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## **TRINITY WESTERN UNIVERSITY WINS IN B.C.C.A.**

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*By Jennifer M. Leddy\**

### **A. INTRODUCTION**

On November 1, 2016, a five member panel of the [Court of Appeal of British Columbia](#) (“B.C.”) (the “Court”) unanimously upheld the decision of the B.C. Supreme Court to quash the decision of the Law Society of B.C. (“LSBC”) not to accredit the proposed law school of Trinity Western University (“TWU”). The Court affirmed that the case raised “important issues about tolerance and respect for differences in a diverse and pluralistic society.”

### **B. BACKGROUND**

TWU is a private evangelical Christian university in British Columbia. Students and faculty must sign a faith based Community Covenant which requires that they adhere to certain behavior, including abstaining from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” While the governing body of the LSBC had initially approved the accreditation of the law school, they later agreed to be bound by a referendum of its members when its decision was questioned on the grounds that the Community Covenant discriminated against lesbian, gay, bisexual, transgendered and queer persons (“LGBTQ”). Similar objections were voiced in hearings before the Law Society of Upper Canada (“LSUC”) and the Nova Scotia Barristers’ Society (“NSBS”).

The hearings before the various law societies occurred after the Federation of Law Societies of Canada accredited the TWU Law School on December 16, 2013 and the B.C. Government approved the granting

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of degrees to its graduates. In December 2014, the B.C. Government revoked its approval of the law school following the decisions of the NSBS, LSUC and LSBC not to accredit TWU's proposed law school on the basis that the Community Covenant was discriminatory. The LSUC decision not to approve the proposed law school was upheld by the Ontario Court of Appeal, however a similar decision by the NSBS was not upheld by the Nova Scotia Court of Appeal. TWU has since appealed the decision by the Ontario Court of Appeal to the Supreme Court of Canada ("SCC"), but the NSBS has decided not to appeal to the SCC. The LSBC also [announced](#) its intention to appeal the decision of the B.C. Court of Appeal to the SCC. The Law Societies in Alberta, Saskatchewan, Manitoba, New Brunswick, P.E.I. and the Yukon have agreed to accredit TWU's proposed law school either by accepting the decision of the Federation of Law Societies of Canada or through their own processes. The Law Society of Newfoundland and Labrador has deferred its decision.

## C. PRINCIPLES IN BALANCING *CHARTER RIGHTS*

The B.C. Court of Appeal based its decision on both administrative law and the *Charter of Rights and Freedoms* (the "*Charter*"). Given that the cases in B.C., Ontario and Nova Scotia have all addressed the question of how to balance conflicting *Charter* rights, this brief overview of the decision will focus only on the *Charter* issues. The B.C. Court of Appeal sets out clearly and succinctly the governing principles in balancing *Charter* rights in the context of the case: 1) one cannot begin with the presumption that one *Charter* right is more important than another, 2) the *Charter* rights must be balanced against the statutory objectives of the B.C. *Legal Profession Act*, the Court noting that acting in the "public interest" does "not mean making a decision with which most members of the profession or public would agree", and 3) balancing rights involves a "robust proportionality test" which assesses the "degree of infringement of a decision on a *Charter* right". It involves much more than simply considering the two rights and "choosing to give effect to one or the other with either course of action being equally reasonable."

## D. BALANCING THE RIGHTS TO FREEDOM OF RELIGION AND EQUALITY

The Court relied on the SCC decision in *Loyola*, which recognized that freedom of religion protects "the embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions." In balancing the competing *Charter* rights of freedom of religion and sexual orientation equality rights, the Court found that the LSBC decision was a "severe" infringement of the right to freedom of religion of the students and faculty and TWU itself because the

B.C. Government, as a result of this decision, withdrew its consent for TWU to grant degrees which effectively prevented it from operating a law school. The Court was also influenced by the fact that TWU is a private university which is not subject to the *Charter* and is exempt in part from provincial human rights legislation so that its discrimination is not “unlawful”. By contrast, in the Court’s view, the impact on the equality rights of LGBTQ students was minimal because the TWU law school would not only increase the spaces available in law schools but also increase the available spaces in other law schools if students chose to go to TWU because it is an evangelical Christian community. The effect would be to increase accessibility to law schools for everyone, including LGBTQ students. The Court did not minimize the “offensive and hurtful” nature of the Community Covenant to LGBTQ persons but stated, that there is “no Charter or other legal right to be free from views that offend and contradict an individual’s strongly held beliefs, absent the kind of “hate speech” described in *Whatcott* that could incite harm against others.” In the course of proceedings, hurtful rhetoric had also been directed at the beliefs of TWU and its students and faculty.

## E. STATE NEUTRALITY

The Court also did not accept the argument that approving TWU’s law school would amount to the state endorsing its discriminatory beliefs because to accept this premise would make it impossible for other faith based institutions, such as health care facilities, to be accredited or licensed if granting the license would be considered an endorsement of its beliefs. The argument was also weakened by the fact that the LSBC was willing to accredit the law school provided it amended the provisions of the Community Covenant on marriage. In that scenario, TWU would have retained its views on marriage, however they would not have been written down. The Court stated that, ultimately “[s]tate neutrality is essential in a secular pluralistic society. Canadian society is made up of diverse communities with disparate beliefs that cannot and need not be reconciled”. It noted that the *Civil Marriage Act* expressly provides that “it is not against the public interest to hold and publically express diverse views on marriage.”

## F. IMPACT OF 2001 SCC CASE ON TWU

The Court did a careful review of the 2001 SCC case of *Trinity Western University v. British Columbia College of Teachers* where the B.C. College of Teachers refused to approve TWU’s teacher training program on the basis of the same Community Covenant because in its view, unsubstantiated by the evidence, it would lead to intolerance in public classrooms. In that case, the SCC ruled in favour of TWU.

The B.C. Court of Appeal found that while the 2001 decision was not dispositive of the case before it, “the principles enunciated in that decision provide significant guidance in the present case.” The SCC will have the last word, as both the Ontario and B.C. Court of Appeal decisions are headed that way.

## G. CONCLUSION

The Court concluded that TWU has a right “to hold and act on its beliefs, absent evidence of actual harm” and that the LSBC decision infringed *Charter* rights in a way that was disproportionate and unacceptable. The Court quoted with approval from the SCC decision in *Loyola* that, “a secular state does not – and cannot- interfere with the beliefs or practices of a religious group unless they conflict with or harm overriding public interests”.