

TOP FIVE 2016

Each year at OJEN's Toronto Summer Law Institute, former Ontario Court of Appeal judge Stephen Goudge presents his selection of the top five cases from the previous year that are of significance in an educational setting. This case summary and related questions, based on his comments and observations, is appropriate for discussion and debate in the classroom.

TRINITY WESTERN UNIVERSITY v THE LAW SOCIETY OF UPPER CANADA, 2016 ONCA 518

Date Released: June 26, 2016

Full decision: <http://www.ontariocourts.ca/decisions/2016/2016ONCA0518.pdf>

Facts

Trinity Western University (TWU), the appellant, is a private evangelical Christian university in Langley, British Columbia. All students who attend TWU are required to sign a "community covenant" to pledge that their lifestyle aligns with biblical teachings. The covenant requires students to abstain from things like using obscene language, stealing, watching pornography, and engaging in sexual intimacy "that violates the sacredness of marriage between a man and a woman".

TWU planned to establish a law school and applied to the Law Society of Upper Canada (LSUC) for accreditation. If accredited, this would mean that TWU Law School graduates would be able to work as lawyers in Ontario. LSUC, however, refused to approve the school's request for accreditation on the basis that the "community covenant" was discriminatory to members of the LGBTQ community.

Procedural History

The Law Society of Upper Canada, the respondent, refused to accredit the university's proposed law school. The effect of the refusal was that the university's future graduates would be ineligible to practice law in Ontario.

The university appealed the decision of the Law Society through a legal process called judicial review. Judicial review is the process where a judge reviews the decision of an administrative body (like the Law Society of Upper Canada) to make sure that the administrative body is acting within the law.

A unanimous panel of the Ontario Divisional Court upheld the Law Society's decision that Trinity Western's law school should not be accredited.¹ The decision was appealed to the Court of Appeal for Ontario.

¹ See *Trinity Western University v. Law Society of Upper Canada*, 2015 ONSC 4250

Issues

1. Did the Law Society of Upper Canada act reasonably by refusing to accredit Trinity Western University's proposed law school?
2. Did the Law Society of Upper Canada engage in a proportionate balancing of freedom of religion and equality?

Decision

The Ontario Court of Appeal unanimously upheld the decision of the Ontario Divisional Court. It found that the Law Society acted reasonably, and balanced freedom of religion and equality.

The Court of Appeal found that although the decision did infringe on the University's freedom of religion, the decision to not accredit TWU represented a reasonable balance between TWU's freedom of religion under s. 2(a) of the *Charter* and the LSUC's statutory objective to ensure that everyone who is qualified has an equal opportunity to a legal education. The LSUC successfully argued that no one is denied access to an accredited law school on discriminatory grounds.

Ratio

The Law Society reasonably balanced the religious freedom of the university against the need for equality in the legal profession as a matter of public interest.

Reasons

The Court of Appeal reasoned that Law Societies play an important role in ensuring equality of admission to the legal profession. The Court found there was nothing wrong with a Law Society scrutinizing the admissions process of a law school in deciding whether to accredit the law school. In doing so, the Law Society is permitted to, for example, take into account the impact of a community covenant on LGBTQ students.

The Law Society was also entitled to consider that TWU is unique among faith-based universities in imposing formal policies that discriminate on the basis of sexual orientation. The Court balanced freedom of religion with equality rights by finding that the Law Society was not preventing the practice of a religious belief but rather denying a public benefit (i.e. accreditation) because of the impact of the religious belief on others (i.e. specifically members of the LGBTQ community).

The Court of Appeal commented on the role of human rights in the Law Society's decision. It noted that while the university does not have to comply with the Ontario *Human Rights Code*, the Law Society does. In making its decision, the Law Society was acting in accordance with its obligation under s. 6 of the *Human Rights Code*, which states that:

Vocational associations

6. Every person has a right to equal treatment with respect to membership in any trade union, or occupational association or self-governing profession without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identity, gender expression, age, marital status, family status or disability.²

Follow Up

In February 2017, the Supreme Court of Canada announced that it would hear the appeal from Trinity Western University. The case is scheduled to be heard at the SCC in late 2017.⁴

The Court then considered the role of international law and found that the decision of the Law Society complies with the *International Covenant on Civil and Political Rights*, which says that religious freedom should only be limited in certain instances, including where necessary to protect the fundamental rights and freedoms of others.³

The Court found that the Law Society did not violate any rule of state neutrality on religious freedom. That is, just because the subject matter of the Law Society's decision had a religious dimension does not mean that the Law Society could not take a position on it.

² Human Rights Code, R.S.O. 1990, c. H.19 at s. 6.

³ *International Covenant on Civil and Political Rights*, 19 December 1966, 999 UNTS 171 art 18 (entered into force 23 March 1976, accession by Canada 19 May 1976).

⁴ See <https://scc-csc.lexum.com/scc-csc/scc-l-csc-a/en/item/16424/index.do>

DISCUSSION

1. What is the role of the Law Society of Upper Canada (LSUC)? What is its importance in this case?
2. What group did Trinity Western University's "community covenant" target and how?
3. What reasons did the Court of Appeal provide for supporting the LSUC's decision?
4. Why do you think the courts referred to international law to show that the LSUC's decision was reasonable?
5. Why do you think the Supreme Court of Canada agreed to hear the appeal from TWU? What do you think the Court will decide?