated with the more conceptual rejection reflected in a religious refusal to recognize the validity of same-sex marriage. A law school's refusal to recognize same-sex marriage (while both

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[11] *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518 at paras 115-119.
[12] BCCA Decision at para 1.
[13] To reject gay sex is to reject gay people: *Saskatchewan (Human Rights Commission) v Whatcott*, [2013] 1 SCR 467, 2013 SCC 11 [*Whatcott*] at paras 121-124.
[14] Appellant's Record, Vol 3, Part 3, Tab 15(C) at 403.

significant and wrong) constitutes a narrower impact on the equality interests of sexual minorities.

17. TWU excludes sexual minorities from a law school on the basis of highly stigmatizing and prejudicial attitudes. This exacerbates the prejudice perpetuated by the act of exclusion, and is a proper aspect of the decision for a public body such as the Law Society to consider. Religious motivations for exclusion do not reduce these harms. The harm is profound whether inspired by religion, politics, or plain bigotry. In *R v Kapp,* the Supreme Court of Canada identified human dignity as "an essential value underlying the s. 15 equality guarantee".[15] Human dignity is crucial because it provides an individual or group with self-respect and self worth. It is lost 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."[16]

18. For the few sexual minority students who decide to apply to TWU notwithstanding its discriminatory policy, duplicity or self-loathing is the price of admission. These students will have to hide their sexual orientation to obtain (and maintain) a place at the law school.[17] They will also have to study and learn in an environment in which everyone has agreed to condemn central aspects of their identity and where their fellow students are required by TWU's policy to police their sex lives, creating a climate of shame and fear for sexual minorities. These students will have to hide their sexual orientation to obtain (and maintain) a place at the law school, or risk being marginalized, or forced to reveal their sexual orientation. As this Court recognized in *Vriend,* fear of discrimination and the concealment of identity that

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[15] [2008] 2 SCR 483, 2008 SCC 41 at para 21.
[16] *Law v Canada (Minister of Employment and Immigration)*, [1999] 1 SCR 497 at para 53, [1999] SCJ No 12.
[17] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, at para 25 and in dissent (though not on this point) at para 73.

results from this fear can create serious psychological harm, which is precisely what a guarantee of substantive equality is intended to prohibit.[18]

Framing the Issue as a Religious Right to Not Recognize Same-Sex Marriage Skewed the Court's Balancing Assessment

19. Framing the issue as a religious right not to recognize the validity of same-sex marriage rather than a religious right to exclude LGBTQ persons skewed the Court's conclusion about the reasonableness of the balance struck by the Law Society's refusal to accredit TWU's law degree.

20. As a consequence of its mischaracterization of the Covenant, the Court failed, almost entirely, to recognize the broad equality interest at stake in this proceeding or to give it the weight it deserves in balancing the rights in issue with the statutory objectives at play. This occurred in two ways.

21. First, by focusing in on the issue of marriage, the Court failed to apprehend the societal impact of a public body accrediting an institution with a policy that prohibits same-sex intimacy at large. The hate and vilification of LGBTQ individuals articulated by a policy that prohibits same sex intimacy – which the history and contemporary context of this Covenant reveal to be its purpose – is of a substantially higher degree than a policy that denies "the validity of same-sex marriage".[19] Individuals and religious institutions are entitled to hold and express objections to same-sex intimacy. However, the Law Society, a public body mandated to preserve and protect the rights and freedoms of all persons,[20] should not approve of a law school that mandates exclusion of a group on the basis of such beliefs.

22. Reducing the discrimination caused by TWU's admission policy to simply the rejection of same-sex marriages provides some explanation for why the Court of Appeal wrongly viewed the harm to sexual minorities posed by the accreditation of

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[18] *Vriend v Alberta*, [1998] 1 SCR 493, [1998] SCJ No 29 at para 102.
[19] BCCA Decision at para 170.
[20] *Legal Profession Act*, SBC 1998, c 9, s. 3(a).

TWU's law degree as mere "hurt feelings".[21] The Court of Appeal failed to account for the severe affront to the dignity and personhood interests of sexual minorities that would be caused by the approval of the Law School. From the perspective of a LGBTQ Canadian, the Law Society approval of a school that bans LGBTQ persons (rather than objects to same-sex marriage for religious reasons) would send the discriminatory message that sexual minorities are not deserving of equal respect and can be effectively excluded from opportunities for legal education on the basis of their sexual orientation.

23. Accrediting a law school that mandates the exclusion of sexual minorities not only affirms an unconstitutional definition of marriage but also condones institutionalized humiliation of sexual minorities and would debase the fundamental principle that all persons are born with freedom and equality in dignity and rights. The experience of being the subject of publicly sanctioned stigma and exclusion should not be deemed, derogatorily, "hurt feelings". Nor should the courts diminish the impact of the potential creation of the law school on the basis that LGBTQ students may not want to apply there anyway, or that there are not that many law school positions in issue.[22] This fails to apprehend the impact of institutionalized exclusion on LGBTQ members of the society at large.

24. Second, by framing the issue as a failure on the part of TWU to recognize same-sex marriage, the Court considered the dignity and personhood interests at stake in this case to be less impacted because of the general Canadian public's support for the legal recognition of same-sex marriage.[23] The impact of this analytical slippage by the Court on its decision is profound. The Court, without justification, shifted sexual minorities from membership in a highly persecuted and historically oppressed

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[21] Note the Nova Scotia Supreme Court made the same error: see *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at paras 8, 12, 14-16, 238-240.
[22] BCCA decision at para 176
[23] BCCA Decision at para 178.

community in Canadian society to inclusion in a Canadian majority, accused by the Court of having subverted the minority rights of TWU.[24]

25. The notion that the TWU community is the victim of too much equality and dignity for LGBTQ persons is preposterous and dangerous. It turns history on its head and undermines the meaning of discrimination. The Court's incorrect conflation of the constitutional recognition of same-sex marriage with the social inclusion and acceptance of sexual minorities masks the reality that sexual minorities have faced historical social, political and economic disadvantage, and face such disadvantage to this day.[25] This fact is confirmed in the evidence filed by the Petitioner, which includes expert evidence from the five social scientists.[26]

26. Further, despite denouncing the concept of "separate but equal", the BC Court of Appeal went on to conclude that separate but equal treatment was sufficient for LGBTQ interests, because LGBTQ candidates have other non-discriminating law schools available to them. This was compounded by the court's view that TWU represents a minority group, while the LGBTQ community forms part of the majority. The Court stated as follows:

> It has been suggested in argument that TWU is, in effect, a segregated community, and that the accreditation of its law program would amount to the endorsement of a "separate but equal" doctrine. We are not persuaded that that is a fair characterization. The long discredited "separate but equal" doctrine was offensive because it forced segregation on an oppressed minority. In the context of this case, the members of the TWU community constitute a minority. A clear majority of Canadians support the marriage rights of the LGBTQ community, and those rights enjoy constitutional protection. The majority must not, however, be allowed to subvert the rights of the minority TWU community to pursue its own values. Members of that community are entitled to establish a space in which to exercise their religious freedom.[27]

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[24] BCCA Decision at para 178.
[25] *Egan v. Canada*, [1995] 2 S.C.R. 513 [*Egan*] at 600-601; *Vriend v. Alberta*, [1998] 1 S.C.R. 493 [*Vriend*] at 543-544; *M. v. H.*, [1999] 2 S.C.R. 3 at para. 69; *R v Find*, 2001 SCC 32, para 48.
[26] Appellant's Record, Vol 4, Part 3, Tab 18(c); Appellant's Record, Vol 5, Part 3, Tab 18(h); Appellant's Record, Vol 5, Part 3, Tab 18(f); Appellant's Record, Vol 5, Part 3, Tab 18(d); Appellant's Record, Vol 5, Part 3, Tab 18(e).
[27] BCCA Decision at para 178.

27. These errors arose from the court having minimized, throughout and without justification, the scope of the discrimination faced by LGBTQ persons, the harm it would effect, and the weight these matters should be given in the proportionality exercise. Failing to properly do so gave undue credence to a long-rejected view that "separate but equal" can stand in today's Canada, where equality rights are substantively protected, not just formally.[28]

28. Framing the issue as a religious right not to recognize the validity of same-sex marriage rather than a religious right to prohibit homosexual behavior (and therefore exclude LGBTQ persons) skewed the Court's conclusion about the reasonableness of the balance struck by the Law Society's refusal to accredit TWU's law degree. The Court's failure to recognize the Covenant's actual purpose and effect undermines the Court's assessment of what constitutes a reasonable balance between the freedom of religion and equality interests at stake in the Law Society's decision on whether to accredit.

PARTS IV & V – SUBMISSIONS CONCERNING COSTS & ORDER SOUGHT

29. The BC LGBTQ Coalition seeks no costs and asks that no costs be awarded against it.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED: September 11, 2017

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[28] *Kahkewistahaw First Nation v Taypotat*, [2015] 2 SCR 548, 2015 SCC 30 at paras 16-19.

PART VI – AUTHORITIES

Case Law	Paragraph
Doré v Barreau du Québec, [2012] 1 SCR 395, 2012 SCC 12	7
Egan v. Canada, [1995] 2 SCR 513	23
Kahkewistahaw First Nation v Taypotat, [2015] 2 SCR 548, 2015 SCC 30	25
Law v Canada (Minister of Employment and Immigration), [1999] 1 SCR 497, [1999] SCJ No 12	15
M. v. H., [1999] 2 SCR 3	23
Marriage Commissioners Appointed Under the Marriage Act (Re), 2011 SKCA 3	9
R v Find, 2001 SCC 32	23
R v Kapp [2008] 2 SCR 483, 2008 SCC 41	15
Saskatchewan (Human Rights Commission) v Whatcott, [2013] 1 SCR 467, 2013 SCC 11	13
Trinity Western University v British Columbia College of Teachers, [2001] 1 SCR 772, 2001 SCC 31	7
Trinity Western University v Nova Scotia Barristers' Society, 2015 NSSC 25	20
Trinity Western University v The Law Society of British Columbia, 2016 BCCA 423	8
Trinity Western University v The Law Society of Upper Canada, 2016 ONCA 518	12
Vriend v Alberta, [1998] 1 SCR 493, [1998] SCJ No 29	16
Statutory Provisions	**Paragraph**
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