

**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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FAITH, FEALTY & CREED SOCIETY, ROMAN CATHOLIC ARCHDIOCESE OF
VANCOUVER, CATHOLIC CIVIL RIGHTS LEAGUE, FAITH AND FREEDOM
ALLIANCE, WORLD SIKH ORGANIZATION OF CANADA and
START PROUD and OUTLAWS**

Interveners

[Style of Cause Continued on Page 2]

**FACTUM OF THE INTERVENER,
EGALÉ HUMAN RIGHTS TRUST**

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

**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 -

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PART I – FACTS

1. Egale accepts and adopts the facts as stated by the Law Society of Upper Canada and the British Columbia Law Society (together the “law societies”).

PART II – POSITION ON THE ISSUES

2. The fundamental question engaged in these appeals is how to strike a proportionate balance between religious freedom and equality rights in the context of access to legal education. This balance can only be achieved if all of the rights and interests at stake are recognized and taken into account in their full variety and complexity. Egale intervenes in these appeals to draw the Court’s attention to particular rights and interests that were largely discounted or ignored by the courts below, but that are nevertheless essential to include in the proportionality analysis. More specifically, Egale advances the following two propositions:

- a. Regardless of how many or few LGBTQ students would generally have an interest in applying to law school at Trinity Western University (TWU), there *are* LGBTQ students who would seek to attend TWU’s law school for a variety of reasons. LGBTQ students who attend TWU face direct, severe and specific harms as a result of the Community Covenant (the “Covenant”) that TWU requires them to sign as a condition of admission, and to adhere to (and police other students’ adherence to) as a condition of continued enrollment and full participation in academic and community life. A meaningful and robust proportionality analysis must give due regard and appropriate weight to the interests of those students and the harms they face.
- b. The Covenant discriminates not only on the basis of sexual orientation but also on the basis of gender identity and expression. The range of discriminatory impacts on and the equality rights of all members of the LGBTQ community, including trans and non-binary persons, must be considered in determining whether the law societies’ decisions on accreditation proportionately balanced the rights at issue.

PART III – STATEMENT OF ARGUMENT

A. The Interests of and Discriminatory Impacts on LGBTQ Students who Attend TWU

3. The courts below treated LGBTQ rights, individuals and communities, and religious rights, individuals and communities as solely and essentially oppositional. The British Columbia Court of Appeal (BCCA) described its task as the reconciliation of competing rights, with the “rights, freedoms and aspirations of [LGBTQ] persons and their place in a progressive and tolerant society” on one side, and “the religious freedom and rights of association of evangelical

Christians who sincerely hold the beliefs described in the Covenant and nurtured by TWU” on the other.¹ For its part, the Ontario Court of Appeal (OCA) characterized the issue before it as a “clash between religious freedom and equality”.²

4. In adopting this approach, both courts disregarded the experiences and interests of LGBTQ students who will apply to and attend TWU, failed to acknowledge the specific discriminatory impacts they face, and discounted their rights in the proportionality analysis.

i. The Courts Below Erred In Assuming LGBTQ Students Would Not Apply To TWU

5. In evaluating the discriminatory effects of the Covenant and the reasonableness of the law societies’ decisions on accreditation, the courts below proceeded on what Egale submits is the erroneous assumption that there are no LGBTQ students who share TWU’s religious convictions and would seek to attend its proposed law school in order to pursue a religious legal education.

6. In the process of assessing “the detrimental impact of the [accreditation] decision concretely and in context”, the BCCA found that “in reality, very few LGBTQ students would wish to apply to study” law as “part of an evangelical Christian community that does not accept same-sex marriage and other expressions of LGBTQ sexuality”.³ In support of that finding the BCCA cited the Supreme Court’s observation in *Trinity Western University v British Columbia College of Teachers (TWU v BCCT)* that LGBTQ students “would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. *TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions*”.⁴ Observing that “[f]or those who do not share TWU’s beliefs, there are many other options”,⁵ the BCCA ultimately concluded that the detrimental impact of accreditation on LGBTQ equality rights would be “insignificant in real terms” because LGBTQ

¹ *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 [“*TWU v LSBC*”] at para 2.

² *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 [“*TWU v LSUC*”] at para 4.

³ *TWU v LSBC*, supra at para 176.

⁴ *Ibid*, citing *Trinity Western University v British Columbia College of Teachers*, 2001 SCC 31 at para 25. [Emphasis added.]

⁵ *Ibid* at para 178. [Emphasis added.]

students could – and would – simply choose to apply for one of the other approximately 2,500 places in common law schools in Canada.⁶

7. Although the OCA reached a different conclusion with respect to the impact of accreditation on LGBTQ equality rights, it similarly appears to have premised its analysis on the understanding that LGBTQ students would not attend TWU, mainly on the basis that LGBTQ students would not hold evangelical Christian beliefs or seek access to a religious legal education. The OCA agreed with and adopted the Supreme Court’s statement in *TWU v BCCT* reproduced above, and also the Divisional Court’s statement that

...in order for persons, *who do not hold the beliefs that TWU espouses*, to attend TWU, they must openly, and contractually, renounce those beliefs or, at the very least, agree not to practise them. The only other apparent option for prospective students, *who do not share TWU’s religious beliefs*, but who still desire to obtain one of its coveted law school spots, is to engage in an active deception, in terms of their true beliefs and their true identity, with dire consequences if their deception is discovered. TWU’s technically correct statement that it “does not ban or prohibit admission” to LGBTQ students must be read and understood in this context.

...

This is the reality with which the [Law Society of Upper Canada] was faced. It was essentially asked to approve and accept students from an institution that engaged in discrimination against persons *who did not share the religious beliefs that were held by TWU*, and the student body that it prefers to have at its institution.⁷

8. Having adopted these statements, the OCA concluded that the sexual intimacy provision of the Covenant “is deeply discriminatory to the LGBTQ community, and it hurts”.⁸ While Egale fully endorses the OCA’s conclusion, it submits that it does not go far enough in recognizing the discriminatory effects of the Covenant. In particular, it fails to recognize and weigh the specific harms caused to LGBTQ students and prospective students who join TWU, including those who share TWU’s beliefs and who wish to become – and to remain – a part of its community.

⁶ *Ibid* at para 179. Indeed, it went further, holding that – as the Federation of Law Societies of Canada had concluded – the increase in the number of seats overall was likely to result in an enhancement of opportunities for all students (*Ibid.*).

⁷ *TWU v LSUC*, supra at para 117, citing *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at paras 112, 114. [Emphasis added.]

⁸ *Ibid* at para 119.

ii. *The Discriminatory Impacts on LGBTQ Students Who Attend TWU*

9. There is no dispute that LGBTQ students can and do attend TWU, and there is no reason to think that the same would not be true of TWU's proposed law school. Some of those students might well be motivated, at least in part and especially in light of the increasing cost of law school generally, by practical considerations such as proximity to home or family financial support; in other words, by the desire to obtain a legal education. There will also, however, undoubtedly be others who – like their straight and cisgender counterparts – are motivated by the desire to obtain a specifically *Christian* legal education.

10. That LGBTQ students may also be Christian and seek access to a Christian education is not an abstract or hypothetical possibility. Rather, it is firmly grounded in TWU's own evidence and reflected in its submissions.⁹

11. One affiant and alumnus of TWU who does not label his sexuality but indicates that he has been strongly attracted to other men for most of his life, states that the fact that TWU was a Christian school was a big draw as his Christian faith is an essential part of his and his family's life.¹⁰ He describes disclosing his same-sex attraction to trusted friends and faculty members, and states that the ability to discuss these attractions "in an environment that understood and respected my religious convictions was very therapeutic and healthy for me".¹¹

12. Another affiant and alumnus describes himself as a Christian and also gay, and states that both aspects of his identity are very important to him.¹² He also applied to TWU in part because it was a Christian community.¹³ He states that four years of university "seemed like a long period of time within which I would grow into the mature, straight man I hoped to be. I knew I wasn't 'straight' at that moment, but I never thought I was gay."¹⁴ Instead, while a student at TWU he

⁹ See Factum of the Appellant, Trinity Western University, SCC Court File No. 37209, at para 70 ("LGBTQ evangelicals find that TWU is a unique environment in which they can find self-acceptance and reconcile their sexuality and faith.")

¹⁰ Affidavit of Iain Cook, sworn August 19, 2014, at para 3.

¹¹ *Ibid* at para 26.

¹² Affidavit of Arend Strikwerda, Sworn August 20, 2014, at para 3, Appellants' Record, SCC Court File No. 37209, Part III, Vol IV, Tab 13.

¹³ *Ibid* at para 6.

¹⁴ *Ibid* at para 11.

began to realize that being gay was not something he was going to grow out of. Seeing many of his friends entering long-term heterosexual relationships and getting married forced him to confront the fact that his reality was not changing as he had hoped. He began to realize and accept that being gay was who he was.¹⁵

13. It is entirely reasonable to expect that LGBTQ Christian students would apply to TWU's proposed law school just as they have to TWU's other programs. Some of those students may apply not yet having realized or acknowledged their gender identity or sexual orientation. Others may apply in the devout hope that studying in an evangelical Christian community will assist them in re-orienting themselves and their desires. Still others may be actively seeking to reconcile their identities as both LGBTQ persons and persons of faith. An LGBTQ student may thus apply to TWU's proposed law school unaware of the implications the Covenant will have for him, hopeful that its strictures will assist her in avoiding temptation, or believing that they will be able to adhere to it while also striving for transformation and renewal within their faith community.

14. Awareness and experience of one's sexuality and gender identity can evolve over time, however, and the effects of the Covenant become apparent or fully felt only after a student is enrolled at TWU. The TWU law student who finds himself falling in love with his same sex best friend; or who comes to view her sexual orientation not as a sickness or a sin but as an integral and God-given aspect of her being; or who discovers that their faith community is more resistant than anticipated to recognizing and affirming all genders, faces a stark and, for many, untenable choice: forego intimate relationships and the full realization and expression of one's humanity, or risk being suspended or even expelled from one's academic – and faith – community.

15. More generally, LGBTQ students at TWU who engage in prohibited "sexual intimacy" – the precise meaning and contours of which are undefined – are burdened with a range of both practical and personal costs. They may find themselves suddenly having to transfer to another law school, and losing a semester and the associated tuition if they are unable to do so immediately. Even if they are permitted to continue at TWU, they may still be stripped of

¹⁵ *Ibid* at paras 13-14.

financial aid and the opportunity to work on campus.¹⁶ They may also be barred from engaging in athletics, student government, and other extracurricular activities, and excluded, at least temporarily, from classes and events¹⁷ – in effect, denied full membership and participation in TWU’s community. Thus, as a result of expressing a core and constitutionally protected aspect of their identities, LGBTQ students face the impairment and disruption not only of their education but also of their networks of meaning, belonging and support. LGBTQ students who are not subject to disciplinary measures but who come to realize that they cannot comply with the Covenant and pre-emptively decide to continue their studies elsewhere must bear these same costs.¹⁸

16. While the courts below recognized that many LGBTQ students could only attend TWU at great personal cost, they failed to consider that some LGBTQ students – those who share TWU’s beliefs and desire to take part in its faith-based legal education – could only be *excluded* from attending at similarly great personal cost. The Covenant’s direct and potentially devastating effects on those LGBTQ students must be fully appreciated and taken into account in the balancing exercise.

iii. The Specific Harms to LGBTG Christian Students Must Be Given Due Weight in the Proportionality Analysis

17. To conclude, as the BCCA does, that LGBTQ students can and will simply go elsewhere ignores the lived reality and interests of LGBTQ Christian students who desire and seek to access a religious legal education. Even the OCA, which goes much further in recognizing the hurt the Covenant causes LGBTQ students and the community more broadly, fails explicitly to recognize its effects on those LGBTQ students who *do* espouse and strive to live in accordance with an evangelical Christian faith, and who merely – like many individuals in all faith communities – grapple with, object to, or seek to reform a single one of its many aspects.

¹⁶ “TWU Student Handbook, 2016-2017” at p 46.

¹⁷ *Ibid.*

¹⁸ These costs are similar to those historically borne by students who enrolled in schools that prohibited interracial dating and marriage, and who faced expulsion if they entered into relationships that violated school policy. See *Bob Jones University v United States*, 461 US 574.

18. Indeed, this approach arguably compounds the harm to those students. The courts' erasure of LGBTQ Christian students reinforces the message that one cannot be both LGBTQ and a faithful Christian, that one must choose between the two (at great personal cost either way), that it is impossible to live a life of wholeness and integrity in which both core aspects of one's identity are embraced and fully manifested. This is a message with which LGBTQ Christians are frequently confronted, and one that has repeatedly been shown to have profoundly deleterious effects, especially on youth and young adults.¹⁹

19. TWU's record bears this out. As one of its affiants wrote in an article published in TWU's student newspaper:

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.²⁰

20. The erasure of LGBTQ Christian students also seriously distorts the proportionality analysis. In its submissions, the British Columbia Law Society argues that the BCCA's quantitative approach misunderstands the guarantee of substantive equality. Egale agrees, but further submits that the flaws embedded in that approach are cast into particularly sharp relief when the rights and interests of LGBTQ Christian students who wish to pursue a religious legal education are recognized and accorded appropriate weight. It is no answer to say to those students that there are 2,500 other law school places available to them; what is fundamentally at issue is their access to the 60 places at TWU's proposed law school on the same terms as and on an equal footing with straight and cisgender students.

¹⁹ See *eg* Angie L. Dahl & Renee V. Galliher, "LGBQQ Young Adult Experiences of Religious and Sexual Identity Integration" (2009) 3 *Journal of LGBT Issues in Counselling* 92; Jeremy J. Gibbs & Jeremy Goldbach, "Religious Conflict, Sexual Identity, and Suicidal Behaviours Among LGBT Young Adults" (2015) 19 *Archives of Suicide Research* 472; Jodi O'Brien, "Wrestling the Angel of Contradiction: Queer Christian Identities" (2004) 6 *Culture and Religion* 179; Geoffrey L. Ream & Ritch C. Savin-Williams, "Reconciling Christianity and Positive Non-Heterosexual Identity in Adolescence, with Implications for Psychological Well-Being" (2005) 2(3) *Journal of Gay & Lesbian Issues in Education* 19.

²⁰ Exhibit "A" to the affidavit of Iain Cook, sworn August 19, 2014.

21. A robust, nuanced, and contextual proportionality analysis requires more than simply balancing the religious freedom rights of Christian students to a religious legal education against the equality rights of LGBTQ students to non-discriminatory access to law school and the legal profession. It also requires paying thoughtful attention and according appropriate weight to the specific interests and experiences of LGBTQ Christian students, whose rights to both religious freedom *and* equality are engaged.

22. This is of course not to suggest that LGBTQ Christian students, or Christian students more generally, have a free-standing right to a religious legal education. Had TWU not proposed to open a Christian law school, neither an LGBTQ Christian student nor indeed Mr. Volkenant would be entitled to claim that it or any other educational institution was required to do so; no one's rights are infringed by the simple absence or unavailability of religious legal education. When religious legal education is proposed to be made available, however, it is not only appropriate but vital to consider the concrete impact of discriminatory barriers on precisely those persons who wish to access that particular form of legal education but are prevented from doing so.

23. The effect of TWU's discrimination against LGBTQ students in the provision of religious legal education cannot be dismissed or discounted in the proportionality analysis on the pretext that LGBTQ Christians do not exist, would not seek to attend TWU's law school, and would not experience profound and particular harms as a result of being denied admission, suspended, or expelled on the basis of their sexual orientation and/or gender identity and expression.

B. The Covenant Discriminates on the Basis of Gender Identity and Expression as well as Sexual Orientation

24. Although both the BCCA and OCA referred throughout their respective judgments to "LGBTQ" – that is, lesbian, gay, bisexual, trans, and queer – persons and communities, they failed to acknowledge the Covenant's specific implications for trans and non-binary students.²¹ Instead, in identifying the discriminatory effects of the Covenant, both courts focused exclusively on the issue of sexual orientation. Observing that the Covenant "recognizes the

²¹ Egale uses the terms trans and non-binary as together inclusive of all gender identities other than cisgender, including but not limited to agender, genderfluid, genderqueer and two spirit. In referring to trans and non-binary gender identities separately, Egale does not mean to suggest that the two are mutually exclusive. Egale recognizes that trans individuals may also identify as non-binary.

marriage of heterosexual couples only; expressions of sexual intimacy between same-sex married couples remain prohibited”, the BCCA held that it is “in this respect that LGBTQ persons are treated unequally”.²² It went on to consider the impact of the British Columbia Law Society’s accreditation decision on the “equality rights of LGBTQ individuals” under the heading “impact of the decision on sexual orientation equality rights”.²³ Similarly, the OCA concluded that “TWU’s admission policy, viewed in conjunction with the Community Covenant, discriminates against the LGBTQ community on the basis of sexual orientation”.²⁴ No mention was made by either court of discrimination against trans persons, either on the basis of gender identity and expression or on the basis of sex.²⁵

25. While there can be no doubt that the Covenant prohibits expressions of sexual intimacy between same-sex married couples, in fact it goes much further, prohibiting expressions of sexual intimacy in any marriage other than one between “a man and a woman”. This effectively forecloses the possibility of even married sexual intimacy for any student who does not identify with or fit within one of those two categories as they are understood by TWU. It is highly doubtful, in light of the beliefs that TWU espouses,²⁶ that it would recognize trans students’ gender identities – for example, the female gender identity of a person assigned male at birth who transitions to female, or the gender identity of a non-binary person who identifies as neither

²² *TWU v LSBC*, *supra* at para 15.

²³ *Ibid* at para 170.

²⁴ *TWU v LSUC*, *supra* at para 115.

²⁵ Although protection from discrimination on the specific grounds of gender identity and expression has only recently been included in human rights legislation, courts and tribunals have long recognized that discrimination against trans persons is prohibited under the ground of sex. See *eg Vanderputten v Seydaco Packing Corp.*, 2012 HRTO 1977 at para 58:

The [Ontario *Human Rights*] Code ... has since been amended to add the grounds of gender identity and gender expression. Prior to those amendments, however, it was well established that discrimination because a person is transgendered falls under the ground of “sex”: *Forrester v. Peel Regional Police Services Board*, 2006 HRTO 13 at paras 404-15; *Hogan v. Ontario (Health and Long-Term Care)*, 2006 HRTO 32 at paras 121-28; *Finan v. Cosmetic Surgicentre (Toronto)*, 2008 HRTO 47 at para 38; *MacDonald v. Downtown Health Club for Women*, 2009 HRTO 1043 at para. 31.

See also *Kavanagh v Canada (AG)*, [2001] CHR D No 21, 2001 CanLII 8496 (CHRT); *Nixon v Vancouver Rape Relief Society*, 2002 BCHRT 1, 2003 BCSC 1936, 2005 BCCA 601; *Sheridan v Sanctuary Investments Ltd.*, [1999] BCHRTD No 4, 33 CHRR D/467.

²⁶ TWU “affirms with conviction the full truth and authority of the Bible” (“TWU Core Values Statement Series No. 1” (January 5, 1999)), which includes the Genesis account of the creation of humanity in God’s image and likeness as “male and female”. Further, the Covenant directs that married sexual intimacy between “a man and a woman” is for the purpose of procreation as well as marital intimacy. TWU’s avowed beliefs in relation to gender implicitly exclude trans and non-binary gender identities.

female nor male. Discrimination on the basis of gender identity and expression can also intersect with discrimination on the basis of sexual orientation in various ways. For example, a student who arrives at TWU in an apparently heterosexual marriage but subsequently comes out as trans either has to deny their gender identity or risk being found to have breached the Covenant if they continue to engage in married sexual intimacy with their spouse.

26. That these concerns may be speculative (insofar as there is no evidence on the record in these cases of any trans or non-binary student having been denied admission, disciplined, suspended, or expelled on the basis of gender identity and expression) is irrelevant. There is similarly no evidence on the record of any lesbian, gay, bisexual or queer student having been denied admission, disciplined, suspended, or expelled on the basis of sexual orientation – yet neither the law societies nor the courts reviewing their decisions have hesitated to conclude that the Covenant discriminates on that ground. Discrimination on the basis of gender identity and expression is equally apparent and should similarly be included in the proportionality analysis.

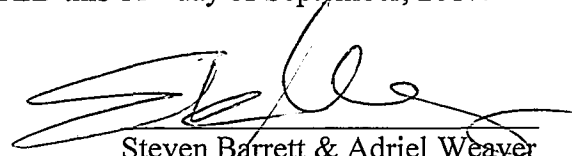
C. Conclusion

27. All vectors of discrimination and the various intersections of identities, interests and rights at stake must be taken into account in assessing the reasonableness of the law societies' decisions to refuse accreditation. The discriminatory effects of the Covenant cannot be wholly appreciated, nor can a truly proportionate balance be achieved, unless the rights, interests and experiences of LGBTQ – including trans – students who do wish to attend TWU are fully measured and carefully weighed.

PARTS IV AND V – COSTS AND ORDER SOUGHT

28. Egale respectfully request that there be no order of costs for or against it, and that the appeals be determined in accordance with the foregoing submissions.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of September, 2017.

 for.
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Egale Canada Human Rights Trust

PART VI: TABLE OF AUTHORITIES

Case Law	Paragraph(s)
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