SCC clarifies freedom of religion, gives law societies license to limit it

On June 15, 2018, the Supreme Court of Canada released a highly-anticipated pair of decisions: *Law Society of British Columbia v Trinity Western University*[1] and *Trinity Western University v Law Society of Upper Canada*.[2] These also happened to be the last two decisions of former Chief Justice Beverley McLachlin's career on Canada's highest court. The Supreme Court upheld the decisions of law societies in British Columbia (B.C.) and Ontario, both of which had refused to approve Trinity Western University's law school. The proposed law school is an evangelical Christian law school that requires its students to sign a code of conduct. The Supreme Court addressed two important constitutional issues:

1. What does freedom of religion protect?
2. When can administrative bodies such as law societies, acting under government authority, breach *Charter* rights?

The Supreme Court upheld the government's broad power to define and act in the public interest. It also limited the scope of protection for freedom of religion.

Background

Trinity Western University (TWU) is a private evangelical Christian university in B.C. All students at TWU have to sign a code of conduct (known as the Community Covenant) that sets rules for student behaviour. One of the rules is that students cannot have sexual relations outside of marriage between a man and a woman. The Supreme Court found that this rule was grounded in evangelical Christian belief.

TWU wanted to open a law school. For their graduates to be able to practice law, it needed approval from the provincial law societies in Canada. Law societies get their power from government, including the power to decide who can practice law in their province.[3] According to the laws which give them this power, law societies must act in the public interest.[4] The public interest is a very broad concept and what it requires depends on the particular context.

The law societies in B.C. and Ontario decided not to approve TWU's law school. Their view was that TWU's code of conduct would have made it difficult for LGBTQ students to attend. They also felt it would go against the public interest to approve a law school that set up such barriers. Because the B.C. law society did not approve TWU's law school, the B.C. government did not allow TWU to start operating it.

TWU claimed that the law societies' decisions violated their *Charter*-protected right to

freedom of religion, as their code of conduct—the basis for rejecting the law school—was based on evangelical Christian beliefs. Students interested in attending TWU's law school also claimed a belief in the importance of studying in an environment where other students would act in accordance with their beliefs. TWU asked the courts in B.C. and Ontario to review the law societies' decisions. TWU won in B.C. at the Court of Appeal and lost in Ontario—both decisions ended up at the Supreme Court of Canada.

The Decisions

The Supreme Court upheld the decisions of both law societies. The cases turned on three issues: the purpose of law societies, the definition of religious freedom, and how the law societies balanced their purpose and the Charter protected freedom of religion against each other. Law societies must act in the public interest—this includes protecting the rights and freedoms of citizens and ensuring that lawyers act competently and with integrity.[5] When they make decisions that affect *Charter* rights, law societies' decisions must not affect those rights any more than is necessary to meet the law societies' objectives. Law societies, like other government bodies, have a fair amount of leeway in making decisions. A decision does not have to be the same one that a court would make, but it has to be reasonable. That is, courts that review decisions of law societies will only overturn them if they are not within a range of outcomes that a reasonable decision-maker could have made.

TWU's freedom of religion was infringed, but not significantly

The Supreme Court said that the law societies infringed the religious freedom of the TWU community under section 2(a) of the *Charter*. To show that the law societies infringed religious freedom, TWU had to first demonstrate

1. A sincere belief in a religious practice or doctrine, and
2. That they were prevented from acting on that belief in a manner that is more than trivial.

Here, the Supreme Court found that the TWU community had a sincere belief that studying in an environment where everybody follows the same rules of conduct is better for spiritual development. In this case, the code of conduct provided the rules for everybody to follow. The Supreme Court also found that the law societies' denial of TWU's law school prevented TWU from acting on that belief in the context of a law school. The Supreme Court found this to be a non-trivial infringement.

Although freedom of religion was infringed in this case, the Supreme Court said it did not deserve as much protection as courts had given it in previous cases. This was for two reasons. First, TWU's mandatory code of conduct is not absolutely required by its religious beliefs. For evangelical Christians, studying law in a religious environment governed by certain rules is preferred, but not necessary, for spiritual growth. This, the Supreme Court found, made the limit on freedom of religion less serious, and thus less worth protecting.

Second, the Supreme Court noted that the code of conduct would restrict LGBTQ

individuals from enrolling at TWU. Despite the fact that attending TWU is optional (as other law schools are available), the Supreme Court found that restriction created a harmful effect. The harmful effect also made freedom of religion less worth protecting in this case.

Public interest outweighs freedom of religion

Because the law societies' decisions infringed TWU's religious freedom—even if the infringement was not significant—the law societies still had to balance religious freedom with the law societies' objectives. This required the law societies to consider whether there were other possibilities which could better protect religious freedom while still accomplishing their objectives. The courts also had to consider how serious the limit on religious freedom was when compared with the benefits of meeting the law societies' objective of protecting the public interest.

Here, given TWU's proposal to open a law school, the law societies were faced with only two possibilities: either to give or deny accreditation of students from TWU to their law societies. The Supreme Court said that the law societies acted reasonably, because their decisions to reject the law school were a reasonable balance of the Charter-protected right to freedom of religion and their duty as law societies to protect the public interest. This was both because religious freedom was not greatly limited by their decisions and because the benefits of achieving the law societies' objectives were significant.

The Supreme Court ruled that the decisions of the law societies significantly advanced the objectives of maintaining equal access and diversity in the legal profession and preventing harm to the LGBTQ community. It also said that approving TWU's law school would have weakened public confidence in the justice system. This is because the public might have seen the law societies as approving or condoning the restriction of LGBTQ individuals from the legal profession. TWU argued that the law societies' mandates did not allow them to consider anything other than the competency of potential graduates. But the Supreme Court said that law societies had the discretion to define "public interest" to include these other considerations.

Because the benefits of the decisions—maintaining equal access and diversity and preventing harm—outweighed the negative impacts on freedom of religion, the law societies' decisions were reasonable.

Conclusion

The Supreme Court's decisions may have offered a preview of how it will approach future cases involving freedom of religion. The reasoning in the TWU case suggests that when the government limits *Charter* rights while pursuing public interest-related goals, such as equality or non-discrimination, the courts will not scrutinize the government's objectives too closely, but will largely defer to the government's framing of the issue. This is especially so where the government tries to advance a particular view or value by excluding or withholding support (financial or otherwise) from those holding other views.

One such other case involves the federal government's Summer Jobs Program, which offers grants to employers to employ students during the summer. This year, the federal government added a condition for employers to receive the grant. Employers had to check a box indicating that the job and the employer's core mandate respected the values of the *Charter*, including, controversially, "reproductive rights."[6] This was done to allow the government to withhold funding from groups that advocated against abortion.[7] Using the reasoning from the TWU cases, it seems likely that a court would weigh the government's goal of protecting *Charter* values more heavily than an employer's right not to affirm those values. In other words, a court will uphold the right of the government to deny funding to a religious group that does not affirm a woman's right to abortion.

[1] 2018 SCC 32.

[2] 2018 SCC 33.

[3] *Legal Profession Act*, SBC 1998, c 9, s 14.

[4] *Ibid*, s 3.

[5] *Ibid*.

[6] Amanda Connolly, "Canada summer jobs program will no longer fund anti-abortion, anti-gay groups" (15 December 2017), *Global News*, online: <https://globalnews.ca/news/3914528/canada-summer-jobs-anti-abortion-anti-gay-groups/>.

[7] *Ibid*.