Selected Topics in LGBTQ Rights Protection in the Common Law Provinces of Canada

A Collaboration Between Justice Cory Gilmore, Ontario Superior Court of Justice, and Dragana Rakic, Judicial Law Clerk

Ontario Superior Court of Justice
361 University Avenue
Toronto, Ontario, Canada
M5G 1T3

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The past half-century has seen remarkable – though often slow and piecemeal – progress in the recognition and protection of lesbian, gay, bisexual, transgender and queer ("LGBTQ"[1]) rights in Canada[2].

As recently as fifty years ago, same-sex sexual activity was a criminal offence in Canada: in 1967, a majority of the country's highest court upheld an indefinite preventative detention order for a man who had been declared a dangerous sexual offender because he had admitted to having had sex with other consenting, adult men and was considered likely to do so again.[3] This ruling by the Supreme Court of Canada contributed to the impetus for legislative reform that resulted in the decriminalization of same-sex sexual activity in 1969. Since then, decades of advocacy, political activism, and legal battles by the LGBTQ community have brought about a very different social and cultural landscape. Today, same-sex marriage is legal throughout Canada, discrimination on the basis of sexual orientation is prohibited by the constitution, and there is a growing awareness of the need to address the marginalization of transgendered individuals in society. Discrimination and barriers still exist in many contexts, but progress also continues to be made.

This paper sets out to provide, in part I, an overview of some of the legal mechanisms that have been used to further and protect LGBTQ rights in the common law provinces of Canada over the past several decades; in part II, to highlight some of the progress in this respect in two specific areas – equality for LGBTQ parents and their families and the right to identity documents that reflect an individual's correct gender identity; and finally, in part III, to consider the Canadian approach to balancing equality rights with other fundamental rights and freedoms in cases where conflicts arise by examining one particular case: the campaign of a private evangelical Christian university to found a law school recognized by provincial law societies.

Part I: Sources of and Mechanisms for Protecting LGBTQ Rights in the Common Law Provinces of Canada

i. The Equality Guarantee in s. 15 of the *Canadian Charter of Rights and Freedoms*

The most significant legal development with respect to rights-protection in Canada over the past half century has undoubtedly been the addition, in 1982, of the *Canadian Charter of Rights and Freedoms*[4] to the Canadian constitution, and, most relevant to the present discussion, the coming into effect in 1985 of s. 15 of the *Charter*, section 15(1) of which provides:

[1] This paper will use the acronym "LGBTQ" for simplicity but recognizes that this term is underinclusive of all of the individuals and communities affected by the issues discussed in this paper.

[2] Canada has a federal system of government, with 10 provinces and three territories, with legislative jurisdiction divided (and in some instances shared) between the two levels of government. Relevant to this discussion, the Constitution allocates legislative authority for "property and civil rights" to each province and territory, which encompasses most private relationships. On the other, the federal parliament has exclusive legislative jurisdiction over criminal law, marriage and divorce, among other things. Curiously, although each province is responsible for its own administration of justice, including provincial superior courts, all superior court justices are appointed by the federal government.

[3] *Klippert v. The Queen*, [1967] S.C.R. 822, 65 D.L.R. (2d) 698.

[4] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c. 11 [*Charter*].

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

This provision provides protection against discriminatory government action and legislation: legislation that infringes the equality right in s. 15 – and that cannot be justified as a reasonable limit on the right under the saving provision in s. 1 of the *Charter* – will be struck down as unconstitutional.

Section 15 has been interpreted as prohibiting discrimination on the basis of the prohibited grounds enumerated within the provision, as well as on the basis of other grounds that courts identify as analogous to these enumerated grounds.[5] In a 1995 case, *Egan v. Canada*,[6] the Supreme Court of Canada recognized sexual orientation as one such analogous ground under s. 15. Although in *Egan* itself, a majority of the Supreme Court held that the exclusion of same-sex couples from spousal benefits under the *Old Age Security Act* was not unconstitutional (either because it was not discriminatory or because the breach of s. 15 was a reasonable limit on the right to be free from discrimination), the recognition of sexual orientation as a prohibited ground of discrimination by the Court set an important precedent. That sexual orientation was a prohibited ground of discrimination was key to the Supreme Court's finding a few years later in the case of *M. v. H.* that the differential treatment with respect to spousal support obligations of opposite-sex and same-sex couples in conjugal, marriage-like relationships was an unjustified infringement of s. 15.[7] The prohibition against discrimination on the ground of sexual orientation in s. 15(1) was also a basis for the finding of a number of courts across Canada[8] that the exclusion of same-sex couples from the common law definition of marriage was an unjustified infringement of s. 15 of the *Charter*, and therefore, unconstitutional. These court decisions were the impetus for the eventual legalization of same-sex marriage throughout Canada via the enactment by the federal government of the *Civil Marriage Act*[9] in 2005.

With respect to discrimination against transgender individuals, although the question has not yet been considered by the Supreme Court, at least one lower court has had no trouble finding that for the purposes of s. 15, distinctions between cisgender (i.e., non-transgender) and transgender individuals are distinctions made either on the enumerated ground of sex or else an analogous ground.[10]

In addition to equality, however, the *Charter* protects a number of other rights and freedoms, including freedom of religion, freedom of association, and freedom of expression. The right to

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[5] See generally, Robert J. Sharpe & Kent Roach, *The Charter of Rights and Freedoms*, 5th ed. (Toronto: Irwin Law Inc., 2013), at p. 334; Martha Butler, "Section 15 of the *Canadian Charter of Rights and Freedoms*: The Development of the Supreme Court of Canada's Approach to Equality Rights under the Charter" (Background Paper) (Ottawa: Library of Parliament, 2013).
[6] [1995] 2 S.C.R. 513, 124 D.L.R. (4th) 609.
[7] *M. v. H.*, [1999] 2 S.C.R. 3, 43 O.R. (3d) 254.
[8] See, e.g., *Halpern v. Canada (Attorney General)* (2003), 225 D.L.R. (4th) 529, 36 R.F.L. (5th) 127 (Ont. C.A.).
[9] S.C. 2005, c. 33.
[10] See *C.F. v. Alberta (Director of Vital Statistics)*, 2014 ABQB 237, [2014] A.J. No. 420 [*C.F.*].

equality for one group can, and has, come into conflict with the rights asserted by other groups – an issue that is discussed further in part III of this paper.

ii. Provincial (and Federal) Human Rights Statutes

Protection from discrimination on a number of grounds and in particular contexts is also guaranteed by human rights statutes, which exist in every province and territory, as well as within the federal jurisdiction.[11] Human rights legislation is quasi-constitutional, in that while it cannot be relied on to strike down other legislation, it will be given primacy over other (provincial or territorial) legislation in the case of an apparent conflict.[12]

The Ontario *Human Rights Code*[13] is the human rights statute that applies to workplaces and services in Ontario that are governed by provincial law. The *Code* provides protection against discrimination on prohibited grounds of discrimination in five social areas: services, goods, and facilities; accommodation (i.e., housing); contracts; employment; and vocational associations. Although Ontario's first *Human Rights Code* was proclaimed in 1962, sexual orientation was not added as a prohibited ground of discrimination until 1986 (though this amendment was first recommended by the Ontario Human Rights Commission in 1977).[14] In 2012, the Ontario *Human Rights Code* was further amended to add gender identity and gender expression as prohibited grounds of discrimination – changes brought about by a bill that was co-sponsored by all three parties in the Ontario legislature.[15]

Currently, all provincial and territorial human rights statues explicitly include sexual orientation as a prohibited ground of discrimination.[16] At the time of writing of this paper, the human rights statutes of eight of the nine common law provinces[17] and one of three territories also explicitly prohibited discrimination on the basis of gender identity, gender expression, or both.[18] In Nunavut, one of the other two territories, legislation that will amend the territorial human rights statute to provide explicit protection against discrimination on the basis of gender identity and

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[11] See "Human Rights Law Basics" (2013) *Canadian Human Rights Reporter*, <online: https://www.cdn-hr-reporter.ca/content/human-rights-law-basics>.
[12] *Ibid*, citing *Ontario Human Rights Commission v. Simpsons-Sears*, [1985] 2 S.C.R. 536, 52 O.R. (2d) 799.
[13] R.S.O. 1990, c. H.19.
[14] "A Bit of History" *Ontario Human Rights Commission*, online: <http://www.ohrc.on.ca/en/bit-history>.
[15] "Bill 33, Toby's Act (Right to be Free from Discrimination and Harassment Because of Gender Identity or Gender Expression), 2012" *Legislative Assembly of Ontario*, online: <http://www.ontla.on.ca/web/bills/bills_detail.do?locale=en&BillID=2574&isCurrent=false&ParlSessionID=40%3A1>.
[16] "Part I – The context: sexual orientation, human rights protections, case law and legislation" *Ontario Human Rights Commission*, online: < http://www.ohrc.on.ca/en/policy-discrimination-and-harassment-because-sexual-orientation/part-i-%E2%80%93-context-sexual-orientation-human-rights-protections-case-law-and-legislation>.
[17] Quebec, like the state of Louisiana, has a civil code system of private law, based on the French Napoleanic Code.
[18] *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5 (since 2015); *Alberta Bill of Rights*, R.S.A. 2000, c. A-14 (since 2015); *Human Rights Code*, R.S.B.C. 1996, c. 210 (since 2016); *The Human Rights Code*, C.C.S.M. c. H175 (since 2012); *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1 (since 2013); *Human Rights Act*, S.N.W.T. 2002, c. 18 (since at least 2004); *Human Rights Act*, R.S.N.S. 1989, c. 214 (since 2012); *Human Rights Code*, R.S.O. 1990, c. H.19 (since 2012); *Human Rights Act*, R.S.P.E.I. 1988, c. H-12 (since 2013); *The Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1 (since 2014).

expression was passed by the territorial legislature in March 2017,[19] while similar changes have been signaled by the Yukon territorial government.[20]

The Canadian *Human Right Act*[21] is the human rights statute that governs federally regulated services and workplaces – for example, banks – across Canada.[22] The *Human Rights Act* has included sexual orientation as a prohibited ground of discrimination since 1996.[23] In May 2016, the Canadian government introduced Bill C-16, which would, among other things, amend the *Human Rights Act* to add gender identity and gender expression to the list of prohibited grounds of discrimination. Bill C-16 passed third reading in the House of Commons in November 2016, and at the time of writing of this paper was being studied by a committee of the Canadian Senate.[24]

It is important to note that although gender identity and gender expression are not yet explicitly listed as prohibited grounds of discrimination in the federal *Human Rights Act* or the human rights statutes of three other jurisdictions, transgender and gender non-conforming individuals – whom the inclusion of these grounds is meant to protect – are not without recourse against discrimination in those jurisdictions: in the absence of explicit protections against discrimination on the basis of gender identity or expression, protection against discrimination on these grounds has long been regarded in human rights jurisprudence as being based on the prohibition against discrimination on the ground of sex and/or disability (although the reliance this latter ground has also been recognized as problematic).[25]

iii. Specific Legislation

In addition to human rights legislation, other provincial (or federal) statutes may provide benefits, rights, or direct or indirect protections to LGBTQ communities and individuals. For example, Bill C-16, the federal bill that would amend the Canadian *Human Rights Act*, would also amend the *Criminal Code*[26] to extend the protection against hate propaganda to groups distinguished by gender identity or gender expression, and would explicitly add bias, prejudice, or hate on the basis of sexual identity or expression to the list of aggravating circumstances to be considered in sentencing for criminal offences.

iv. Policies

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[19] See Rob Salerno, "Nunavut passes trans-rights law" (March 14, 2017) *Daily Xtra*, online: <http://www.dailyxtra.com/canada/news-and-ideas/news/nunavut-passes-trans-rights-law-216803>; Nunavut, Legislative Assembly, *Hansard (Unedited Transcript)*, 4th Leg., 3rd Sess. (13 March 2017) at p. 66.
[20] See Rob Salerno, "Nunavut and Yukon to enact trans-rights bills" (December 13, 2016) *Daily Xtra*, online: <http://www.dailyxtra.com/canada/news-and-ideas/news/nunavut-and-yukon-enact-trans-rights-bills-211900>.
[21] R.S.C. 1985, c. H-6.
[22] "Your Guide to Understanding the Canadian Human Rights Act" *Canadian Human Rights Commission*, online: <http://www.chrc-ccdp.gc.ca/eng/content/your-guide-understanding-canadian-human-rights-act-page1>.
[23] "Part I – The context: sexual orientation, human rights protections, case law and legislation," *supra* note 15.
[24] "House Government Bill, 42nd Parliament, 1st Session, C-16" *Parliament of Canada*, online: <http://www.parl.gc.ca/LegisInfo/BillDetails.aspx?Language=E&Mode=1&billId=8269852>.
[25] See Ontario Human Rights Commission, *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, approved January 31, 2014, available online: <www.ohrc.on.ca>; *X.Y. v. Ontario (Government and Consumer Services)*, 2012 HRTO 726, 74 C.H.R.R. D/331, at para. 88 [*X.Y.*].
[26] R.S.C. 1985, c. C-46.

Discrimination and barriers faced by LGBTQ individuals may also be ameliorated – or conversely, exacerbated – by the policies adopted by governments and various public and private institutions.

One example of a policy with a potentially broad positive impact is the Ontario Human Rights Commission's 2014 *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*,[27] which aims to increase "understanding and awareness about trans people and their rights" and to "prevent and address discrimination based on gender identity and gender expression."[28] Furthermore, this policy is significant as the Human Rights Tribunal of Ontario may, and in some cases, must consider this policy, and others policies approved by the Ontario Human Rights Commission, in proceedings under the Ontario *Human Rights Code*.[29]

Policies may address the needs and rights of LGBTQ individuals in more specific contexts as well. For example, school boards may have policies on LGBTQ issues, including policies providing for trans students to use the washrooms that correspond to their gender identity. The Vancouver School Board's "Sexual Orientation and Gender Identities" policy, for example, provides that the "use of washrooms and change rooms by trans* students shall be assessed on a case-by-case basis with the goals of maximizing the student's social integration, ensuring the student's safety and comfort, minimizing stigmatization and providing equal opportunity to participate in physical education classes and sports."[30]

v. Interaction of Legal Mechanisms

The sources and mechanisms for protection of rights identified in this part do not exist in isolation but, in fact, interact. For example, the *Charter* may be relied on to address shortcomings in legislation, including human rights statues. This was done in the 1998 case of *Vriend v. Alberta*,[31] in which the Supreme Court of Canada held that the omission at that time of sexual orientation as a prohibited ground of discrimination in an Alberta human rights statute unjustifiably infringed the equality guarantee in s. 15 of the *Charter*. To remedy this shortcoming, the Court read the words "sexual orientation" into the list of prohibited grounds of discrimination in the Act. Human rights legislation, of course, may be relied on to challenge the actions or policies of certain private and public actors, which may help to bring about favorable policy changes: an instance of this is arguably by the adoption of a policy on "Gender Expression and Gender Dysphoria" by a Vancouver Catholic school board after a transgender student launched a human rights complaint against that board.[32]

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[27] *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23.
[28] *Ibid*, at pp. 6-7.
[29] *Ibid*, at p. 53; Ontario *Human Rights Code*, *supra* note 19, ss. 45.5-45.6.
[30] "ACB - R - 1: Sexual Orientation and Gender Identities" *Vancouver School Board*, online: <https://www.vsb.bc.ca/district-policy/acb-r-1-sexual-orientation-and-gender-identities>.
[31] [1998] 1 S.C.R. 493, 156 D.L.R. (4th) 385.
[32] "Human rights complaint prompts new gender policy in Vancouver Catholic schools" (16 July 2014) *CBC News*, online: <http://www.cbc.ca/news/canada/british-columbia/human-rights-complaint-prompts-new-gender-policy-in-vancouver-catholic-schools-1.2709429>.

As well, legislation other than human rights legislation may mandate the existence of policies that address discrimination: for example, Ontario's *Occupational Health and Safety Act*[33] requires employers with more than five employees to prepare and regularly review a policy with respect to workplace harassment, which includes harassment on based on sexual orientation, gender identity, or gender expression.

Part II: Progress in Two Areas – Equality for Families and Equality with Respect to Official Documents

i. Equality for Families

In Canada, matters such as adoption and certain other aspects of family law (not relating to marriage or divorce) are areas of provincial jurisdiction. Therefore, laws regarding these matters vary from province to province and progress with respect to LGBTQ equality in these areas may vary across the country at any given time.

In 1995, Ontario became the first Canadian province to allow joint or step-parent adoptions by same-sex partners when an Ontario court, in a case reported as *K. (Re)*,[34] found the prohibition on joint or step-parent adoptions by same-sex couples in the governing legislation to be unconstitutional. Ontario's *Child and Family Services Act*,[35] as it existed at the time of the court challenge, allowed for adoption by individuals regardless of sexual orientation (and had done so since 1984[36]). However, the Act provided that joint applications for adoption could only be made by "spouses," and defined "spouses" as persons of the opposite sex.[37] Further, under the Act, upon the making of an adoption order, the biological or birth parent of a child ceased to be the child's parent, unless the adoption order was made in favour of the spouse of the birth parent.[38] The constitutionality of this adoption regime was considered in the context of a series of applications for joint adoptions brought by four lesbian couples. Each of the couples had been living in a long-term committed relationship and had conceived their child(ren) by means of artificial insemination during the currency of the relationship: in each case, the decision to have a child or children was a joint one and in each case the mothers had, in the court's words, "shared equally in the joys and burdens of child rearing."[39] However, the *Child and Family Services Act* definition of spouse had the effect of precluding each of the couples from being recognized as the two parents of their child(ren) because they could neither jointly adopt the child, nor have the

[33] R.S.O. 1990, c. O.1, s. 32.0.1 and definition of "workplace harassment" and "workplace sexual harassment" in s.1(1); see generally *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23, at p. 34.
[34] *K. (Re)*, 23 O.R. (3d) 679, [1995] O.J. No 1425 (Ont. Ct. (Prov. Div.)); see Mary C. Hurley, *Current Issue Review: Sexual Orientation and Legal Rights* (Ottawa: Library of Parliament, first published October 1992, last updated May 2007), at p. 12.
[35] R.S.O. 1990, c. C.11.
[36] See *K. (Re)*, *supra* note 32, at p. 683.
[37] The *Child and Family Services Act* definition of "spouse" was, at that time, the definition of "spouse" found in Ontario's *Human Rights Code*: "the person to whom a person of the opposite sex is married or with whom the person is living in a conjugal relationship outside marriage."
[38] *K. (Re)*, *supra* note 32, at pp. 682-83.
[39] *Ibid*, at pp. 683-84.

non-birth mother adopt the child without the birth mother losing parental privileges. Thus a preliminary issue on each adoption application was whether the restriction of spouses for the purposes of adoption under the *Child and Family Services Act* unjustifiably infringed s. 15(1) of the *Charter* – a question that the court answered in the affirmative. Significantly, the Attorney General for Ontario intervened in the applications, and while counsel for the Attorney General presented a complete argument in favour of the legislation for the benefit of the court, the Attorney General's ultimate position was that the court should accept the position of the applicants.[40]

Over the following years, court challenges and legislative reform similarly changed the laws in other provinces to allow joint or step-parent adoption by same-sex spouses.[41] However, significant challenges for families headed by same-sex couples nonetheless remained. For example, despite the availability in Ontario, after 1995, of joint or step-parent adoption by same-sex couples, adoption (and other mechanisms to recognize parental relationships of non-biological parents) could only be initiated after the birth of a child. Furthermore, such mechanisms did not appear to be available to recognize more than two adults as the parents of a child.

These aspects of Ontario's legislative regime were subject to a number of court challenges in the middle of the first decade of this century. In a case reported as *A.A. v. B.B.*, the Court of Appeal for Ontario considered an application by a woman, A.A., to be declared a mother of D.D., her child and the child of C.C., who was the D.D.'s birth mother and A.A.'s long-time partner. When they decided to start a family, A.A. and C.C. had chosen to do so with the assistance of their male friend, B.B., who was the biological father of the child; while A.A. and C.C. had intended to be – and were – the child's primary caregivers, they believed that it would be in the child's best interests that B.B. remain involved in the child's life. While it was open to A.A. to seek an adoption order in order to be legally recognized as D.D.'s mother, this would have had the effect of severing B.B.'s parental relationship to D.D. – a situation that all parties wished to avoid.[42]

In its decision, the Court of Appeal for Ontario emphasized the many important consequences of the legal recognition of the parent-child relationships: determining lineage and citizenship; allowing the parent to assert rights under various laws, including those governing consent in medical contexts; and, in short, "allow[ing] the parent to fully participate in the child's life."[43] The Court concluded that while Ontario's *Children's Law Reform Act*[44] could only be read as contemplating that a child can only have two parents – one mother and one father – this aspect of the legislative scheme represented an unintentional legislative gap. The purpose of the *Children's Law Reform Act* was to declare that all children should have equal status, which at the

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[40] *K. (Re)*, *supra* note 32, at p. 682 ("Although the Attorney General, as intervenor, chose not to defend the legislation in question, and in fact urged me to agree with the position taken by the applicants, counsel nevertheless presented a very complete argument in favour of the legislation so I would have the benefit of examining both sides of the issue.").

[41] See generally Hurley, *supra* note 32, at pp. 9-15. According to the Adoption Council of Canada, there are currently no legal prohibitions against adoption by same-sex couples in any jurisdiction in Canada ("Frequently Asked Questions About Adoption" *Adoption Council of Canada*, online: <http://www.adoption.ca/faqs>.

[42] *A.A. v. B.B.*, 2007 ONCA 2, 83 O.R. (3d) 561.

[43] *Ibid*, at para. 14.

[44] R.S.O. 1990, c. C.12.

time the Act was passed, the legislature saw as requiring the recognition of equal status of children born inside and outside of marriage; the legislature "did not legislate in relation to other types of relationships because those relationships and the advent of reproductive technology were beyond the vision of the Law Reform Commission and the Legislature of the day."[45] Given the legislative gap, and the Court's finding that it would not be in the best interests of D.D. to be deprived of the legal recognition of the parentage of one of his mothers or of his father, the Court of Appeal concluded it could exercise its *parens patriae* jurisdiction to declare A.A. to be D.D.'s mother, despite the terms of the *Children's Law Reform Act*.[46]

At the time that the *A.A. v. B.B.* case was proceeding through the courts, another aspect of the Ontario scheme for recognizing parentage was challenged by a number of lesbian couples whose children were conceived through anonymous donor insemination and whose attempts to register the particulars of both mothers as parents on the children's statements of live birth were denied by Ontario's Deputy Registrar. In a case reported as *M.D.R. v. Ontario (Deputy Registrar General)*,[47] a judge of the Superior Court of Justice granted declarations of parentage for the respective non-birth mother of each of these children.[48] The judge then went on to consider the argument that the provisions of the *Vital Statistics Act*[49] that prevented the mothers from being registered as parents upon their children's births were unconstitutional as violations of the equality right in s. 15 of the *Charter*, finding that they were. The judge characterized the benefit being sought by the applicants as the ability to "register both intended parents as of right, with the resulting presumption of parentage" or, alternatively, as "access to the symbolic institution of having their names on the birth record at first instance."[50] The application judge found that the applicants were denied this benefit in a discriminatory manner and on the prohibited grounds of sex and sexual orientation: while heterosexual couples who conceive through sperm donation are able to successfully register the names of non-biological fathers on statements of live birth – which had fields for "the mother" and "the father" – lesbian mothers were not able to do the same.[51] The application judge suspended the declaration that the provisions were constitutionally invalid for one year in order to allow the legislature to remedy the deficiency. The legislature amended, as of 2007, a regulation under the *Vital Statistics Act* to allow "the mother and the other parent of the child" to certify a statement of live birth, but only where the child had been conceived by assisted reproduction using anonymous donor sperm.[52] In other situations – such as where a lesbian couple chooses to have a child using sperm donated by someone known to them – a non-birth mother would still have to wait until after a child's birth to initiate the process to be declared the child's parent.

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[45] *A.A. v. B.B.*, *supra* note 40, at para. 34.
[46] The Court noted that this holding seemed to be consistent with the position of the Ontario government: while Ontario had chosen not to intervene in *A.A. v. B.B.*, it did intervene in the *M.D.R.* case, heard at about the same time and discussed below, in which it took the position that the *Children's Law Reform Act* "could be interpreted to allow for a declaration that two women were the mothers of a child." *A.A. v. B.B.*, *supra* note 40, at para. 39.
[47] *M.D.R. v. Ontario (Deputy Registrar General)*, 81 O.R. (3d) 81, 270 D.L.R. (4th) 90 (Sup. Ct.) [*M.D.R.*].
[48] In the case of one family, a declaration of parentage had already been granted. *Ibid* at para. 5.
[49] R.S.O. 1990, c. V.4
[50] *M.D.R.*, *supra* note 45, at para. 112.
[51] See *Ibid* at para. 111-14.
[52] See O. Reg. 401/06, s. 1.

As the courts in *A.A. v. B.B.* and *M.D.R.* observed, in addition to the dignitary harms associated with being precluded from declaring the parentage of a child upon the child's birth – and the expense of a court application to have parentage recognized – an important practical concern with a scheme under which only a birth mother is recognized as a child's parent at birth is that in the unfortunate circumstance of the death of the birth mother before a declaration of parentage for the non-birth mother can be obtained, the non-birth mother would have no legal entitlement to the child. Such fears on the part of lesbian parents in Ontario (as well as frustration with being denied equal access to benefits and services available to legally recognized parents) led to a new wave of court challenges, and eventually, comprehensive legal reform in this area.[53] In 2016, the government of Ontario settled a *Charter* application with 21 applicants and acknowledged that the *Children's Law Reform Act*, and in particular the rules of parentage under that Act, as well as the *Vital Statistics Act* were in need of reform to make these regimes inclusive. Ontario consented to an order declaring the *Children's Law Reform Act* to be an unjustified infringement of s. 15(1) of the *Charter* to the extent that that Act "does not provide equal recognition and the equal benefit of the law to all children, without regard to their parents' sexual orientation, gender identity, use of assisted reproduction or family composition; and to the extent that the legislation does not provide equal recognition and the equal benefit of the law to all families." The resulting declaration of invalidity was suspended and the remainder of the application adjourned in order to give the government time to pass legislation amending the parentage regime. Ontario agreed to propose a law that would be informed by principles including equal treatment and protection of all children, pre-conception intention to parent as a basis of parentage in the context of same-sex relationships and assisted reproduction, the possibility of more than two parents, and the inclusion of trans parents who give birth to a baby.[54]

The government of Ontario did introduce such proposed legislation – the "*All Families Are Equal Act*" – which came into force in December 2016.[55] The *All Families Are Equal Act* amends the *Children's Law Reform Act* to establish new rules for parentage and makes related amendments to the *Vital Statistics Act*, and other legislation, to address birth registrations and name changes. The new provisions of the *Children's Law Reform Act* determine parentage for all purposes of Ontario law. Significantly, the new provisions use the gender-neutral term "parent" rather than "mother" and "father." The new rules of parentage provide that a birth parent is the parent of a child (subject to exceptions in the case of surrogacy) and that if the child is conceived through sexual intercourse, the person whose sperm resulted in the conception is also a parent of the child.[56] However, if a child is conceived through assisted reproduction or through insemination by a sperm donor, the spouse of the birth parent (regardless of gender) is presumed to be a parent of the child (provided the spouse consented to be the parent of the child and the birth parent is not a surrogate).[57] The new parentage rules also provide that two to four parties, one of whom is the birth parent, may enter into a pre-conception parentage agreement according

[53] See Jennifer Mathers McHenry "Ontario's laws make no sense for same-sex couples who have kids" (6 September 2016) *Precedent*, online: < http://lawandstyle.ca/law/opinion-ontarios-laws-make-no-sense-sex-couples-kids/>.
[54] Order of the Honourable Justice Chiappetta dated 22 June 2016, Ontario Superior Court of Justice, Family Court, and attached Minutes of Settlement.
[55] *All Families Are Equal Act (Parentage and Related Registrations Statute Law Amendment), 2016*, S.O. 2016, c. 23 [*All Families Are Equal Act*].
[56] *Children's Law Reform Act*, *supra* note 42, ss. 6-7.
[57] *Children's Law Reform Act*, *supra* note 42, ss. 8.

to which they agree to, together, be the parents of the child.[58] As well, the rules provide for surrogacy agreements under which up to four intended parents become the parents of a child carried by a surrogate if certain conditions are met.[59]

Although some, during the legislative debates, voiced the concern that the recognition of up to four parents under the new parentage rules would unwisely and unduly complicate matters including in family courts,[60] supporters of the legislative reform had noted that blended families with more than two parents are already a reality in Canadian society.[61] Indeed, the Ontario *All Families Are Equal Act* was not the first legislation of its kind in Canada. Rather, the drafters of the Ontario law drew on similar legislation in existence in Alberta (since 2010)[62] and British Columbia (since 2013).[63] Under such laws, families like the one in *A.A. v. B.B.* that could only be recognized by court order under the old Ontario regime, can be planned and come into being upon a child's birth.[64]

ii. Equality with Respect to Identity Documents

There has been growing recognition in recent years, both in Canada and internationally, of the discrimination faced by transgender and other gender-non-conforming individuals whose gender identity or gender expression differs from their sex as assigned at birth.[65] In its 2014 *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, the Ontario

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[58] *Children's Law Reform Act*, *supra* note 42, s. 9.

[59] *Children's Law Reform Act*, *supra* note 42, s. 10. If there are more four intended parents under such a surrogacy agreement, an application to a court for a declaration of parentage is required: s. 11.

[60] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Leg., 2nd Sess. (3 October 2016) at p. 1410 (Mr. Randy Hillier)

[61] Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Leg., 1st Sess. (10 October 2015) at p. 7255 (Ms. Cheri DiNovo) (speaking about predecessor legislation to the *All Families Are Equal Act*).

[62] *Family Law Act*, S.A. 2003, c. F-4.5.

[63] *Family Law Act*, S.B.C. 2011, c. 25, Part III. Debates in the legislature also indicate that the drafters drew on the Uniform Law Conference of Canada's 2010 *Uniform Child Status Act* (online: <http://www.ulcc.ca/en/home/86-josetta-1-en-gb/uniform-actsa/child-status-act/1371-child-status-act-2010>). See Ontario, Legislative Assembly, *Official Reports of Debates (Hansard)*, 41st Leg., 2nd Sess. (3 October 2016) at p. 530 (Hon. Yasir Naqvi) and (29 November 2016) at p. 1905 (Ms. Cheri DiNovo). While a number of other common law provinces and territories also have legislation dealing with parentage in the circumstance of assisted reproduction, the degree to which they address the circumstances of LGBTQ parents varies. For example, s. 8.1(1) of Northwest Territories' *Children's Law Act* (S.N.W.T. 1997, c. 14) provides that the spouse of a birth mother (whether same-sex or opposite-sex) is a parent of a child conceived through assisted reproduction, provided certain conditions are met. However, the provisions of the Newfoundland and Labrador *Children's Law Act* (R.S.N.L. 1990, c. C-13) use the gendered language of "mother" and "father" and only apply to opposite-sex couples (see generally, Manitoba Law Reform Commission, "Assisted Reproduction: Legal Parentage and Birth Registration" (Issue Paper, April 2014), at pp. 14-18).

[64] Catherine Rolfsen, "Della Wolf is B.C.'s 1st child with 3 parents on birth certificate" *CBC News* (10 February 2014), online: <www.cbc.ca>.

[65] *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23, esp. at pp. 3-6, 10-11, citing several Canadian and international sources including the *Yogyakarta Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (2007), online: <http://www.yogyakartaprinciples.org/principles-en/>. "Gender identity" is defined in the *Yogyakarta Principles* as "each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms."

Human Rights Commission describes the disadvantage faced by transgender and gender-non-conforming individuals as follows:

> People who are transgender, or who otherwise don't conform to gender stereotypes, come from all walks of life. They are represented in every social class, occupation, race, culture, religion and sexual orientation, and live in and contribute to communities across Ontario and around the world.
>
> Yet, "trans" people are one of the most disadvantaged groups in society. They routinely experience prejudice, discrimination, harassment, hatred and even violence. People who are in the process of "transitioning" or "coming out" are particularly vulnerable. Many issues go to the core of human dignity. Courts and tribunals have recognized this as "substantial and disturbing."[66]

One practice that has been recognized as perpetuating the disadvantage experienced by transgender individuals are laws and policies that result in discrepancies between a transgender individual's gender identity and their sex as recorded on official identity documents. To date, requirements that transgender individuals undergo sex reassignment surgery before being able to change sex designations on legal documents have been successfully challenged in a number of human rights tribunal and court cases that have also led to legislative and policy reform.

In *X.Y. v. Ontario (Government and Consumer Services)*,[67] the Human Rights Tribunal of Ontario considered such a challenge to Ontario's *Vital Statistics Act*.[68] The Act had provided, since 1978, that a person could obtain a birth certificate with a sex designation other than the one assigned at birth, but only if the person provided to the relevant government ministry documentation from two doctors certifying that the person has undergone "transsexual surgery."[69] In *X.Y.*, a transgender woman who had undergone the removal of both testes in order to obtain a change in sex designation on her birth certificate argued that the requirement that she have and certify that she had "transsexual surgery" in order to change her birth certificate to correspond to her felt gender identity infringed her right to equal treatment with respect to services. As this application pre-dated the introduction of gender identity and gender expression as prohibited grounds of discrimination in the Ontario *Human Rights Code*, the applicant argued that the requirement discriminated on the basis of sex, and in the alternative, on the basis of disability – though this alternative argument was advanced only reluctantly.[70] The Human Rights Tribunal of Ontario agreed with the applicant that the requirement that Ontario birth certificates reflect the sex assigned at birth, unless a person has "transsexual surgery" has a distinct and disadvantageous effect on transgender individuals. The Tribunal was satisfied that this distinction was substantively discriminatory as it "exacerbates the situation of transgendered persons as a historically disadvantaged group," or alternatively, because it "perpetuates stereotypes about transgendered persons and their need to have surgery in order to live in

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[66] *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23, at p. 5 (citations omitted).
[67] *Supra* note 23.
[68] *Supra* note 47.
[69] See *X.Y.*, *supra* note 23, at para. 1.
[70] *Ibid*, at paras. 2-6.

accordance with their gender identity."[71] By way of remedy, the Tribunal, pursuant to its authority to make orders for future compliance with the *Code*, ordered the government of Ontario to remove the discriminatory effect on transgender persons of the existing regime for issuing birth certificates by removing the requirement for transsexual surgery and by otherwise revising the criteria for changing sex designation on a birth registration. The Tribunal also ordered that Ontario publicize the revised criteria so that transgendered persons are aware of them.[72] Although the provisions of the *Vital Statistics Act* remain unchanged, Ontario policy now provides that proof of transsexual surgery is not required (though may be submitted in support of) an application to change the sex designation on a birth certificate.[73]

As the Ontario Human Rights Commission notes, the decision in *X.Y.* is consistent with international human rights principles,[74] and indeed, the reasoning in the decision has been followed by at least one other Canadian court. In *C.F. v. Alberta (Director of Vital Statistics),*[75] an Alberta court adopted the reasoning in *X.Y.* to find that provisions of the Alberta *Vital Statistics Act* that made proof of surgical alternation of an individual's "anatomical sex structure" a prerequisite for changing the stated sex on an individual's birth certificate to be an unjustified infringement of the equality guarantee in s. 15 of the *Charter*. The decisions in *X.Y.* and *C.F.* have apparently prompted a number of legislatures in the common law provinces to amend their vital statistics regimes to remove proof of sex reassignment surgery as a requirement for government documentation to be amended to correspond to an individual's felt or lived gender identity.[76]

Part III: Balancing Rights: The Trinity Western University Law School Litigation

While the cases discussed to this point in this paper have involved, for the most part, claims by individuals that the individual's *Charter* or other rights had been infringed, a more difficult scenarios for courts to address is one in which one individual's or group's rights come into conflict with those of another group or individual – a situation that is discussed here through the lens of ongoing litigation concerning the recognition of the Trinity Western University ("TWU") law school.

TWU is a private university in British Columbia. The university operates as an arm of the Evangelical Free Church of Canada and with an underlying evangelical Christian philosophy. Part of this philosophy is a "strong opposition to same-sex relationships and marriages, and common law relationships outside of marriage."[77] Although members of the LGBTQ community may enroll at TWU, TWU requires its students and staff to sign and adhere to the university's "Community Covenant" – a code of conduct that, in addition to a number of less controversial

[71] *Ibid*, at paras. 14-15.
[72] *Ibid*, at paras. 288-99.
[73] See "Changing your sex designation on your birth registration and birth certificate" *ServiceOntario*, online: <https://www.ontario.ca/page/changing-your-sex-designation-your-birth-registration-and-birth-certificate; *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23, at p. 36.
[74] *Policy on Preventing Discrimination Because of Gender Identity and Gender Expression*, *supra* note 23,
[75] *Supra* note 9.
[76] See *Chédor v. Canada (Citizenship and Immigration)*, 2016 FC 1205, [2016] F.C.J. No. 1218.
[77] *Trinity Western University v. The Law Society of Upper Canada*, 2016 ONCA 518, 131 O.R. (3d) 113, at para. 5 [*TWU*, ONCA].

stipulations, requires community members to abstain from sexual intimacy that "violates the sacredness of marriage between a man and a woman." Discipline for non-compliance with the Community Covenant may include suspension or expulsion from the University.[78]

TWU wishes to add a law degree to its program offerings. Wanting to ensure that the graduates of its law program would be eligible to practice law in various Canadian jurisdictions, TWU applied to each of the provincial and territorial law societies responsible for regulating the practice of law in each province and territory, as well as to a national coordinating body – the Federation of Law Societies of Canada, for approval of its proposed law school. While the Federation of Law Societies, as well as a number of provincial law societies concluded that TWU's program should be approved, approval was denied by the law societies of three provinces: British Columbia, Nova Scotia, and Ontario.

In response, TWU, along with a TWU graduate and would-be law student, Brayden Volkenant, challenged each of these decisions denying approval by way of an application for judicial review, with different results in the three provinces. The law society decisions refusing approval in British Columbia and Nova Scotia were overturned by superior courts and these lower court decisions were affirmed on appeal to the respective provincial appellate courts. By contrast, the decision of the Law Society of Upper Canada – which governs lawyers in Ontario – was upheld by both a panel of the Ontario Divisional Court[79], and subsequently by the Court of Appeal for Ontario.

In considering whether to quash the decision denying approval made by the Nova Scotia Barristers' Society, the Nova Scotia Court of Appeal limited the scope of its analysis to the issue of whether the Society had the statutory authority to refuse approval in the manner that it did. The Court of Appeal found that the Society's governing statute did not authorize it to pass a regulation that would allow the Society to decline to approve a law degree on the basis that the university granting the degree "unlawfully discriminated" in its policies on grounds prohibited by the *Charter* or Nova Scotia's *Human Rights Act*. According to the Court of Appeal, a decision made under such a regulation would amount to the Society issuing "an independent ruling" that someone has violated the Nova Scotia *Human Rights Act* or the *Charter* – a ruling the Society could not make.[80]

Furthermore, even if the regulation had been within the Society's power to make, the Court of Appeal concluded that the decision to deny approval to TWU's law school on the basis of such a regulation would be unreasonable: since neither the *Charter* nor Nova Scotia's *Human Rights Act* apply to TWU, it could not be said that TWU "unlawfully" discriminates under either enactment.[81] Having invalidated the Society's refusal to approve TWU's law school, the Court found it unnecessary to comment on the alternative argument that the Society's decision

[78] *The Nova Scotia Barristers' Society v. Trinity Western University*, 2016 NSCA 59, 376 N.S.R. (2d) 1, at paras. 1, 5-7 [*TWU*, NSCA]; *TWU*, ONCA, *supra* note 75 at paras. 6, 24.
[79] An intermediate court in Ontario made up of a panel of three Superior Court judges. Its primary jurisdiction is to review decisions of administrative bodies.
[80] *TWU*, NSCA, *supra* note 76, at paras. 48-68.
[81] *Ibid*, at paras. 69-75.

infringed TWU's and Mr. Volkenant's freedom of religion and freedom of association, as protected by the *Charter*.[82]

In contrast to the Nova Scotia Court of Appeal decision, the lower and appellate courts in both Ontario and British Columbia explicitly considered the balancing of the religious freedom of the applicants and the equality rights of LGBTQ individuals in assessing the validity of the decisions refusing approval to the proposed law school. Indeed, the Court of Appeal for Ontario described this balancing as the "crux" of its decision. It stated as follows:

> As will be seen, the crux of the appeal involves a collision between freedom of religion and equality, both of which are protected in the Charter and both of which have been defined and interpreted in a generous fashion by the Supreme Court of Canada.
>
> In *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, Dickson C.J. said, at p. 336:
>
> > A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms….
>
> The challenge in this appeal is considering the balance between freedom of religion on the one hand and equality in the context of sexual orientation on the other hand.[83]

Though their decisions had a similar focus, the British Columbia and Ontario appellate courts ultimate reached different results.

The British Columbia Court of Appeal affirmed the ruling of the chambers judge in that province that the Law Society of British Columbia's decision not to approve TWU's proposed law school was unreasonable (though for somewhat different reasons than those relied on by the chambers judge). The Court of Appeal found that in making the decision not to approve the law school in the way that it did,[84] the Society failed to balance the potential infringement of TWU's freedom of religion, guaranteed by the *Charter*, with concerns for LGBTQ equality and non-discrimination. Although where an administrative decision-maker undertakes such a balancing, a

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[82] *Ibid*, at paras. 3-4, 38. The Court did opine that it was open to the Society to enact a "properly worded regulation that establishes requirements" for admissions to the profession based on features of a law graduate's law school, but that any such regulation must serve the Society's statutory purpose to "uphold and protect the public interest in the practice of law," as "the practice of law" is defined in the Act. See *TWU*, NSCA, *supra* note 76, at paras. 76-100.
[83] *TWU*, ONCA, *supra* note 75, at paras. 12-14.
[84] Specifically, the Law Society's Benchers initially declined to declare that TWU's law school should not be approved notwithstanding preliminary approval by the Federation of Law Societies. Following input from members, however, the Benchers decided to put the issue to a binding referendum by members. The members voted in favour of denying approval, and this result was subsequently adopted by a resolution of the Benchers. *Trinity Western University v. The Law Society of British Columbia*, 2016 BCCA 423, 92 B.C.L.R. (5th) 42, at paras. 10-30 [*TWU*, BCCA].

court is required to show deference to this balancing exercise, as the Law Society here engaged in no such balancing, the Court concluded that it did not need to defer to the Society's decision.[85]

The Court then went on to consider whether, had the Law Society balanced the relevant competing considerations, it could have reasonably decided to refuse to approve TWU's law school. To answer this question, the Court engaged in its own balancing exercise. The Court had no trouble finding that the freedom of religion and conscience of TWU's faculty and students were engaged, as were the equality rights of LGBTQ persons.[86] According to the Court of Appeal the question to be asked was whether the Law Society's decision not to approve TWU's law school interfered with the freedom of religion of TWU's faculty and students no more than necessary given the statutory objectives of the Law Society's governing legislation.[87]

In conducting this balancing exercise, the Court rejected the contention that the approval of the proposed school would impede access to law school and the profession for LGBTQ students. On this point, the Court found that although the Community Covenant would likely make TWU an "unwelcoming" place for LGBTQ individuals and would "discourage most from applying to a law school at the university," TWU does not limit or ban the admission of LGBTQ students and some LGBTQ students might choose to attend the institution. Moreover, denying approval would not result in fewer choices for LGBTQ students and indeed, would "expand the choices for all students."[88] Thus, although the approval of TWU's law school has "in principle a detrimental impact on LGBTQ equality rights because the number of law school places would not be equally open to all students," given that the proposed law school would add only 60 law school spaces to about 2,500 seats in common law schools across Canada, the practical impact on access to law schools by LGBTQ students would be "insignificant in real terms," or if anything, positive due to the overall increase in law school seats.[89]

The Court also rejected the argument that the approval of TWU's law school would undermine the public interest objective of the Law Society, as it would be seen as an endorsement of the discriminatory aspects of the Covenant for two reasons. First, approval by the Law Society was not "a financial benefit" "granted in the exercise of the largess of the state," but a "regulatory requirement to conduct a lawful 'business' which TWU would otherwise be free to conduct in the absence of regulation."[90] Furthermore, in a pluralistic society, if regulatory approval is to be denied based on the state's fear of being seen to endorse the beliefs of individuals or institutions seeking licences, permits, or accreditation, "no religious faculty of any kind could be approved."[91]

Finally, the Court of Appeal firmly rejected the argument that TWU was, in effect, a "segregated community," and that accreditation of its law program would amount to an endorsement of the "separate but equal" doctrine:

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[85] *Ibid*, at paras. 80, 87-91.
[86] *Ibid*, at paras. 102, 107-8.
[87] *Ibid*, at para. 133.
[88] *Ibid*, at para. 174.
[89] *Ibid*, at paras. 179-80.
[90] *Ibid*, at para. 182.
[91] *Ibid*, at para. 184.

> 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.[92]

Ultimately, the Court concluded that "in light of the severe impact of non-approval on the religious freedom rights at stake and the minimal impact of approval on the access of LGBTQ persons to law school and the legal profession" "a decision to declare TWU not to be an approved law faculty would be unreasonable."[93]

The British Columbia Court of Appeal's decision stands in contrast to the decision of the Court of Appeal for Ontario, both in reasoning and result. The Court of Appeal for Ontario, after concluding that the decision of the Law Society of Upper Canada not to accredit TWU's proposed law school fell squarely within the Law Society's statutory mandate, considered, as did the British Columbia Court, whether the Law Society's decision not to accredit struck a reasonable balance between TWU's and Mr. Volkenant's *Charter* rights and the Law Society's statutory mandate.[94]Further, like its British Columbia counterpart, the Ontario Court of Appeal concluded that the Law Society's decision interfered with TWU's and Mr. Volkenant's *Charter*-protected freedom of religion as it had the effect of interfering with TWU's community members' ability to act in accordance with sincerely held religious beliefs in a more than trivial or insubstantial manner.[95]

However, the Ontario Court of Appeal took a somewhat different view of the countervailing factors to be balanced than did the British Columbia Court of Appeal. First, the Ontario Court of Appeal accepted, as did the Divisional Court below, the Law Society's broad view of its statutory mandate to govern the legal profession in the public interest as including a mandate to "integrate equity and diversity values into the Society's model policies, services, programs and procedures."[96] In fulfilling this mandate, the Law Society had, appropriately, over the course of its history "strived to remove discriminatory barriers to the legal profession."[97] In promoting the goal of a diverse profession and ensuring the quality of those who practice before it, it was appropriate for the Law Society to consider how discriminatory classifications would impact on these goals. Furthermore, the Court noted, the Law Society is itself subject to the *Charter* and the Ontario *Human Rights Code*, such that "*Charter* and human rights values must inform how [the Law Society] pursues its stated objective of ensuring equal access to the profession."[98] The Court of Appeal, like the Divisional Court below, had no hesitation in concluding that TWU's requirement that students sign and abide by the Community Covenant discriminated against the

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[92] *Ibid*, at para. 178.
[93] *Ibid*, at para. 192.
[94] *TWU*, ONCA, *supra* note 75, at paras. 69, 79.
[95] *Ibid*, at paras. 80-101.
[96] *Ibid*, at paras. 106-9, quoting in part from a legal opinion provided to the Law Society by Freya Kristjanson, now The Honourable Justice Freya Kristjanson of the Superior Court and *Trinity Western University v. The Law Society of Upper Canada*, 2015 ONSC 4250, 126 O.R. (3d) 1 (Div. Ct.) [*TWU*, Div. Ct.].
[97] *TWU*, ONCA, *supra* note 75, at para. 109.
[98] *Ibid*, at para. 110.

LGBTQ community on the basis of sexual orientation contrary to s. 15 of the *Charter* and the protections of the Ontario *Human Rights Code*: "the part of TWU's Community Covenant in issue in this appeal is deeply discriminatory to the LGBTQ community, and it hurts."[99]

Having identified the conflict between freedom of religion and equality rights at stake in the case, the Court of Appeal went on to find that the Law Society of Upper Canada Benchers[100] – many of whom who had given speeches in the debates before a vote on TWU's accreditation was called – were also aware of the conflict and took seriously their legal obligation to weigh the competing rights.[101] As to whether the Benchers' ultimate decision was reasonable, the Court concluded that it was. Contrary to the view reached by the British Columbia Court of Appeal, the Court of Appeal for Ontario concluded that accreditation, in this case, *was* a public benefit, and in determining whether to grant it, the Law Society was entitled to consider TWU's discriminatory admission policies and the Law Society's own obligations under the Ontario *Human Rights Code*. The Law Society's decision was faithful to Canada's international obligations to protect fundamental freedoms and did not violate the duty of state neutrality. Ultimately, taking the extent of the impact on TWU's freedom of religion and the Law Society's mandate to act in the public interest into account, the Law Society's decision was a reasonable balance between the two that should not be disturbed.[102]

Not surprisingly, given the arguably divergent results reached by three provincial appellate courts and the public importance of the underlying issues, the Supreme Court of Canada has granted leave to hear appeals of the decisions of the British Columbia and Ontario courts of appeal in this case.[103]

Conclusion

This paper has attempted to provide an introduction to some of the mechanisms that LGBTQ advocates have relied on – and advocated for – in furthering rights for LGBTQ individuals and communities in Canada. While this paper has focused, in part, on some of the strides that Canadian common law provinces have made in recognizing rights and working to promote the inclusion of LGBTQ individuals, much work remains to be done. In continuing to highlight and work to overcome barriers to full inclusion of LGBTQ individuals and communities in Canadian society, however, advocates will undoubtedly continue to build on some of the mechanisms and successes identified above.

[99] *Ibid*, at paras. 115-19, quoting in part *TWU*, Div. Ct., *supra* note 93, and other sources.
[100] The elected and appointed members of the Board of Directors of the Law Society.
[101] *TWU*, ONCA, *supra* note 75, at paras. 120-28.
[102] *Ibid*, at paras. 129-43.
[103] As of the writing of this paper, the appeals are tentatively scheduled to be heard in November 2017.