

TOP FIVE 2018

Each year at OJEN's Toronto Summer Law Institute, a judge from the Court of Appeal for Ontario identifies five cases that are of significance in the educational setting. This summary, based on these comments and observations, is appropriate for discussion and debate in the classroom setting.

LAW SOCIETY OF BRITISH COLUMBIA v TRINITY WESTERN UNIVERSITY, 2018 SCC 32

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<https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17140/index.do>

(Note: companion case is *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33.

Available here: <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/17141/index.do>)

Facts

Trinity Western University (TWU) is a private Evangelical Christian university located in British Columbia. As part of its religious mandate, Trinity Western requires that all students sign a 'Community Covenant' or a code of conduct based on rules from their religion. All members of the school community must agree to and follow the Community Covenant. One requirement of the Covenant is that students abstain from all sexual activity outside of marriage between a man and a woman.

In 2010, TWU submitted a proposal to the Federation of Law Societies (the body regulating legal education in Canada) to open its own law school and in 2013 the Federation approved the proposed school. However, every province has a Law Society – a body created by law whose broad purpose is to regulate lawyers and the legal profession in the public interest. One of the Law Society's roles is to accredit law schools so that law degrees from that

school qualify law school graduates to practice law. Therefore, for graduates of TWU's proposed law school to be able to practice law, the school also had to be accredited by the law societies.

TWU applied for accreditation in both British Columbia and Ontario. The controversy was whether TWU's Community Covenant violated equality rights, particularly those of the LGBTQ community, so that accrediting the school would violate the public interest. At the same time, an opposing issue was whether not accrediting the law school would violate TWU students' religious freedom. The Law Society of Upper Canada ("LSUC" as it was then, now known as the Law Society of Ontario or "LSO") and the Law Society of British Columbia (LSBC) each came to the conclusion that the Community Covenant infringed upon equality rights and risked damaging diversity in the legal profession, and denied accreditation to TWU in their respective provinces.

Background

Section 2(a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") states that, "Everyone has the following fundamental freedoms: (a) freedom of conscience and religion."

Section 15 of the *Charter* states that: "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."

Section 1 of the *Charter* states that, "The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

In *Doré v Barreau du Québec*, a Supreme Court case from 2012, the Court decided that when regulatory bodies (like Law Societies) are making decisions that limit *Charter* rights they must follow certain steps to "demonstrably justify" any decision that violates *Charter* rights. The decision maker must proportionally balance their objective (like the public interest) with the right at stake (like religious freedom).

Procedural History

Trinity Western University and one of its students asked the British Columbia Supreme Court (BCSC) to review the LSBC's decision not to accredit the law school. The Court held that because the LSBC relied on an all-membership vote, they did not properly consider all the issues. Therefore, the decision not to accredit was not valid.

The LSBC appealed this decision to the British Columbia Court of Appeal (BCCA). The appeal court agreed with the BCSC that the Law Society did not choose the right decision method and did not properly consider the issues. The BCCA also concluded that the Law Society did not properly balance the competing religious freedom and equality rights. The Court of Appeal held that not accrediting the law school would severely infringe the TWU student's religious freedom. Further, accrediting the law school would have a limited negative effect on equality rights.

Notably, the Ontario courts decided differently. Both the Ontario Superior Court of Justice and the Court of Appeal for Ontario found in favour of the LSUC.

The LSBC appealed the BCCA's decision to Supreme Court of Canada (SCC).

Issues

1. The primary issue in the case was whether the Law Society's decision not to accredit was reasonable, meaning whether that decision was a legally valid option. However, within this question of reasonableness, the Supreme Court also considered the following questions:
 - a. Does governing the legal profession in the public interest include taking into consideration diversity, minority rights and potential harm to LGBT students?
 - b. Is Trinity Western University students' freedom of religion, as guaranteed by s.2(a) of the *Charter*, infringed by not accrediting the law school?
 - c. If the right to religious freedom is violated, is not accrediting TWU a proportionate balance between the competing interests - equality and religious freedom?

Decision

Appeal allowed (with Justices Côté and Brown dissenting). The Law Society of British Columbia's decision not to accredit was reasonable. It is within the definition of the public interest to consider minority rights and sexual diversity in the legal profession. In this case, it was reasonable to conclude that the covenant will have a negative impact on equality rights.

Furthermore, while not accrediting the law school may restrict religious freedom, the Court held that that restriction is minor because studying in a religious environment is a preference and not a religious obligation. According to the majority of the Court, not accrediting the law school, even though it restricts religious freedom, is an appropriate balance between religious and minority rights at issue.

Ratio

Law societies have broad authority to regulate the profession in the public interest, and this includes considering law school admission policies and minority rights. When a court reviews a decision made by the Law Society, they should ask whether the decision maker properly balanced the *Charter* rights at issue. Because not accrediting TWU's law school only has a minor impact on religious freedom, the Law Society's decision proportionally balances the equality and religious rights at stake.

Reasons

The Supreme Court justices were deeply split on the issues in this case, so there are many sets of reasons.

Five justices wrote the majority opinion that held that the Law Society's decision was reasonable. First, they held that the LSBC is entitled to consider law school admission policies as part of their responsibility for regulating the profession in the public interest. Regulating the profession means more than ensuring that the law school graduates meet all the technical requirements to become lawyers. Rather, the Law Society is also responsible for ensuring that the profession is diverse and respect minority rights and equality.

Next, the majority asked whether the decision violated freedom of religion. Religious freedom is violated when a decision interferes with a person's sincerely held belief in a substantial way. In order to demonstrate that religious freedom has been violated, the claimant has to show that they have a sincerely held religious belief that has been seriously violated by state action. In this case, the majority said that because the Law Society's decision prevents TWU's students from studying law in a religious environment, not accrediting the law school violates students' freedom of religion.

Since TWU students' religious freedom was violated, the next question was

whether this violation is reasonable. The majority noted that the Law Society was faced with one of two options: either to accredit or not. The majority held that accrediting TWU's law school would not have advanced the Law Society's goal of promoting the public interest. Further, while not accrediting violates freedom of religion, the majority considered the violation minor because studying in a religious environment is a religious preference (and not a requirement of their faith). The majority also decided that freedom of religion can be limited when it harms others. Because not accrediting the law school would advance the public interest, and the violation was minor, the Law Society's decision is a proportionate balancing of interests and hence, is reasonable.

Both Chief Justice McLachlin and Justice Rowe wrote concurring opinions, meaning they agreed with the majority's outcome but not their reasons. Chief Justice McLachlin found that not accrediting TWU's law school was a serious infringement of religious freedom. Nevertheless, it is important for the Law Society not to support discriminatory practices and therefore the decision remains reasonable. Justice Rowe, on the other hand, held that TWU's religious freedom was not infringed in this case. According to Justice Rowe, there was no infringement because religious freedom only protects an individual's right to

believe and to express those beliefs through practice. This means that freedom of religion does not include any communal aspect of religion.

Justices Côté and Brown disagreed with the majority. According to Justices Côté and Brown, the Law Society's role is to ensure that law school graduates are qualified to practice law. The Law Society should not consider law school admission policies when deciding whether or not to accredit a law school. Furthermore, regulating the profession in the public interest means that the Law Society should consider the interests of all minorities, including religious minorities. Because the Law Society took into account considerations beyond professional qualifications when deciding whether to accredit TWU, the decision was invalid.

DISCUSSION

1. What are the main *Charter* arguments raised in this case?
2. What kinds of intimate personal relationships other than those between members of the LGBTQ community might be affected by TWU's Community Covenant?
3. Is studying in a religious environment part of practicing one's religion? Should it be protected by the Constitution?
4. Why might the SCC have determined there was a greater public interest in protecting the minority rights of LGBTQ people than the religious rights of TWU?
5. How should the public interest be defined and who is responsible for defining what is in the public interest?