Sex, religion, and a private university pave a bumpy road to the Supreme Court

There is nothing like sex and religion to ignite a heated debate. Once again, such a debate has found its way to the courtroom and is scheduled to be heard by the Supreme Court of Canada on November 30, 2017.

Three provincial courts of appeal have now weighed in on the dispute over a university's proposed law program that has pitted the religious freedoms of evangelical Christians against the equality rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals, both of which are guaranteed by the *Canadian Charter of Rights and Freedoms*.[1]

This article focuses on the key findings of the Courts of Appeal in B.C., Ontario, and Nova Scotia, some of which are being appealed further to the Supreme Court of Canada.

Sex, religion, and Trinity Western University

Trinity Western University (TWU) – a private evangelical Christian University located in B.C. – wants to offer its own law degree program. Before being admitted to the program, students must agree to follow TWU's Community Covenant ("Covenant"), which is based on Christian beliefs derived from the Bible.[2] This is where the dispute begins.

The Covenant says that students may not engage in any sexual conduct, unless that conduct occurs within a heterosexual marriage.[3] Pre-marital sex and expressions of sexual intimacy within a same-sex union violate the Covenant, and are punishable by expulsion or suspension from TWU.[4]

Prospective LGBTQ students feel that TWU's Covenant discriminates against them in terms of their life at and admission to TWU because the Covenant punishes same-sex couples for expressions of their sexual orientation.[5] Meanwhile, TWU argues that it is free to establish a law program with a code of conduct that fosters Christian values, and that Christian students should not be denied the opportunity to study law in such an environment.

The Law Societies

Provincial laws give law societies the power to set educational requirements and to determine who can enter the legal profession in a given province.[6] The Law Societies in B.C., Ontario, and Nova Scotia have refused to recognize the graduates of TWU's law program as qualifying to article and practice law.[7] The program's graduates would therefore be unable to apply to practice law in those provinces immediately after completing their law degree.[8] TWU has challenged the "accreditation" decisions made by the Law

Societies in the courts of their respective provinces.

The major issues

The Courts of Appeal in B.C., Ontario, and Nova Scotia were tasked with answering the following key questions:

1. Do the Law Societies have the authority to refuse to accredit TWU's law school graduates?
2. Did the Law Societies follow a decision-making process that properly weighed law society objectives against the *Charter* values at stake?
3. Do the decisions of the Law Societies reasonably balance law society objectives and *Charter* rights?

Issue 1: Authority of law societies to refuse the accreditation of TWU's law graduates

A law society may only refuse to admit the graduates of a particular school to the legal profession if provincial laws authorize the law society to do so.

In **British Columbia,** the Court of Appeal found that the *Legal Profession Act* granted the Law Society of British Columbia (LSBC) the power to refuse accreditation on the basis of TWU's Covenant, because one of the Law Society's objectives is to preserve and protect the rights and freedoms of all persons.[9]

The **Ontario** Court of Appeal (ONCA) similarly said that the Law Society of Upper Canada (LSUC) could deny accreditation in order to promote equality and diversity in the profession.[10]

Meanwhile, the **Nova Scotia** Court of Appeal (NSCA) concluded that the Nova Scotia Barristers' Society (NSBS) acted outside of its authority when it refused to accredit TWU's graduates.[11]

Issue 2: Weighing law society objectives against *Charter* values

Both the British Columbia Court of Appeal (BCCA) and the ONCA agreed that when law societies make an accreditation decision, they must carefully consider their governing objectives and the *Charter* rights of the people affected by their decisions.[12] The Law Societies share an overarching public interest objective, which is furthered by promoting diversity and equal opportunity in the legal profession, and protecting the rights and freedoms of all people.[13]

The **BCCA** found that the LSBC failed to engage in a process that first assessed the Law Society's objectives, and then carefully balanced those objectives with concerns about the rights and freedoms of TWU, TWU's Christian students, and the LGBTQ community.[14] Instead, the LSBC refused to accredit TWU's graduates because that was the decision voted

for by a majority of lawyers in the province.

In **Ontario**, the **ONCA** concluded that the LSUC properly weighed its objectives against the *Charter* values affected by its decision. The LSUC considered multiple legal opinions and reports, as well as input from the public, members of the Law Society, and TWU, and made its accreditation decision by balancing its objectives against the values expressed in that process.[15]

The **NSCA** did not make a finding on this issue because the Court had already set aside the NSBS' decision for being outside of the Law Society's powers.

Issue 3: Striking a reasonable balance between law society objectives and *Charter* rights

It is not only important *how* a law society makes its accreditation decision, but also that the decision *itself* be reasonable. In *Doré v Barreau du Quebec*, the Supreme Court of Canada said that the decision of an administrative body (such as a law society) is reasonable if it reflects a proportionate balance between *Charter* protections and the administrative body's objectives.[16] Therefore, a law society's accreditation decision must not disproportionately impact the religious freedoms of one group in order to promote the equality rights of another.

The **BCCA** found that the LSBC's refusal to accredit TWU's graduates had a severe negative impact on the religious freedoms of TWU's prospective Christian students (and potentially, on the rights of TWU itself).[17] The immediate result of the decision was that the B.C. government retracted its approval of TWU's law program, stopping the program from opening.[18] Christian students are now unable to study law in an environment that fosters their sincerely held religious beliefs.[19]

In comparison, the Court noted that if the LSBC had decided to accredit TWU's graduates and therefore exposed LGBTQ students to discrimination, the impact on those students would be "minimal." [20] LGBTQ students are not expressly barred from admission to TWU, and there are many options besides TWU available for attending law school in Canada.[21] The BCCA set aside the LSBC's decision for being an unreasonable interference with religious freedoms.

The **ONCA** concluded that the LSUC's refusal to accredit TWU's graduates reflected a reasonable balance of *Charter* rights and the Law Society's public interest objectives.[22] While the decision makes it more difficult for TWU to attract students (because they would be unable to immediately apply to article in Ontario), the LSUC's decision does not directly stop TWU from offering a law program.[23] The Court found that the importance of the LSUC's decision for promoting equality and diversity in the legal profession justified the decision's impact on religious freedoms.[24]

As the balancing exercise was not an issue considered by the **NSCA**, the Court did not make a finding on this point.

What next?

Ultimately, the NSCA found that the NSBS acted outside of its government-granted powers when it refused to accredit TWU's law graduates. Meanwhile, the BCCA and the ONCA agreed that the Law Societies in B.C. and Ontario had the authority to refuse to admit TWU's graduates to the legal profession.

On the key issues of whether the Law Societies followed an appropriate rights-balancing approach while making their accreditation decisions, and whether those decisions were reasonable, the BCCA and the ONCA arrived at different conclusions. The BCCA reversed the LSBC's decision to refuse accreditation, while the ONCA upheld the LSUC's decision to not accredit TWU's graduates.

The Supreme Court has now agreed to hear the appeals from the decisions made by both the BCCA and the ONCA at the end of November 2017.[25] Once a final decision is reached, we will discover how the Supreme Court reconciles the opposing conclusions formed by the Courts of Appeal. Canada's highest court may also provide further insight into how conflicts between rights and freedoms that are guaranteed in the *Charter* can be resolved.

For related reading see:

- When Charter Rights Collide: Trinity Western University at the British Columbia Court of Appeal
- Trinity Western University v. Ontario and Nova Scotia

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[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, ss 2(a), 15.

[2] *Trinity Western University v Law Society of Upper Canada*, 2016 ONCA 518 at paras 6, 22 ; *Trinity Western University v Law Society of British Columbia*, 2016 BCCA 423 at para 7 ; Trinity Western University, "Community Covenant Agreement" (2014), online: <www8.twu.ca/studenthandbook/university-policies/community-covenant-agreement.html> .

[3] *Covenant, ibid*.

[4] *Trinity Western BCCA, supra* note 2 at para 15; *Trinity Western ONCA, supra* note 2 at para 28; *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59 at para 8 .

[5] *Trinity Western BCCA, ibid* at paras 170-172; *Trinity Western ONCA, ibid* at para 6.

[6] See e.g. *Legal Profession Act*, SBC 1998, c 9, ss 3, 21(1)(b) ; *Legal Profession Act*, SNS

2004, c 28, s 4(2)(a)-(c); *Law Society Act*, RSO 1990, c L-8, s 4.1, 4.2.5 .

[7] *Trinity Western BCCA, supra* note 2 at para 30; *Trinity Western ONCA, supra* note 2 at paras 9-10, 49.

[8] *Trinity Western BCCA, ibid* at para 168; *Trinity Western ONCA*, *ibid* at paras 34-35, 49. It should be noted that graduates of TWU's law program may still be able to work in provinces where the governing law society has refused to recognize TWU as an "approved" or "accredited" faculty if the students meet certain entrance requirements, similar to those set for foreign trained lawyers. See Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 CJWL 148 at 167.

[9] *Trinity Western BCCA, ibid* at paras 58-59.

[10] *Trinity Western ONCA, supra* note 2 at paras 108-111.

[11] *Trinity Western NSCA, supra* note 4 at paras 63-67, 70-74.

[12]*Trinity Western ONCA, supra* note 2 at paras 68, 112-113; *Trinity Western BCCA, supra* note 2 at paras 80, 84, 89, citing *Doré v Barreau du Quebec*, 2012 SCC 12 at paras 55-56 .

[13] *Trinity Western BCCA, ibid* at paras 152, 164; *Trinity Western ONCA, ibid* at paras 108-111; *LPA SBC*, *supra* note 6, s 3; *LSA RSO*, *supra* note 6, s 4.2.3.

[14] *Trinity Western BCCA*, *ibid* at paras 85, 89-91.

[15] *Trinity Western ONCA, supra* note 2 at paras 121-125.

[16] *Supra* note 12 at paras 7, 56-58.

[17] *Trinity Western BCCA, supra* note 2 at paras 107, 168.

[18] *Ibid* at paras 9, 31. Even if B.C.'s Minister of Advanced Education re-approved the opening of TWU's law program, a program whose graduates are unable to apply to practice law in the major markets of B.C. and Ontario may potentially be viewed by the University as pointless, and could effectively stop the program from opening.

[19] *Ibid* at paras 116, 168.

[20] *Ibid* at paras 179, 191.

[21] *Ibid* at paras 178-179.

[22] *Trinity Western ONCA, supra* note 2 at paras 129, 143.

[23] *Ibid* at paras 97-99. The ultimate decision on whether or not a university can offer a law degree program lies with the provincial government, regardless of whether or not a law society recognizes the education of the program's graduates.

[24] *Ibid* at paras 130-143.

[25] *Ibid*, leave to appeal to SCC granted, 37209; *Trinity Western BCCA*, *supra* note 2, leave to appeal to SCC granted, 37318.