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SCC UPHOLDS DENIAL OF ACCREDITATION OF TRINITY WESTERN DUE TO MANDATORY COVENANT

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A. INTRODUCTION

On June 15, 2018, the Supreme Court of Canada ("SCC") released two significant decisions, *Law Society of British Columbia v Trinity Western University*[1] and *Trinity Western University v Law Society of Upper Canada*,[2] concerning Trinity Western University's ("TWU") legal battle to receive accreditation for its proposed law school from the Law Society of British Columbia ("LSBC") and the Law Society of Upper Canada ("LSUC", together the "Law Societies"). In its decisions, the SCC upheld the Law Societies' decisions to deny TWU accreditation on the basis that TWU students would be required to sign a faith-based Community Covenant (defined below) obligating them to adhere to certain behavior. This *Church Law Bulletin* reviews the SCC's decisions and provides a commentary on their impact for faith-based organizations.

B. BACKGROUND

TWU is a private evangelical Christian university in British Columbia ("BC") that had proposed opening a law school. Like all students and faculty of the university, those of the law school would have been required to sign a mandatory faith-based community covenant that included, among other requirements, abstinence from sexual intimacy outside heterosexual marriage (the "Community Covenant"). The Law

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[1] *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32 ["LSBC Decision"].

[2] *Trinity Western University v Law Society of Upper Canada*, 2018 SCC 33 ["LSUC Decision"].

Societies both denied accreditation to TWU's proposed law school primarily because the existence of the Community Covenant was not in adherence with the Law Societies' statutory duties and role as professional regulators, because, amongst other things, it was discriminatory towards the LGTBQ community.

To be licensed as a lawyer by the LSBC and LSUC, prospective licensees must either have a law degree from a law school accredited or approved by the respective Law Society, in which case they would be deemed presumptively fit for licensing, or must otherwise receive a certificate of qualification from the Federation of Law Societies of Canada. The effect of this decision therefore meant that graduates of the proposed law school would, unlike graduates of accredited law schools, not be automatically determined to be presumptively fit to be granted licenses to practice law in BC or Ontario. TWU therefore brought applications for judicial review of the respective Law Societies' decisions in BC and Ontario.

While the BC Court of Appeal ruled in favour of TWU, the Court of Appeal for Ontario conversely upheld the LSUC's decision not to accredit TWU. The decisions in BC and Ontario have been discussed in *Charity & NFP Law Bulletin* No. 394[3] and the August 2016 *Charity & NFP Law Update*.[4] Both decisions were subsequently appealed to the SCC.

C. THE COURT'S RULING

As the facts and principal issues were the same and both cases concerned the Community Covenant, the SCC released parallel decisions at the same time providing virtually the same reasoning from the majority, concurring and dissenting opinions. The SCC was split 7-2 in its decisions, ultimately holding that both Law Societies' decisions to deny TWU accreditation were reasonable under the circumstances. The majority held that, while the Law Societies' decisions not to accredit TWU's proposed law school limited TWU's religious freedom, the decisions proportionately balanced the deleterious effects on religious freedom as provided under s. 2 (a) of the *Canadian Charter of Rights and Freedoms* ("*Charter*") with the statutory objectives governing the Law Societies, and were therefore justifiable. In coming to its decision, the majority considered, in part, the issue of whether the Law Societies were entitled under their enabling

[3] Jennifer M. Leddy, *Charity Law Bulletin No. 394*, "Trinity Western Wins in B.C.C.A.," online: Carters Professional Corporation <http://www.carters.ca/pub/bulletin/charity/2016/chylb394.pdf>.
[4] Jennifer M. Leddy, *August 2016 Charity & NFP Law Update*, "Ongoing Conflicting Decisions in Trinity Western Cases," online: Carters Professional Corporation <http://www.carters.ca/pub/update/charity/16/aug16.pdf>.

statutes (*i.e.* the *Legal Profession Act*[5] in BC and the *Law Society Act*[6] in Ontario) to consider TWU's admissions policies.

1. The Majority Opinion

The majority found that the Law Societies' statutory objectives are, broadly speaking, to "uphold and protect the public interest in the administration of justice,"[7] which includes upholding a positive public perception of the legal profession. It found that the Law Societies' enabling statutes require Benchers (*i.e.* the governing boards of the Law Societies) to "consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school."[8] It added that the Law Societies, as regulators of a self-governing profession, were owed deference in determining how best to further these broad public interest mandates, as this "properly reflects legislative intent, acknowledges the law society's institutional expertise, follows from the breadth of the "public interest", and promotes the independence of the bar."[9] Given the harm to the integrity of the legal profession in limiting access to membership on the basis of personal characteristics unrelated to merit, and the Law Societies' interest as public actors in protecting the values of equality and human rights, the majority of the SCC found that it was reasonable for the Law Societies to support diversity within the bar, promote equal access to the legal profession, and protect students on the basis of gender and sexual orientation, when pursuing their statutory objectives and the public interest.

Having found the Law Societies to be acting within the purview of their statutory objectives, the majority then considered whether the Law Societies' administrative decisions to deny TWU accreditation were reasonable. In accordance with the test set out in the SCC cases of *Doré v Barreau du Québec ("Doré")*[10] and *Loyola High School v Quebec (Attorney General)* ("*Loyola*"),[11] the majority of the SCC considered whether the Law Societies' administrative decisions engaged the *Charter* by limiting the protections to freedom of religion, and whether the decisions proportionately balanced the engaged *Charter* protections, taking into consideration the nature of the decisions and the statutory and factual contexts.

[5] SBC 1998, c 9, s 13.
[6] RSO 1990, c L.8.
[7] LSBC Decision, *supra* note 1 at para 32; LSUC Decision, *supra* note 2 at 16-18.
[8] LSBC Decision, *supra* note 1 at para 31; LSUC Decision, *supra* note 2 at 14.
[9] LSBC Decision, *supra* note 1 at para 38.
[10] 2012 SCC 12 ["*Doré*"].
[11] 2015 SCC 12 ["*Loyola*"].

In order to establish whether the *Charter* s. 2(a) freedom of religion was limited, the majority followed established precedent holding that a claimant must demonstrate that he or she "sincerely believes in a practice or belief that has a nexus with religion" and that the impugned state conduct "interferes, in a manner that is more than trivial or insubstantial, with his or her ability to act in accordance with that practice or belief."[12] In this case, the majority found that members of TWU's community have a sincere belief that studying in an evangelical Christian community contributes to their spiritual development, and that the universal adoption of the Community Covenant contributes towards creating an environment that allows TWU students to grow spiritually.[13] By interpreting the public interest in a manner that precludes accreditation of TWU's law school, the Law Societies interfered with TWU's ability to maintain an accredited law school as a religious community defined by its own religious practices. The acknowledged effect is a limitation on TWU community members' rights to grow spiritually through the study of law in an evangelical Christian environment in which members follow certain religious codes of conduct.[14] Accordingly, their religious rights were engaged by the Law Societies' decisions.

As the *Charter* was engaged, the majority then considered the reasonableness of the Law Societies' decisions by asking whether they proportionately balanced the *Charter* protection of freedom of religion with the Law Societies' statutory mandates. In accordance with *Loyola*, the majority held that the reviewing court must be satisfied that the decision "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate," that the *Charter* protection is "affected as little as reasonably possible in light of the state's particular objectives," and the court must consider how substantial the limitation on the *Charter* protection is in relation to furthering the statutory objectives.[15] In this regard, the majority stated that the denial of accreditation would be unreasonable if alternate options were reasonably open to the Law Societies that would otherwise reduce the impact on TWU's freedom of religion while still allowing it to sufficiently further its objectives.

In its analysis of the facts, the majority found that the Law Societies were constrained to the two options of either accrediting or rejecting TWU's proposed law school. As accrediting the proposed law school would not have advanced the Law Societies' statutory objectives in accordance with their interpretation

[12] LSBC Decision, *supra* note 1 at para 63; LSUC Decision, *supra* note 2 at 32.
[13] LSBC Decision, *supra* note 1 at paras 71-73; LSUC Decision, *supra* note 2 at 33.
[14] LSBC Decision, *supra* note 1 at para 75; LSUC Decision, *supra* note 2 at 33.
[15] *Loyola*, *supra* note 11 at paras 39, 40, and 68.

of their statutory mandates, the majority held that it was not an option reasonably open to the Law Societies. Further, the majority found that the Law Societies' decisions reasonably balanced the impact of the interference with that of the statutory objectives, as they did not significantly limit religious freedom, but rather only limited TWU's ability to open a law school with a *mandatory* Community Covenant, which it found restricted the conduct of others, including those of different religious beliefs.

The majority therefore held that

> "[t]his limitation is of minor significance because a mandatory covenant is not absolutely required to study law in a Christian environment in which people follow certain religious rules of conduct, and attending a Christian law school is preferred, not necessary, for prospective TWU law students."[16]

Apart from this interference, the SCC held that the Law Societies' decisions did not deny evangelical Christians the right to practise their religion freely, but reasonably denied accrediting a law school which imposed their religious beliefs on other law students. The majority also found that the Law Societies' decisions significantly advanced their statutory objectives, as they ensured equal access to and diversity in the legal profession, and prevented the risk of harm to the LGBTQ community. Given the above, the majority found that the Law Societies' decisions significantly benefited the statutory objectives and did not significantly limit TWU's freedom of religion, with no reasonable alternatives to reduce the impact on TWU's *Charter* rights and sufficiently further the statutory objectives. It therefore held that the decision not to accredit TWU's proposed law school was reasonable and represented a proportionate balance that "gives effect, as fully as possible to the *Charter* protections at stake given the particular statutory mandate,"[17] and upheld the Law Societies' decisions not to accredit TWU's proposed law school.

2. The Concurring Opinions

The former Chief Justice McLachlin agreed with the majority but provided differing reasons in her own concurring opinion. Chief Justice McLachlin stated that in judicial review of administrative decisions, the court's focus should be on proportionality by asking whether a state actor's decision infringes a *Charter* right. Where a *Charter* right is infringed, the onus is on the state actor to demonstrate that the infringement is justified under s. 1 of the *Charter*. In most cases, this can be done by asking whether the decision

[16] LSBC Decision, *supra* note 1 at para 87; LSUC Decision, *supra* note 2 at 38.
[17] LSBC Decision, *supra* note 1 at para 105; LSUC Decision, *supra* note 2 at 42.

"balances the negative effects on the right against the benefits derived from the decision in a proportionate way."[18] In considering whether the Law Societies' decisions limited other *Charter* rights, in addition to the majority's consideration of freedom of religion, Chief Justice McLachlin held that courts must also consider freedom of expression and association, which she found fell within the ambit of freedom of religion.[19] She found that the decision limiting TWU community members' freedom of religion could not be characterized as minor, as it "precludes members of the TWU community from engaging in the practice of providing legal education in an environment that conforms to their religious beliefs, deprives them of the ability to express those beliefs in institutional form, and prevents them from associating in the manner they believe their faith requires."[20] Nonetheless, in her analysis of proportionality and reasonableness of the Law Societies' decisions, she found that the Law Societies refusal to condone discrimination and unequal treatment based on sexual orientation outweighed TWU's claim to freedom of religion.

In a separate concurring opinion, Justice Rowe held that the Law Societies are required to self-regulate in the public interest, and that courts therefore owe deference to decisions they make in the public interest. Both the majority and Justice Rowe analyzed the Law Societies' decisions based on prevailing administrative law. He reviewed the decisions under a standard of reasonableness, stating that the decisions would command deference where they met the criteria of the test for reasonableness set out in *Dunsmuir v New Brunswick* ("*Dunsmuir*").[21] To be reasonable under the *Dunsmuir* test, the process used to reach a decision must provide "justification, transparency and intelligibility" and the outcome of the decision must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."[22] Applying the test, Justice Rowe examined the record of the Benchers' deliberations in reaching the decision, and found that their manner in reaching the decision and their reasons for the decision met the *Dunsmuir* test. Like the majority, Justice Rowe further found that the Law Societies had one of two options – to accredit or refuse accreditation – and that they reasonably concluded that their mandates included "promoting equal access to the legal profession, supporting diversity within the bar,

[18] LSBC Decision, *supra* note 1 at para 119.
[19] *Ibid* at para 122.
[20] *Ibid* at para 134.
[21] 2008 SCC 9.
[22] LSBC Decision, *supra* note 1 at para 254; LSUC Decision, *supra* note 2 at 51.

and preventing harm to LGBTQ law students."[23] Justice Rowe therefore also found the Law Societies decisions to be reasonable.

3. The Dissenting Opinion

In their dissenting opinion, Justice Côté and Justice Brown found that the Law Societies' enabling statutes provided that "the only proper purpose of a law faculty approval decision is to ensure that individual graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct."[24] As TWU's proposed law school did not raise concerns of fitness of its graduates, the dissent held that the only defensible exercise of the Law Societies' statutory discretion was to accredit the school, stating that "[s]o long as a law school's admissions policies do not raise concerns over its graduates' fitness to practise law, the [Law Societies are] simply not statutorily empowered to scrutinize them."[25] On this basis, it held that the Law Societies violated their statutory duty. The dissent further found that even if the Law Societies' statutory mandates had permitted them to consider the broader public interest, the decisions substantially interfered with the TWU community's freedom of religion. It held that the purpose of TWU's admissions policy was to establish a code a conduct that supported its religious community rather than to exclude anybody, that no single group had been singled out, and that "the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society."[26] Based on this reasoning, the dissent held that accrediting TWU's proposed law school was the only decision that proportionately balanced *Charter* rights and the Law Societies' statutory rights.

D. COMMENTARY

1. Charter Rights vs. Charter Values

In a complicated decision where religious rights under the *Charter* conflicted with the Law Societies' mandate to protect the public interest, which the majority interpreted to include "*Charter* values" of equality and diversity, the SCC attempted to find a proportionate balance and ultimately upheld the Law Societies' decisions not to accredit TWU's proposed law school. Although the majority assessed the decisions' impact on *Charter* values, Chief Justice McLachlin, Justice Côté, Justice Brown and Justice

[23] LSBC Decision, *supra* note 1 at para 258.
[24] LSBC Decision, *supra* note 1 at para 267; LSUC Decision, *supra* note 2 at 57.
[25] LSBC Decision, *supra* note 1 at para 290; LSUC Decision, *supra* note 2 at 77.
[26] LSBC Decision, *supra* note 1 at para 327; LSUC Decision, *supra* note 2 at 81.

Rowe disagreed with this approach. Chief Justice McLachlin stated that the initial focus must be on *Charter* rights rather than *Charter* values.[27] Similarly, in their dissenting opinion, Justice Côté and Justice Brown criticized the majority's approach as one that treated *Charter* values as being equivalent to *Charter* rights. Rather, they stated that, "resorting to Charter values as a counterweight to constitutionalized and judicially defined *Charter* rights is a highly questionable practice," because *Charter* values, unlike *Charter* rights which are products of constitutional settlement, are unsourced, amorphous, and undefined.[28] The question of how and when *Charter* rights and "values" are incorporated into administrative law judicial review is clearly an area that will require further comment and clarification by the Court.

2. Faith-Based Law School

While the majority decision held that the infringement of freedom of religion was not significant enough to warrant overturning the decisions of the Law Societies not to accredit TWU, the SCC decision does not necessarily mean that religious freedom in Canada is in serious peril. Rather, in conducting its proportionate balancing, the majority of the SCC acknowledged that "[t]he ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2(a)."[29] It should be noted that the SCC's decision does not preclude the creation of a faith-based law school. In a similar vein, neither Law Society prohibited the existence of a faith-based law school. The SCC, referring to the BC Court of Appeal decision, notes that, "the [LSBC] was prepared to approve the law school if TWU agreed to remove the offending portions of the Covenant requiring students to abstain from 'sexual intimacy that violates the sacredness of marriage between a man and a woman."[30]

3. Mandatory Covenant

With respect to the Community Covenant itself, the majority recognized the Community Covenant's role in creating an environment that supported students' spiritual growth. Specifically, the majority said that "[t]he TWU has the right to determine the rules of conduct which govern its members. Freedom of religion protects the rights of religious adherents to hold and express beliefs through both individual and communal

[27] LSBC Decision, *supra* note 1 at para 115.
[28] *Ibid* at paras 306-310.
[29] LSBC Decision, *supra* note 1 at para 64; LSUC Decision, *supra* note 2 at 33.
[30] LSBC Decision, *supra* note 1 at para 324.

practices." However, the majority also held that "where a religious practice impacts others….this can be taken into account at the balancing stage" and went on to say that "[t]he Covenant is a commitment to *enforcing* a religiously based code of conduct, not just in respect of one's own behaviour, but also in respect of other members of the TWU community […]. The effect of the mandatory Covenant is to restrict the conduct of others"[31][emphasis by the SCC] and that "impos[ing] those religious beliefs on fellow law students [has] an inequitable impact and can cause significant harm."[32] In this regard, the majority noted that:

> The LSBC did not deny approval to TWU's proposed law school in the abstract; rather, it denied a specific proposal that included the mandatory Covenant. Indeed, when the LSBC asked TWU whether it would "consider" amendments to its Covenant, TWU expressed no willingness to compromise on the mandatory nature of the Covenant. The decision therefore only prevents TWU's community members from attending an approved law school at TWU that is governed by a *mandatory* covenant.[33] [emphasis by the SCC]

As such, at dispute was not the general permissibility of a faith-based law school, or of a law school with a statement of faith, conduct or lifestyle statement, but rather with the mandatory nature of the Community Covenant requiring students at the law school to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman." The majority held that the mandatory covenant was:

> […] not absolutely required for the religious practice at issue; namely, to study law in a Christian environment in which people follow certain religious rules of conduct. The decision to refuse to approve TWU's proposed law school with a mandatory covenant only prevents prospective students from studying law in their optimal religious learning environment where everyone has to abide by the Covenant.

4. Aspirational Covenant

As such, the majority decision of the SCC would suggest that an aspirational code of conduct, rather than a mandatory covenant, may have resulted in a different decision from the SCC and possibly from the Law Societies themselves. Given that codes of conduct prohibiting sexual intimacy are virtually impossible to enforce in a graduate professional school due to the problems with 1) determining an objective definition of "sexual intimacy" or similar term that the organization can enforce, 2) obtaining evidence of a breach

[31] LSBC Decision, *supra* note 1 at para 99.
[32] LSUC Decision, *supra* note 2 at 41.
[33] LSBC Decision, *supra* note 1 at para 85.

of the mandatory covenant, and 3) establishing a hearing protocol that could fairly deliberate the appropriateness of alleged conduct in violation of the mandatory covenant when a student's professional career is at stake, there remains the question whether there is any practical point in insisting upon the mandatory aspect of a code of conduct for students. The alternative would be to focus on developing an aspirational code of conduct for students to rely upon but not be mandated to adhere to. An aspirational approach in this regard would be consistent with the spirit of the Covenant as referenced by the majority of the SCC:

> The University is an interrelated academic community rooted in the evangelical Protestant tradition; it is made up of Christian administrators, faculty and staff who, along with students choosing to study at TWU, covenant together to form a community that *strives* to live according to biblical precepts, believing that this will optimize the University's capacity to fulfil its mission and achieve its *aspirations*. [Underlining added by the SCC] [Italics added by the authors]

5. Provincial Human Rights Legislation

As indicated above, the SCC did not rule out the use of a code of conduct or similar document being adopted by a faith-based organization. The dissent in the LSBC decision noted in obiter that provincial human rights legislation has applicability to codes of conduct.[34] In this regard, many faith-based organizations, both in B.C. and other provinces, have codes of conduct or documents of a similar nature to that of the Community Covenant which may attract protection of human rights legislation in their applicable province. While the TWU decisions discussed the applicability of the *Charter* to decisions of state actors, such as provincial law societies, a scrutiny of *Charter* rights and values would not apply to most faith-based organizations because, as private organizations, they are not subject to the *Charter*. However, they are still subject to the obligations, as well as the benefits, of provincial human rights legislation.

E. CONCLUSION

Whether or not a religious institution wishes to adopt a mandatory or aspirational code of conduct is a matter for each institution to decide according to their understanding of their particular faith. Where the religious institution wishes to adopt an aspirational code of conduct, as many religious educational institutions already do, the TWU decision would not restrict its ability to do so. Where a religious

[34] LSBC Decision, supra note 1 at para 324.

institution that is regulated by a state actor, such as a provincial accrediting body, however, wishes to adopt and presumably enforce a mandatory code of conduct, as TWU did, then the mandatory code of conduct in question may come under scrutiny and possible challenge by the state actor. As the SCC has indicated in this case, whether a state actor may be able to review a mandatory covenant of an institution it governs will depend on the facts at hand and a "reasonable" balancing of the harms and benefits. This would include matters such as how vital it is for an individual's conduct to be mandatory and how such a covenant will affect those who are required to comply with the mandatory covenant. Faith-based organizations contemplating adopting a covenant may want to consult with their legal counsel with respect to their specific fact situation and applicable law prior to doing so, particularly where the covenant is mandatory in nature.