Case 27168

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and DONNA GAIL LINDQUIST

RESPONDENTS
(RESPONDENTS)

AND:

THE BRITISH COLUMBIA COLLEGE OF TEACHERS

APPELLANT
(APPELLANT)

APPELLANT'S REPLY FACTUM
(Filed by leave of the Court, granted at the hearing on November 9, 2000)

Solicitors for the Appellant:
NELSON VANDERKRUYK
Barristers & Solicitors
1300 - 355 Burrard Street
Vancouver, B.C. V6C 2G8
Ph: 684-1311 Fx: 684-6402
COUNSEL: Thomas R. Berger, Q.C.
Gary A. Nelson
Erin Berger

Agents for the Appellant:
GOWLINGS
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, Ontario K1N 8S7
Ph: 613-232-1711

Solicitors for the Respondents:
KUHN & COMPANY
Barristers & Solicitors
300-31935 S. Fraser Way
Abbotsford, B.C. V2T 5N7
Ph: 864-8877 Fx: 864-8867
COUNSEL: Robert G. Kuhn
Kevin G. Sawatsky
Kevin L. Boonstra

Case 27168

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

BETWEEN:

TRINITY WESTERN UNIVERSITY and DONNA GAIL LINDQUIST

RESPONDENTS
(RESPONDENTS)

AND:

THE BRITISH COLUMBIA COLLEGE OF TEACHERS

APPELLANT
(APPELLANT)

APPELLANT'S REPLY FACTUM
(Filed by leave of the Court, granted at the hearing on November 9, 2000)

Solicitors for the Appellant:
NELSON VANDERKRUYK
Barristers & Solicitors
1300 - 355 Burrard Street
Vancouver, B.C. V6C 2G8
Ph: 684-1311 Fx: 684-6402
COUNSEL: Thomas R. Berger, Q.C.
Gary A. Nelson
Erin Berger

Agents for the Appellant:
GOWLINGS
Barristers & Solicitors
2600-160 Elgin Street
Ottawa, Ontario K1N 8S7
Ph: 613-232-1711

Solicitors for the Respondents:
KUHN & COMPANY
Barristers & Solicitors
300-31935 S. Fraser Way
Abbotsford, B.C. V2T 5N7
Ph: 864-8877 Fx: 864-8867
COUNSEL: Robert G. Kuhn
Kevin G. Sawatsky
Kevin L. Boonstra

INDEX

AUTHORITIES

A. INTRODUCTION

1. The B.C. College of Teachers, in its Appellant's Factum, maintained that this appeal is an administrative law appeal. TWU had argued Charter issues below. Davies, J. at first instance and Goldie, J.A., for the majority in the Court of Appeal, did not discuss Charter issues. Charter issues were, however, discussed by Rowles, J.A. in dissent. In its Factum filed in this court the Appellant adopted the Reasons of Rowles, J.A. on the Charter issues, except as to s. 15(1) of the Charter.

2. The Respondents raised Charter issues under s. 2(a), 2(b), 2(d) and 15(1). The religious interveners provided further argument on the points raised by the Respondents; in addition, they raised a Charter issue under s. 7. They also raised issues under the Constitution Act, 1867, s. 93.

3. At the hearing of this appeal on November 9, 2000 the court granted leave to the Appellant to file a Reply Factum.

B. DID THE COLLEGE VIOLATE THE RESPONDENTS' CHARTER RIGHTS?

4. In Canadian society we have many religious faiths. They do not share the same beliefs, or the same anathemas.

5. We have a secular system of public education (in B.C., required by the School Act R.S.B.C. 1996, c. 412, s. 76), that is, one in which there is no religious instruction and no promotion of sectarian religious belief.

6. In this secular system of public education, Canadian values are transmitted by public school teachers.

7. One of those Canadian values is protection from discrimination - protection which extends to homosexual persons. It has been affirmed in Canadian and B.C. human rights statutes, and in s. 15(1) of the Charter. In M. v. H. [1999] 2 S.C.R. 3, Cory, J. and Iacobucci, J., writing for the majority, pointed out, at para. 64, that in Egan v. Canada [1995] 2 S.C.R. 513 the Court

"unanimously affirmed that sexual orientation is an analogous ground...[to those enumerated in s. 15(1)]". Cory, J. and Iacobucci, J. also said, in the same paragraph, that in Egan a majority had held that gays, lesbians and bisexuals "form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage."

8. The intellectual attainments of students at TWU, including Donna Lindquist, are informed by their religious education, and their gifts as potential teachers are enhanced by their experience as students at TWU. Canadian values no doubt in many respects track many of the values taught at TWU. But the Council had to consider whether graduates of the proposed TWU five-year program would necessarily be equipped to deal with the diversity of students, parents and staff they will encounter in the public schools.

9. According to TWU's evidence, the Evangelical Free Church believes in the literal truth of every word in the Bible, both the Old and New Testaments. According to their reading of the Bible, the Bible condemns homosexuality and homosexual behaviour in the most graphic and compelling language. These are the values that TWU seeks to have affirmed by its faculty and to foster in its student body. The most obvious evidence of this lies in the Community Standards contracts that are required to be signed by faculty and students at TWU.[1]

10. Rowles, J.A. said, at Appellant's Record, Vol. 3, p. 549 (para. 221): "It is undisputed that a gay or lesbian faculty member could not sign the Community Standards in good conscience.". As for students, counsel for TWU conceded at the hearing in this court (in response to a question by Justice L'Heureux-Dubé), "the effect may be to discourage a homosexual from applying to enter TWU" or to sign the Community Standards Contract. The Council has decided that discriminatory practices at TWU have a bearing on the suitability of TWU's proposed five-year program to prepare TWU graduates to teach in public schools.

---

[1] It is important to remember that faculty as well as students must sign the Community Standards Contract. Moreover, "all faculty members ... must annually indicate their support for the Statement of Faith": Affidavit of Rev. Penner, para. 10: Appellant's Condensed Book, Tab 2.

1. Section 2(a), Freedom of Conscience and Religion

11. The College agrees that it is subject to the Charter, since it exercises governmental power.

12. Like TWU, the religious interveners seek to invoke TWU's freedom of religion: see Catholic Bishops' Factum, para. 19; Seventh Day Adventist Church's Factum, para. 32.

13. If freedom of religion is to be invoked here it can only be done by the Respondent, Donna Lindquist. No such right is claimable by TWU under the Charter. A corporation cannot hold a religious belief: R. v. Big M Drug Mart [1985] 1 S.C.R. 295.

14. The Canadian Conference of Catholic Bishops allege coercion in their Factum, paras. 15 - 22. In para. 19 they say:

> "By requiring a private religious institution to conform to a standard of public morality arising out of BCCT's undefined views of Canadian, secular or Charter values, it has, in effect, elevated these state imposed moral values to quasi-religious status."
>
> (Emphasis added)

15. See also the Factum of the Seventh-Day Adventist Church, para. 32, the Factum of the Evangelical Fellowship, at para. 30, and the Factum of the Christian Legal Fellowship, at para. 17.

16. The Council's decision not to approve TWU's proposed five-year program has not violated Donna Lindquist's religious freedom.

17. Donna Lindquist is free to believe that homosexual behaviour is condemned by the Bible, that it is a sin in the same category described in the Community Standards Contract as dishonest or (as Justice Major suggested at the hearing) that it is included in the catalogue of "sexual sins".

18. Moreover, Donna Lindquist is free to declare her beliefs openly - on the campus, in church, on the street - anywhere except in the classrooms of the public schools. But that is a limitation imposed by the Charter itself and by B.C.'s requirement that public education is to be secular in nature.

19. It should not be overlooked that, in Big M, Dickson, C.J. pointed out, at p. 337, that:

> "Freedom [of religion] means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience."

20. The decision of the Council did not constitute coercion, direct or indirect, requiring students at TWU to give up their beliefs.

21. TWU has not been singled out. Nor have its graduates been singled out. The requirement that teacher education programs should graduate teachers who are perceived as reflecting society's fundamental values and who will provide a supportive environment for all students, is a requirement which grows out of an assessment of what makes a good teacher. That assessment must be made with respect to any teacher education program for which certification is sought. All graduates must meet the same requirement, i.e., they all must be capable of teaching in a classroom where diversity is the hallmark.

22. In R. v. Jones [1986] 2 S.C.R. 284 it was held that it was not a violation of s. 2(a) of the Charter to require that an application be made to the provincial Department of Education for approval of a private school or a certificate of efficient instruction for teaching at home.

23. In Adler v. Ontario [1996] 3 S.C.R. 609 Jewish and Evangelical parents were denied public funding for their denominational schools. They said they were discriminated against vis-à-vis Catholic denominational schools and public schools, which were guaranteed public funding. Iacobucci, J., writing for the majority, held that private and public school funding was protected under s. 93 of the Constitution Act, 1867, and was immune from Charter scrutiny.

24. In Adler, L'Heureux-Dubé, J., Sopinka, J. (Major, J. concurring) and McLachlin, J. held that the Charter did apply. The question then arose, had there been a violation of freedom of religion on the ground that a burden had been imposed on Jewish and Evangelical parents (the cost of providing religious schooling) on the basis of their religious beliefs, a burden not imposed on parents generally? Sopinka, J. and Major, J. concurred in the result reached by the majority, L'Heureux-Dubé, J. dissented, and McLachlin, J. dissented in part. Nevertheless, all four judges held that there had been no violation of the parents' freedom of religion under s. 2(a).[2]

25. Sopinka, J. pointed out that the leading cases under s. 2(a), Big M and R. v. Edwards Books [1986] 2 S.C.R. 713, had been decided on facts which arose before s. 15 came into force. There is, he said, at para. 166: "...some overlap between the claims based on s. 2(a) and s. 15 of the Charter.". Then he said, at para. 173:

> "...the appellants argue that the province's failure to fund private religious schools imposes an unconstitutional burden on their freedom of religion. It is thus the effect of the Education Act that is the source of the infringement. Much reliance is placed on Edwards Books...." (Emphasis added)

26. Sopinka, J. distinguished Edwards Books on the ground that in that case the legislation had imposed a burden. It had required that a business be closed on Sunday, imposing a burden on those whose Sabbath was on a different day because they would be forced to choose between closing their business an extra day or keeping open on the Sabbath. He cited, at para. 173, the judgment of Dickson, C.J. in Big M in which he said that "All coercive burdens on the exercise of religious beliefs are potentially within the ambit of s. 2(a)." Sopinka, J. then said:

---

[2] In Zybeberg v. Sudbury Board of Education (1988), 52 D.L.R. (4th) 577, the Ontario Court of Appeal held that legislation requiring public schools to open the day with the Lord's Prayer and scripture readings imposed a burden on religious minorities. There is no such burden in the case at bar. In Can. Civil Liberties Ass'n v. Ontario (1990), 65 D.L.R. (4th) 1, the Ontario Court of Appeal held that the indoctrination of school children in Ontario in the Christian faith was a direct burden on students belonging to religious minorities. There is no such burden in the case at bar. In Bal v. Ontario (1994), 121 D.L.R. (4th) 96, Ont. Ct. (General Div.), Bal v. Ontario (1997), 151 D.L.R. (4th) 761 (Ont. C.A.), a directive was given by the Ministry of Education that in the province's schools there must be no sectarian religious instruction. Winkler J. held this did not violate the Charter. The Ontario Court of Appeal agreed with Winkler, J.

"As I understand this passage [from Edwards Books] it is on the basis that the legislation [in Edwards Books] had the effect of imposing different burdens on different religions vis-à-vis non-observers that a s. 2(a) infringement was found."

27. So Sopinka J. held in Adler that there had been no violation of s. 2(a). The parents were free to send their children to the religious school of their choice. The cost incurred, the burden of so doing, he said, is a natural cost of the parents' religion and does not flow from the legislation. Sopinka J. said, at para. 174:

"On this account, the appellants have no complaint cognizable in law since the disadvantage they must bear is one flowing exclusively from their religious tenets."

28. L'Heureux-Dubé, J. said at p. 652, para. 58, that:

"...the cost of sending their children to private schools, being not a prohibition of religious practice but rather the absence of funding for one, has not historically been considered a violation of the freedom of religion."

29. She continued, in the next sentence:

"While these parents do bear a cost which is not imposed on parents who can send their children to public schools, this lack of benefit is more appropriately addressed under s. 15 of the Charter, the equality guarantee."

30. McLachlin, J. distinguished Big M and Edwards Books on the basis that those two cases involved a state prohibition on otherwise lawful conduct. Then she said, at p. 713, para. 199:

"People remain free to educate their children whenever and however they choose, provided they meet prescribed standards. While this may impose costs on them not borne by parents of children attending public secular schools, the cost issue is more appropriately considered under the equality provision of the Charter, s. 15."

31. The Appellant will therefore deal with the issue of burden or adverse effect in its argument under s. 15(1), *infra*.

2. Freedom of Thought, Belief, Opinion and Expression

32. TWU, as regards s. 2(b) of the Charter, tracks the argument it made under s. 2(a). Respondent's Factum, paras. 105 and 106.

33. The Catholic Bishops say that "BCCT intentionally set out to censor" the expression by TWU and its students of their beliefs: Factum, para. 26. They go on to say: Factum, para. 34:

> "BCCT's decision may amount to a form of religious persecution as it attempts to prevent this private accredited university from communicating its belief system to the public and its own adherents."

34. Does the decision of the Council prevent TWU from "communicating its belief system to the public and its own adherents"? Does it mean that "the expression of [these] religious beliefs will result in a denial of a public benefit to which a party would otherwise be entitled"? The only plausible answer to these questions is "No".

35. TWU has no right to approval of its teacher education program. What is, in effect, claimed here is immunity from scrutiny for TWU's stated beliefs. But TWU cannot claim the right to immunity from scrutiny for its stated beliefs when a consideration of them is relevant to a determination by the Council of the suitability of graduates of the proposed TWU five-year program to teach in the public schools.

36. Rowles, J.A. said, at Appellant's Record, Vol. 3, p. 572, para. 270:

> "Signing TWU's Community Standards Contract may well be an expressive activity protected by s. 2(b), but it does not follow that the consequences of the exercise of that expression are immune from consideration by the certifying body."

37. In the case at bar there is no prohibition on expression. There is no censorship. Cases such as Canada v. Taylor, [1990] 3 S.C.R. 892, R. v. Zundel, [1992] 2 S.C.R. 731 and Irwin Toy v. Quebec [1989] 1 S.C.R. 927 were cases of legislation or governmental action aimed at a particular form of expression. There is no such governmental action in the case at bar.

38. Nor is there any forced expression, i.e., compulsion by law to make a statement, as in Slaight Communications v. Davidson [1989] 1 S.C.R. 1038 or R.J.R.-MacDonald v. Canada [1995] 3 S.C.R. 199.

3. Section 2(d), Freedom of Association

39. This ground, urged by TWU, is not argued by any of the religious interveners.

4. Section 7

40. The Seventh-Day Adventist Church argues that there has been a violation of s. 7: Factum, paras. 65 to 70.

41. The Seventh-Day Adventist Church has founded this argument on a claim that the College did not provide TWU with a fair hearing, and it alleges that the College was guilty of bias. The Seventh-Day Adventist Church relies, at Factum, paras. 68(a) to (e) on a series of claims of denial of procedural fairness, founded on an analysis of the materials in the Appellant's Record.

42. This was an argument advanced by TWU before Davies, J. at first instance, but not argued in the Court of Appeal. It is an argument which has not been advanced by TWU in this Court.

43. Moreover, an intervener has no right to raise new grounds. Section 7 should not be considered by the Court: Reference Re GST [1992] 2 S.C.R. 445.

5. Section 15(1), Equality Rights

44. TWU has no right, as a corporation, to claim any rights under s. 15. Only an "individual" may be protected under s. 15: Hogg, Constitutional Law of Canada, Loose-leaf edition, 1997, Vol. 2, pp. 34-3 and 34-4.

45. Therefore, the only question that arises is whether the Respondent Donna Lindquist's equality rights have been infringed.

46. Discrimination, according to McIntyre J. in Andrews v. Law Society [1989] S.C.R. 143 consists in the imposition of a burden on an individual, a burden not imposed on others, by reason of the individual's possession of an enumerated or analogous s. 15(1) characteristic. The Appellant submits that, to determine the application of s. 15(1) in the case at bar, two judgments of the court should be examined in detail: Adler v. Ontario, *supra* and Law v. Canada [1999] 1 S.C.R. 497.

a) Adler v. Ontario [1996] 3 S.C.R. 609

47. In Adler, it was held that failure to fund Jewish and Evangelical religious schools (Catholic schools are publicly funded under the Constitution Act, 1867, s. 93) was not a breach of s. 15(1).

48. Sopinka, J. (Major, J. concurring) held that the Charter did apply, but that Jewish and Evangelical parents had not been discriminated against because of their religious beliefs. Sopinka J. said, at p. 448, para. 181:

> "[181] Here the Act does not appear to distinguish between the appellants and other groups on the basis of a particular characteristic common to the appellants. However, it is clear that their claim is dependent on such a finding. In my view, such an argument cannot be sustained. While it is true that the appellants feel compelled to send their children to private school because of a personal characteristic, namely their religion, and therefore are unable to benefit from publicly-funded schooling, I fail to see how this is an effect *arising from the statute*. The reason why the public school system is not acceptable to the appellants lies in its secular nature. This secular nature is itself mandated by s. 2(a) of the *Charter* as held by several courts in this country."

49. McLachlin, J. (L'Heureux-Dubé concurring on this point) came to the opposite conclusion. McLachlin, J. held that the non-funding of the private schools was a breach of s. 15(1), because it had the effect of imposing a disproportionate burden on those whose religious beliefs required them to send their children to religious schools; so this constituted adverse effect discrimination on the basis of religion. She said, at pp. 716 - 717:

> "The respondents' second argument is that even if adverse effect discrimination is established, it is not caused by the *Education Act*, but by the appellants' religion. The cause of the inequality, they submit, is not government action, but the appellant's decision to belong to a religion which puts them in the position of having to reject the public secular schools and establish and fund their own independent schools. With all deference to those who hold otherwise, I cannot accept this defence. By definition the effect of a discriminatory measure will always be attributable to the religion, gender, disability and so on of the person who is affected by the measure. If a charge of religious discrimination could be rebutted by the allegation that the person discriminated against chose the religion and hence must accept the adverse consequences of its dictates, there would be no such thing as discrimination. This Court has consistently affirmed a substantive approach to equality. The substantive approach to equality is founded on acceptance of the differences which lie at the heart of discrimination. Be they differences of birth, like race or age, or be they differences of choice, as religion often is, the law proceeds from the premise that the individual is entitled to equal treatment in spite of such differences. The state cannot "blame" the person discriminated against for having chosen the status which leads to the denial of benefit. The person is entitled to the benefit regardless of that choice. The essence of s. 15 is that the state cannot use choices like the choice of religion as the basis for denying equal protection and benefit of the law."

50. Rowles, J.A. adopted the reasoning of McLachlin, J. in Adler. That is why she found there had been a breach of s. 15(1). She concluded, at Appellant's Record, Vol. 3, pp. 575 - 576, para. 276:

> "In *Adler, supra*, the burden on parents for exercising their religious freedom and sending their children to religious schools was the cost of private religious school education. In this case, the burden on students for attending the religious school of their choice would be the exclusion from the automatic certification process for teaching in the public schools. This constitutes an adverse impact and is related to the students' religious convictions. The Council's decision which would require public school teacher education training programs to conform to non-discriminatory standards thus would have a *prima facie* discriminatory impact on TWU students on the basis of their religion."

51. TWU argues at Factum, para. 116, based on the reasons of McLachlin, J. in Adler, that TWU students are

> "adversely affected by the BCCT's denial of approval. This denial impacts them because of their religiously-based decision to attend TWU. The fact that they voluntarily chose to attend TWU is irrelevant."

52. The religious interveners make the same argument.

53. The judgments in Adler approach the issue of the cause of differential treatment from quite distinct analytical perspectives.

54. Sopinka and Major, JJ. concluded that the impugned law did not give rise to differential treatment for the purposes of s. 15(1); rather, the differential treatment was owing to the parents' choice of religion.

55. McLachlin and L'Heureux-Dubé, JJ. held that if adverse effect discrimination were established, it would be no defence to say that the claimant chose to follow his or her religious belief. To accept such a defence would undermine the purpose of the Charter itself.

56. The analytical approach to claims of discrimination under s. 15(1) has now been settled by the decision of this court in Law v. Canada [1999] 1 S.C.R. 497. Under the framework adopted in that case, the first inquiry is the inquiry undertaken by Sopinka and Major, JJ. in Adler: Does the impugned law draw a formal distinction between the claimant and others on the basis of one or more personal characteristics?[3]

57. Looking at this first inquiry, it is clear that the case at bar is not at all the same as Adler. There was undoubtedly differential treatment, in Adler, between fully funded and non-funded schools.

58. In the case at bar, all students wishing to teach in the public schools are required to do a professional year through a public university. The requirement is the same for everyone. The only issue raised here is, should a TWU student be able to do that fifth year exclusively through TWU or must a student do it through a public university?

59. Looked at in this way, it is clear that any burden results from a student's choice to attend TWU. A student makes a commitment to abide by the world view of TWU as expressed in

---

[3] The other branch of the first inquiry is not relevant here.

the Community Standards Contract; that very commitment (and the more stringent commitment made by faculty) is what puts the student's preparedness to teach in the public schools in question.

60. The "burden" here is imposed on every teacher seeking certification from the B.C. College of Teachers. No one is singled out. No more is required of TWU and Donna Lindquist than is required of any other institution or any other graduate: all teacher education programs must, to be approved by the Council, prepare graduates to teach in the public schools. All graduates, to be certified, must be professionally prepared to teach in the public schools. All graduates, at TWU or at any other university, must undertake a fifth year or professional year through a public university.

b) Law v. Canada [1999] 1 S.C.R. 497

61. Assuming, however, for purposes of argument, that Rowles, J.A. is right: Donna Lindquist, by electing, according to her religious beliefs, to take her teacher education at TWU, is thereby burdened with the need to take her fifth year under the supervision of SFU or forego "automatic certification"[4], and the adverse effect on her is an effect she suffers because of her religious beliefs.

62. The question remains, however, if a burden is imposed, is it a burden which comes within s. 15(1)?

63. In Miron v. Trudel [1995] 2 S.C.R. 627, McLachlin, J., at para. 131, said the overarching purpose of s. 15(1) is "to prevent the violation of human dignity and freedom by imposing limitations, disadvantages or burdens through the stereotypical application of presumed group characteristics rather than on the basis of merit, capacity, or circumstance." (Emphasis added)

64. In the case at bar, nothing was presumed. The proposed TWU five-year program was determined, on its merits, to be inadequate. It was found that, under the proposed TWU five-year

---

[4] There is no such thing as "automatic certification". The College must determine that a candidate is suitable for entry into the profession, has met all the requirements of the program and has no relevant criminal record. But it is an advantage to be recommended by SFU or some other public university.

program, there was a risk that graduates of the proposed program would not be ready to teach in the public schools.

65. The view expressed by McLachlin, J. in Miron v. Trudel has been elaborated and adopted by the Court in Law v. Canada [1999] 1 S.C.R. 497. In that case Iacobucci, J. said, at para. 39, that a claim of discrimination under s. 15(1) should be approached in this way:

> "Following upon the analysis in *Andrews*, *supra*, and the two-step framework set out in *Egan, supra*, and *Miron, supra*, among other cases, a court that is called upon to determine a discrimination claim under s. 15(1) should make the following three broad inquiries. First, does the impugned law (a) draw a formal distinction between the claimant and others on the basis of one or more personal characteristics, or (b) fail to take into account the claimant's already disadvantaged position within Canadian society resulting in substantively differential treatment between the claimant and others on the basis of one or more personal characteristics? If so, there is differential treatment for the purpose of s. 15(1). Second, was a claimant subject to differential treatment on the basis of one or more of the enumerated and analogous grounds? And third, does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) of the *Charter* in remedying such ills as prejudice, stereotyping, and historical disadvantage? The second and third inquiries are concerned with whether the differential treatment constitutes discrimination in the substantive sense intended by s. 15(1)."

66. What the Appellant wishes to address here is the third broad inquiry: The third broad inquiry that Law requires is, "does the differential treatment discriminate in a substantive sense, bringing into play the purpose of s. 15(1) in remedying such ills as prejudice, stereotyping and historical disadvantage?".

67. In Law, Iacobucci, J. explained, at para. 53, that "human dignity is harmed by unfair treatment premised upon personal traits or circumstances which do not relate to individual needs, capacities or merits". (Emphasis added)

68. Iacobucci, J. went on, at para. 67:

> "At the same time, I also do not wish to suggest that the claimant's association with a group which has historically been more disadvantaged will be conclusive of a violation under s. 15(1), where differential treatment has been established. This may be the result, but whether or not it is the result will depend upon the circumstances of the case and, in particular, upon whether or not the distinction truly affects the dignity of the claimant. There is no principle

or evidentiary presumption that differential treatment for historically disadvantaged persons is discriminatory."

(Emphasis added)

69. The important question, then, is "whether or not the distinction truly affects the dignity of the claimant".

70. Iacobucci, J. said, at para. 88:

> "In general terms, the purpose of s. 15(1) is to prevent the violation of essential human dignity and freedom through the imposition of disadvantage, stereotyping or political or social prejudice, and to promote a society in which all persons enjoy equal recognition at law as human beings or as members of Canadian society, equally capable and equally deserving of concern, respect and consideration."

71. In M. v. H. [1999] 2 S.C.R. 3 Cory, J. and Iacobucci, J., writing for the majority, discussed Iacobucci, J.'s judgment in Law. They said, at para. 47:

> "Iacobucci J. stated that the existence of a conflict between the purpose or effect of an impugned law, on the one hand, and this fundamental purpose of the equality guarantee, on the other, is essential in order to found a discrimination claim."

72. Iacobucci, J.'s analysis of the third broad inquiry under s. 15(1) illuminates the case at bar. Here it is difficult to identify a group which has been subject to prejudice, stereotyping or historical disadvantage. TWU says that the College is engaged in stereotyping of "persons with Christian beliefs": Respondent's Factum, para. 120. But Christians are not, in the context of the case at bar, discriminated against, for not all of them share the views about homosexuality or homosexual behaviour which are taught at TWU.

73. The identification of a group which has been subject to prejudice, stereotyping or historical disadvantage in the case at bar presents real difficulties. Rowles, J.A.'s discussion of s. 15(1) appears at Appellant's Record, p. 573 to 576, paras. 272 to 276. To the extent she did address this issue, it was at para. 275:

> "275. In this case, the concern is that the Standards applied by the council require a teacher education program to abide by secular values of non-discrimination, may adversely impact those students who, for reasons of their religious convictions, choose to attend TWU."

74. The Catholic Bishops have weighed in on this question: They allege "stereotyping", at Factum, para. 54, but it is difficult to determine who they claim is being stereotyped. Is it "TWU and its students"? (para. 50) Or "TWU and its graduates"? (para. 57)

75. The Seventh-Day Adventist Church says that the stereotyping and bias is directed against "religious organizations": Factum, para. 50.

76. None of these arguments actually address the language of the resolution passed by the Council on May 17, 1996. It read:

> "That the application for a new teacher education program by Trinity Western University be denied because [1] it does not fully meet the criteria and because [2] it is contrary to the public interest to approve a teacher education program offered by a private institution which appears to follow discriminatory practices that public institutions are, by law, not allowed to follow."
>
> (Emphasis added)

77. The Council held that TWU, not the students, followed discriminatory practices. The Council did not pass a moral judgment on TWU's graduates; it did, however, determine that under the proposed TWU five-year program, they would not be ready to teach in the public schools.

78. Once it is understood that the Council is not concerned about the beliefs of Christians, the beliefs of evangelical Christians, the beliefs of the Evangelical Free Church, or the beliefs of TWU graduates, but has limited its concern to the actual commitment to a particular view of homosexuality and homosexual practices by TWU and the faculty and students who signed the Community Standards Contract, it is apparent that no individual or group is being stigmatized (on the basis of prejudice, stereotyping or historical disadvantage or on any other footing). Rather, the propositions contained in the contract signed by Donna Lindquist and other TWU students, as well as faculty, are being considered, on their merits, in determining the suitability of graduates of the proposed TWU five-year program to teach in the public schools.

79. As McLachlin, J. said in Miron v. Trudel, supra, at para. 132:

> "distinctions made on enumerated or analogous grounds may prove to be, upon examination, non-discriminatory."

80. The case at bar is not a case of prejudice against someone or prejudice against a group on the ground of personal characteristics (e.g., persons of African descent) or of reinforcing a stereotype (e.g., disabled person cannot perform a job) or perpetuating historical disadvantage (e.g., head taxes on Chinese immigrants).

81. In Lovelace v. Ontario 2000 S.C.C. 37 individual Indians who did not belong to bands registered under the Indian Act sued to obtain a declaration that Ontario's failure to include them as beneficiaries of proceeds of casino gambling at a reserve-based commercial casino was a violation of s. 15(1). Iacobucci, J., writing for the court, rejected their claim. He said, at para. 71:

> "Furthermore, the appellants have emphasized that these disadvantages have been exacerbated by continuing unfair treatment perpetuated by the stereotype that they are "less aboriginal", with the result that they are generally treated as being less worthy of recognition, and viewed as being disorganized and less accountable than other aboriginal peoples. In *Law, supra*, this Court affirmed that the existence of substantive discrimination was highly correlated with the existence of a stigmatizing stereotype. In essence, a stereotype is a "misconception whereby a person or, more often, a group is unfairly portrayed as possessing undesirable traits, or traits which the group, or at least some of its members, do not possess" (*Law, supra*, at para. 64)."
>
> (Emphasis added)

82. No one in the case at bar has been stigmatized as intolerant. No personal traits have been attributed to students at TWU or to graduates of the proposed five-year program.

83. Instead, the Council has found that, because of the policy of TWU towards homosexuals and homosexual practices, graduates of TWU's proposed five-year program would not be ready to teach in the public schools.

84. In Lovelace, Iacobucci, J. said, at para. 73:

> "The appellants have most certainly established pre-existing disadvantage, stereotyping, and vulnerability, and the Be-Wab-Bon appellants legitimately emphasized that "[f]urther inequities should not be layered upon these widely acknowledged unfair historical exclusions". However, leaving aside as I must, the arguments advanced relating to the potentially discriminatory or arbitrary nature of the exclusionary provisions of the *Indian Act*, the appellants have failed to establish that the First Nations Fund functioned by device of stereotype (*Law, supra*, at para. 102). Instead, as will be discussed below, this distinction corresponded to the actual situation of individuals it affects, and the exclusion did not undermine the ameliorative purpose of the targeted program. In short, the First Nations Fund does not conflict with the purpose of s. 15(1) and does not engage the remedial function of the equality right."

85. In the same way the distinction made between graduates of TWU and graduates of other public universities (if there is a distinction) "corresponds to the actual situation of individuals it affects". Those graduating from the public universities (including graduates of the joint TWU-SFU program) are ready, in the judgment of the Council, to teach in the public schools; those graduating from TWU's proposed five-year program would not be ready, in the judgment of the Council, to teach in the public schools.

86. This returns us to the main issue on the administrative law side of the case: was it lawful for the Council to consider the "discriminatory practices" at TWU? If it was, was it patently unreasonable to find that there was evidence of "discriminatory practices"?

87. If the Council is entitled to consider the commitment made in the Community Standards contract by students and faculty, and has acted reasonably in determining that, indeed, the contract required to be signed by students and faculty (taken with TWU's Mission Statement, TWU's Statement of Faith, and the deeply rooted character of TWU's attitude towards homosexuality and homosexual practices) affords evidence of discriminatory practices, no issue of Charter breach arises. On the other hand, if the Council had no authority to consider the contract, or did not act rationally in its consideration of what conclusions to draw from the materials before it, the appeal must be disposed of on administrative law grounds, and no issue of Charter breach arises. Either way, the resolution of the administrative law issues provides a resolution of the Charter issues.

88. The Charter does not extend so far as to protect, under the rubric of equality, the manifestation of discriminatory practices themselves forbidden by the Charter.

C. SECTION 1

89. The Appellant argues that, if there has been a violation of ss. 2(a), 2 (b), 2(d) or 15(1) of the Charter, it can be justified under s. 1.

90. The Appellant concedes that the onus is on the College to establish justification on a balance of probabilities: R. v. Oakes, [1986] S.C.R. 103.

91. In Oakes Dickson C.J. said, at p. 138, that evidence may be required; on the other hand, he said, "there may be cases where certain elements of the s. 1 analysis are obvious or self-evident".

92. In R. v. Jones, [1986] 2 S.C.R. 284, La Forest, J. said, at p. 299:

> "No proof is required to show the importance of education in our society or its significance to government."

See also RWDSU. v. Dolphin Delivery, [1986] 2 S.C.R. 573 at 590.

93. In the case at bar the Appellant relies on the evidence and on the self-evident nature of the justification under s. 1.

1. Compelling and Substantial Interest

94. To begin with, the Province, which has delegated its functions to the College (approval of teacher education programs was a function of the Ministry of Education itself prior to the establishment of the B.C. College of Teachers in 1998), has a compelling and substantial interest in the education of children and young persons. In R. v. Jones, *supra*, LaForest J. said at p. 296:

"Whether one views it from an economic, social, cultural or civic point of view, the education of the young is critically important in our society."

95. He concluded, at p. 299:

"...the province, and indeed the nation, has a compelling interest in the "efficient instruction" of the young."

96. In Adler, McLachlin, J. said, at para. 212, that "[T]he strength of the public secular school system is its diversity....". She said, at para. 213, that the object of fully funding secular schools while denying funds to independent religious schools is "to promote a more tolerant harmonious multicultural society", and that this is a "pressing and substantial" objective.

97. Rowles, J.A. concluded, at Appellant's Record, Vol. 3, p. 577, para. 280:

"The objective of the Council's policy is to uphold values of non-discrimination in the public school system. This goal must be regarded as a pressing and substantial one for it goes to the heart of the values of a free and democratic society. Those values include "respect for the inherent dignity of the human person, commitment to social justice and equality": see *R. v. Oakes*, [1986] 1 S.C.R. 103 at 136."

98. Moreover, only an attenuated level of justification is required here, since the freedom asserted by the Respondent entails the denigration of a group entitled to protection: Ross v. N.B. School District No. 15 [1996] 1 S.C.R. 825, LaForest J., paras. 88 - 94, esp. para. 94; Vriend v. Alberta [1998] 1 S.C.R. 493. And see Burger C.J. in Bob Jones University v. U.S.; Goldsboro Christian Schools v. U.S., 461 U.S. 574, 76 L.Ed. 2d 17, 103 S.Ct. 2017 (1983).

2. Rational Connection

99. In Adler, McLachlin J. said there was a rational connection under s. 1. She said, at p. 720, paras. 218 - 219:

"Scientific demonstration of cause and effect is not "necessary to satisfy the requirement of a rational connection between the objective sought and the infringing measure. Legislators can seldom demonstrate that the measures they propose for the betterment of society will inevitably have that effect. What is required is that the measure not be arbitrary, unfair or

based on irrational considerations: Oakes, *supra*, at p. 139. As a matter of common sense, can it be said that the measure or legislative scheme in question may promote (as opposed to inevitably accomplish) the objective sought?

This test, in my view, is met in this appeal. The denial of funding to separate schools is rationally connected to the goal of a more tolerant society."

100. Here the College has made a decision that will promote in the public schools the idea of a tolerant society and offer support in the classroom for all students. There is obviously a rational connection between the concern of the College and the decision in this case. And see Rowles, J.A., Appellant's Record, Vol. 3, pp. 578 - 579, and paras. 282 - 283.

3. Minimal Impairment

101. Rowles, J.A. stated the issue, at Appellant's Record, Vol. 3, p. 581, para. 287:

"The impairment of the equality rights of TWU students in this case is a result of the Council's objective of ensuring that the public school system upholds the values of non-discrimination. In my view, this case does involve a difficult balancing of competing protected interests in society. Canadian values demand a degree of accommodation for cultural and religious differences, such as those of the TWU students. Those same values require the protection of vulnerable groups in our society historically subject to harmful discrimination, including gays and lesbians and their families."

102. Rowles, J.A. thought that the existence of the joint TWU-SFU fifth year program was not relevant. She said, at p. 584, para. 292:

"I should note here that the existence of TWU's arrangement with Simon Fraser University (SFU) for its fifth year students is not relevant to the present decision. The Council's decision was not contingent on the future cooperation of SFU, and, in any event, that cooperation is apparently by no means assured. The documents from which Council's decision has been drawn do not make reference to the continued cooperation of SFU as desirable and there is no suggestion that it would meet the College's requirements if it were put forward for approval at this time."

103. It is submitted that, notwithstanding Rowles, J.A.'s observations on the SFU-TWU program, the existence of the SFU-TWU program was relevant. It was part of the circumstances known to the Council. The Council, in rejecting the proposed TWU five-year program, knew that

TWU students had been recommended for certification by SFU, and might continue to be recommended for certification by SFU. The present arrangement between TWU and SFU allows TWU students to participate in a joint TWU-SFU program in their fifth year, to receive a TWU Bachelor of Education degree, and to be recommended for certification by SFU.

104. The Council's decision minimally impaired Donna Lindquist's rights (for TWU can claim no rights under s. 15(1)). The fifth year through SFU involves both SFU faculty and students coming to the TWU campus (and TWU students going to the SFU campus). It exposes TWU students to people and values they might not have encountered at TWU, and ensures supervision for the teaching practicum by SFU associates.

105. It does not constitute "re-educating" or "deprogramming" TWU students.

106. Suppose, however, that SFU were to discontinue the joint program.

107. In such circumstances, TWU teacher education students could enroll for their fifth year at any of B.C.'s four public universities which have teacher education programs. They could, as individuals, do exactly what they do now as a group - i.e., do four years at TWU, a fifth year at a public university, and then graduate with a B.Ed. from TWU and be recommended for certification by the public university where they had taken their fifth year.

108. Of course, the Council could have adopted the recommendations of the Teacher Education Programs Committee, and approved TWU's proposed five-year program, subject to the eight conditions that were recommended by the Teacher Education Programs Committee. But the Council was not obliged to follow the recommendations of the College's Program Approval Team or the Teacher Education Programs Committee[5]. It had a duty to consider the matter itself, and to decide on what it thought the best course.

---

[5] The Program Approval Team made eleven proposals. In them were eight conditions. These eight conditions were recommended by the Teacher Education Programs Committee. It was these eight conditions which Davies, J. included in his order at first instance, and this order was upheld by the Court of Appeal.

109. There were two approaches: that of the Teacher Education Programs Committee, "Let's approve the program, with conditions, and monitor it to see how it works out", and that of the Council, "No, we should not stand by and await the outcome of events, when we can require that TWU students be exposed to the more diverse milieu of a public university in their fifth year; we can take measures to diminish any risk, before these students enter the classroom.".

110. This was within the range of acceptable solutions, given TWU's Mission Statement, the Statement of Faith, the contract that faculty had to sign (on the basis that it represented their true belief) and the contract that students had to sign (or go elsewhere).

111. In R.J.R.-MacDonald v. Canada [1995] 3 S.C.R. 199 McLachlin, J. said, at para. 160:

> "[i]f the law falls within the range of reasonable alternatives, the courts will not find [a legislative choice] overbroad merely because they can conceive of an alternative which might better tailor object to infringement .... On the other hand, if the government fails to explain why a significantly less intrusive and equally effective measure was not chosen, the law may fail."

112. The Council explained, in the Registrar's letter dated May 22, 1996 (Appellant's Condensed Book, Tab 8), why it did not think approval of the proposed TWU five-year program, with conditions, would be an effective measure.

113. Rowles, J.A. found that the Council's decision was justified under s. 1. She said, at pp. 583 - 584, para. 291:

> "It would be inappropriate for this Court to suggest or endorse a particular set of conditions to meet the Council's compelling objective in the public school system, such as adoption of the Program Approval Team's recommendations or a continuation of the existing Simon Fraser University Program."

114. She continued, at pp. 584 - 585, paras. 293 - 295:

> "The Council is not obliged to follow the recommendations of the College's Program Approval Team. It had a duty to consider the matter itself, and to decide how best to meet the objective of upholding values of non-discrimination in the public school system. In

doing so, it must also attempt to infringe the religious equality rights of the TWU students as little as possible and still meet its objective.

The Council considered all these requirements and concluded that the recommendations of the Program Approval Team would be inadequate to meet the College's substantial concerns about TWU's Community Standards and its program as affected by those Standards. Some of these concerns were also raised by the Program Approval Team, although it apparently did not specifically consider the impact of the Standards on future gay and lesbian applicants, teachers, or future members of the public school community.

In my opinion, the Council's decision falls within the acceptable range of alternatives and, if that be so, it meets the minimal impairment test."[6]

4. Proportionality

115. The Appellant submits that Rowles, J.A. dealt correctly with the issue of proportionality at Appellant's Record, Vol. 3, pp. 585 - 587, paras. 296 - 300. She said, at p. 585, paras. 296 - 297:

"The effect of the infringements must be proportional to the goal of the decision. In *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 887-888, 120 D.L.R. (4th) 12, Lamer C.J. added that not only the goal of the decision but also its "salutary effects" must be proportionate to the deleterious effects of the infringement.

---

[6] The religious interveners have cited Jones v. The Queen [1986] 2 S.C.R. 284. In that case, La Forest, J. for the majority, offered, at p. 298, the following *obiter* observations:

> "How far the province could go in imposing conditions on the way the appellant provides instruction, if he had applied for registration of his academy as a private school or for certification of the efficiency of his instruction, I need not enter into. Certainly a reasonable accommodation would have to be made in dealing with this issue to ensure that provincial interest in the quality of education were met in a way that did not unduly encroach on the religious convictions of the appellant. In determining whether pupils are under "efficient instruction", it would be necessary to delicately and sensitively weigh the competing interests so as to respect, as much as possible, the religious convictions of the appellant as guaranteed by the *Charter*. Those who administer the province's educational requirements may not do so in a manner that unreasonably infringes on the right of parents to teach their children in accordance with their religious convictions. The interference must be demonstrably justified."

It should be borne in mind that LaForest, J. was referring to a case arising under s. 2(a) of the Charter. But insofar as the language he used can be applied to the case at bar, it is necessary to remember that in the case at bar it is not the rights of parents which are said to be infringed, but rather the rights of students. What has been said already with respect to minimal impairment indicates how R. v. Jones ought to be applied here: Have the students' rights to study at an institution whose teachings are consistent with their religious beliefs been "unreasonably infringed"? The same conclusion as that which flows from a s. 15(1) analysis would result.

It has been established that the College's goal was a compelling one, very close to the heart of the values of our free and democratic society, but so is the value of accommodating and encouraging cultural diversity. In my opinion, the effects and goals of the College's decision are proportionate to the infringement in this case."

116. She concluded, at p. 587, para. 300:

"In my opinion this effect is proportionate to the Council's objective and the effects of its decision in upholding the values of non-discrimination in the public school system."

D. SECTION 93 OF THE CONSTITUTION ACT, 1867

117. The Catholic Bishops say that the College's denial of certification to TWU's teacher education program" is a collateral attack on the "religious or doctrinal" aspect of Catholic schools which McIntyre, J. found [in Caldwell v. St. Thomas Acquinas High School [1984] 2 S.C.R. 603] was at the heart of the Catholic school systems...": Factum, para. 9.

118. The Catholic Bishops then raise the spectre (para. 11) that "no Catholic student or teacher would be allowed to teach in the British Columbia public school system until they were re-educated in what BCCT referred to as Canadian, Charter or secular values".

119. Of course, the reference to re-education is gratuitous and inflammatory. The Council decided that TWU's program did not offer a sufficiently broad exposure to enable graduates to enter the public school system.

120. Then the Catholic Bishops say that BCCT's decision "if taken to its logical conclusion" (para. 13) would nullify this Court's decision in Caldwell which upholds the right of Catholic school boards to insist on religious conformity when hiring or terminating teachers. They allege that it would render "meaningless" the entrenched rights of Catholic schools to public funding under s. 93.

121. This is altogether unsound. Once it is understood that the Council's decision in no way limits the right of TWU to employ only teachers who adhere to and comply with the values of the Evangelical Free Church, the argument falls away. In Caldwell a Catholic teacher who divorced

and remarried was discharged on the ground that her behaviour was not consistent with Catholic doctrine. This court held that she had no valid complaint under B.C.'s human rights legislation. The Council's decision in the case at bar in no way limits the right of TWU and Catholic institutions to hire and fire on the basis of adherence to religious doctrine.

122. The Evangelical Fellowship of Canada also raise s. 93. They ask, rhetorically, at para. 36, "would public funding for Roman Catholic schools in some provinces now withstand scrutiny?". And, "should the equality guarantees of s. 15(a) (sic) relating to sexual orientation now trump the guarantees of Section 93(1) of the Constitution Act, 1867?".

123. The constitutional guarantees of s. 93(1) cannot be trumped by Charter rights: Adler.

124. In any event, s. 93 was not raised by any of the parties to this appeal and ought not to be considered by the court: Re GST *supra*.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Thomas R. Berger, Q.C., counsel for the Appellant

November 30, 2000
Vancouver, B.C.