

A DECISION IN FAVOR OF TRINITY WESTERN UNIVERSITY AND RELIGIOUS RIGHTS IN CANADA

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INTRODUCTION

On December 10, 2015, the Supreme Court of British Columbia overturned a decision by the Law Society of British Columbia (“LSBC”) that previously stood to usurp the religious rights of Trinity Western University (“TWU”) and its expected law school attendants by denying the school accreditation due to the school’s religious-based sexual restrictions on students and faculty.¹ The procedural history leading up to the Supreme Court is as follows:

The B.C. Law Society initially accredited the program, but then reversed its position after members voted against accreditation. . . . An Ontario court has already upheld the Ontario law society's refusal to accredit TWU graduates, while Nova Scotia's law society is appealing a court ruling that stopped it from denying accreditation to graduates.²

The LSBC, in denying accreditation, overstepped its powers conferred upon it by the Federation of Law Societies of Canada (“FLS”).³ While the LSBC generally has jurisdiction to decide whether to approve a law school’s faculty, this jurisdiction only extends to the academic qualifications of the school.⁴ This Comment will discuss how the Court correctly decided in favor of TWU, taking into consideration the otherwise sufficient academic requirements of the school and why TWU imposes sexual restrictions on its faculty and students so as to reflect evangelical Christian beliefs and practice. This Comment will also discuss how this decision serves as a great advancement for religious rights in Canada because it makes the legal profession more inclusive, and does not serve as a restriction on the LGBT community or the community at large, nor does it entail state sponsored religion.

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¹ *Trinity W. Univ. v. Law Society of B.C.*, [2015] BCSC 2326 para. 156 (B.C.).

² *Trinity Western University and B.C. Law Society Face Off in Court*, CBCNEWS: BRITISH COLUMBIA (Aug. 24, 2015, 8:54 AM), <http://www.cbc.ca/news/canada/british-columbia/trinity-western-university-and-b-c-law-society-face-off-in-court-1.3201722>.

³ See *Trinity W. Univ.*, [2015] BCSC at paras. 29, 32, 120–121.

⁴ See *id.* at para. 108; see also Legal Profession Act, S.B.C. 1998, c. 9, § 3.

I. THE FACTS

Evangelicalism, a protestant subculture, represents approximately 11-12% of the Canadian population, therefore forming a minority religious subculture.⁵ TWU is the largest privately funded evangelical Christian school in Canada, currently offering education to roughly 4,000 students.⁶ The law school was still a proposal, pending accreditation, prior to the Supreme Court decision.⁷ TWU's mission statement is as follows:

The mission of Trinity Western University, as an arm of the Church, is to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of [Jesus] Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.⁸

Certain restrictions on sexual activity are practiced by Evangelicals and are therefore encompassed by the school's mission statement.⁹ Such restrictions include a belief that marriage may solely exist between one man and one woman and that premarital sex is also in violation of the sanctity of marriage.¹⁰ Ultimately, students and staff are required to "sign a covenant pledging to abstain from sexual intimacy outside of marriage between one man and one woman. Critics claim it infringes the rights, in particular, of lesbian and gay students."¹¹ These restrictions on sexual behavior are ultimately what triggered the LSBC to deny accreditation to the school by refusing to approve the faculty.¹² After being denied accreditation, "TWU sought a declaration that the society's decision is ultra vires and invalid and that it unjustifiably infringes on their Charter rights."¹³

⁵ *Trinity W. Univ.*, [2015] BCSC at para. 24.

⁶ *Id.* at para. 4; *see also About TWU*, TRINITY W. UNIV., <http://twu.ca/about/history.html> (last visited Mar. 21, 2016).

⁷ *Trinity W. Univ.* [2015] BCSC at para. 1; *see also Proposed School of Law*, TRINITY W. UNIV., <http://twu.ca/academics/school-of-law/> (demonstrating that Trinity Western University School of Law remains a proposal) (last visited Mar. 21, 2016).

⁸ *Trinity W. Univ.*, [2015] BCSC at para. 2; *see also Our Mission*, TRINITY W. UNIV., <https://www.twu.ca/academics/about/mission.html> (last visited Mar. 21, 2016).

⁹ *See Trinity W. Univ.*, [2015] BCSC at paras. 24–25, 27.

¹⁰ *Id.* at para. 27.

¹¹ Neil Etienne, *B.C. Court Quashes LSBC's Trinity Accreditation Denial*, LEGAL FEEDS: THE BLOG OF CANADIAN LAWYER & LAW TIMES (Aug. 24, 2015, 12:51 PM), <http://www.canadianlawyermag.com/legalfeeds/tag/trinity-western-university.html>.

¹² *Trinity W. Univ.*, [2015] BCSC at para. 40.

¹³ Etienne, *supra* note 11.

The LSBC generally has authority over such matters and “is a self-governing body created and authorized by the *Legal Profession Act*”¹⁴ Specifically, section three outlines the object and duty of the LSBC:

It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

- (a) preserving and protecting the rights and freedoms of all persons,
- (b) ensuring the independence, integrity, honour and competence of lawyers,
- (c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.¹⁵

Governing the LSBC are a number of “Bencher,” which essentially serve as a board of directors.¹⁶ Twenty-five Benchers are elected by the members of the LSBC and there are also allowed five “lay Benchers.”¹⁷ It is the Benchers that have the power to judge the sufficiency of a faculty of law, but this does not necessarily mean that the Benchers may delegate such a decision to the general members for a vote, which they did.¹⁸

The decision whether or not to accredit a law school in B.C. is ultimately a matter for the Law Society’s Benchers, a group elected by the Society’s general membership. The Benchers’ discretionary power is essentially negative in character. Once a law school is approved by the Federation of Law Societies of Canada (as TWU’s was), it is treated as approved in B.C. “unless the Benchers adopt a resolution declaring that it was not or had ceased to be approved.”¹⁹

¹⁴ *Trinity W. Univ.*, [2015] BCSC at para.6; see also *Legal Profession Act*, S.B.C. 1998, c. 9, §§ 2–3.

¹⁵ *Legal Profession Act* § 3.

¹⁶ See *Trinity W. Univ.*, [2015] BCSC para. 6.

¹⁷ *Id.*

¹⁸ *Law Society Rule*, 2015, 2-54(3) (Can. B.C.), <https://www.lawsociety.bc.ca/page.cfm?cid=4092&t=Law-Society-Rules-2015-Part-2-%E2%80%93-Membership-and-Authority-to-Practise-Law#17>.

¹⁹ Paul Daly, *A New Angle on the TWU Saga: Trinity Western University v. The Law Society of British Columbia*, 2015 BCSC 2326, ADMIN. LAW MATTERS, (Jan. 8, 2016), <http://www.administrativelawmatters.com/blog/2016/01/08/a-new-angle-on-the-twu-saga-trinity-western-university-v-the-law-society-of-british-columbia-2015-bcsc-2326/>.

Nowhere, though, do the Benchers have an enumerated ability to delegate this decision to the general members of the LSBC.²⁰ Ultimately, this question of “procedural fairness and the no-delegation rule” would undermine the LSBC’s actions.²¹ This is not to say that the LSBC wholly missed the jurisdictional mark, though; Judge Hinkson, presiding, acknowledged that, “a decision to refuse to approve a proposed faculty of law on the basis of an admissions policy is directly related to the statutory mandate of the LSBC and its duties and obligations.”²² Thus, the LSBC facially has jurisdiction in this instance to make such a decision, but that does not mean that the LSBC acted correctly within its jurisdiction, as Judge Hinkson would explain.

II. THE ANALYSIS OF THE COURT

Even though the LSBC generally has jurisdiction to deny accreditation to a school based on its admission process, Judge Hinkson elaborates that the LSBC may only do such a thing “so long as it follows the appropriate procedures and employs the correct analytical framework in doing so.”²³ This is ultimately where Judge Hinkson begins to disagree with the actions and decision that would follow from the LSBC that resulted in TWU not being extended accreditation, labeling the LSBC’s actions as “fettered . . . discretion.”²⁴ The discrepancy in procedure was created when the Benchers delegated the matter to the general members of the LSBC for a vote instead of exercising their individual judgment.²⁵

The Court also inferred multiple Canadian Charter of Rights and Freedoms (the “Charter”) issues with the LSBC’s decision, namely regarding Section 2 of the Charter.²⁶ To remedy these concerns, Judge Hinkson gave the school deserved acknowledgment of the notion that it is designed to form persons, not just lawyers.²⁷ TWU is not meant to be exclusive of non-evangelicals so much as it is to serve as a safe haven in which evangelical Christians could go to learn the law in an environment

²⁰ *See id.*

²¹ *Id.*

²² *Trinity W. Univ.*, [2015] BCSC at para.108.

²³ *Id.*

²⁴ *See id.* at paras. 120–21, 152.

²⁵ *Id.* at paras. 119–120.

²⁶ *Id.* at paras. 127–128, 138; *see also* Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 §§ 2, 15 (U.K.).

²⁷ *See Trinity W. Univ.*, [2015] BCSC at paras. 2, 25.

that would preserve their beliefs and way of life.²⁸ TWU's views on the subject are formally stated as follows:

We view education as a holistic attempt to produce graduates who are well formed in character; good citizens who will take their area of study/expertise and apply that knowledge, through good character in a way that redemptively addresses the evil and injustice of this world, consistent with our understanding of biblical truth.²⁹

Earl Phillips, the law school's executive director, further explicates this inclusive requirement by stating that, "[i]t's not for everyone, but it is important for those who would like to attend such a school."³⁰ Such a sentiment acknowledges that the sexually restrictive covenant may deter people from attending TWU, but is more geared towards promoting the evangelical Christian practices of evangelicals that attend the school.

III. THE HOLDING

Judge Hinkson decided that, "[a]lthough the LSBC contends that the Decision does not infringe TWU's right to freedom of religion, the evidence in this case and the relevant precedents conclusively establish that the Decision does infringe the petitioners' *Charter* right to freedom of religion."³¹ Further bolstering his holding by attacking the procedure taken by the LSBC in denying accreditation, Judge Hinkson added that, "the Benchers improperly fettered their discretion and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program."³² Since this holding largely attacks the procedure by which the Benchers of the LSBC delegated the vote to the members, Judge Hinkson insured his decision by stating: "Even if I am wrong, and the Benchers had the authority to delegate the Decision to the members, I find that the decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore cannot stand."³³

IV. WHY THE COURT WAS CORRECT

The Court was correct for a number of reasons. Primarily, TWU is not state-funded and may therefore more narrowly tailor its mission and

²⁸ See *id.* at paras. 25, 27 (showing that TWU does not require a student to be an evangelical Christian, rather only to sign and abide by the provisions of the TWU Community Covenant).

²⁹ *Id.* at para. 25.

³⁰ *Trinity Western University and B.C. Law Society Face Off in Court*, *supra* note 2.

³¹ *Trinity W. Univ.*, [2015] BCSC at para. 138.

³² *Id.* at para. 152.

³³ *Id.*

rules, even as it pertains to the private lives of its faculty and students.³⁴ If TWU were a state-funded school, then the holding would have most certainly remained adverse to the university. Given the privately funded nature of the school, though, a verdict in the school's favor cannot be construed as state-sanctioned religion.³⁵ As it stands, there is reason to believe that this verdict would have been delivered by the Court for any school of any faith similarly situated as TWU.³⁶ Furthermore, TWU was otherwise within the confines of the academic requirements set forth by the FLS and did nothing to institutionalize discrimination based on invariable characteristics of a person, but rather the behavior of its faculty and students. Had this discrimination taken the form of discrimination based on factors such as race, gender, or class, the holding would in all likelihood have remained adverse to the university. TWU wasn't so much attempting to be exclusive of others, but more inclusive for evangelical Christians who wish to learn the law in an environment full of other evangelical Christians.³⁷ To TWU, the importance of wholly forming attorneys within the evangelical Christian parameters is paramount, which it to say that TWU doesn't simply wish to graduate well-educated students, but TWU wishes to graduate well-educated, wholesome, evangelical Christian students.³⁸ Accrediting TWU will in no way make the legal profession more exclusive, but instead will add a different viewpoint to it, as Guy Saffold, a senior advisor to the president of TWU summarizes:

People from many different faith communities have long been part of Canada's professions and cultural identity. Our graduates are practicing law, teaching in the public school system, operating successful corporations and working as nurses—while treating clients, students and members of the public with the utmost compassion, respect and integrity.³⁹

Speaking to the inclusive, rather than exclusive purposes of the covenant, Saffold also adds:

³⁴ See *id.* at para. 63.

³⁵ Cf. *Religion in Public Schools*, B.C. CIVIL LIBERTIES ASS'N (Apr. 11, 1969), https://bccla.org/our_work/religion-in-public-schools/ (explaining that state-run, public schools are prohibited from teaching religion and demonstrating a commitment to separation of church and state.).

³⁶ See *Trinity W. Univ.* [2015] BCSC at paras. 152–53 (deciding the case on procedural grounds only, the court noted the decision was made without regard to the Charter).

³⁷ See discussion *supra* Part II.

³⁸ *Trinity W. Univ.*, [2015] BCSC at para. 25.

³⁹ Amy Robertson, *B.C. Supreme Court Rules in Favour of Trinity Western University School of Law*, TRINITY W. UNIV.: 2015 NEWS (Dec. 10, 2015, 4:21 PM), <http://twu.ca/news/2015/061-bc-court-ruling.html>.

The covenant isn't about pushing anyone away, but about building a community where we're free to honour our consciences The same covenant calls for all members of the TWU community to respect the dignity of others regardless of their background. Loving one another without exception is one of the most important principles of Christian faith.⁴⁰

V. SIGNIFICANCE

This holding is significant not only for the Evangelical minority in Canada, but all religious groups in Canada. The Court correctly adhered to the Charter, which grants the freedom of religion, of thought, of expression, of the press and of peaceful assembly.⁴¹ The Court, in adhering to the religious freed clause of the Charter, has successfully recognized and legitimized TWU's freedom of religion. Speaking to the magnitude of the decision, Benjamin Bull, Executive Director of ADF International, an international legal organization that advocates for religious freedom, said:

This case may well represent the beginning of the end of viewpoint based-discrimination against Christians and Christian institutions in Canada. It is a very positive step in the right direction No one—including Christians—can be banned from their profession because they hold biblically based views, and no Christian institution of higher education can be sanctioned because it reflects essential tenets of the Christian religion.⁴²

Gerald Chipeur, who intervened on behalf of TWU, bolstered the reasoning of the decisions by commenting that, “Canadians should be free to live and work according to their sincerely held beliefs and convictions. Faith-based educational institutions are welcome in a diverse society and should be free to operate according to the faith they teach and espouse.”⁴³

The LSBC was not satisfied with the result and has alluded to further efforts to counter TWU's victory by releasing a statement saying: “This decision is important to the public and the legal profession. We will be reviewing the reasons for judgment carefully and consulting with our legal counsel regarding next steps.”⁴⁴ Kendra Milne, the director of West Coast LEAF, an intervening party on behalf of the LSBC, elaborated upon the

⁴⁰ *Id.*

⁴¹ Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c 11 § 2(a)–(c) (U.K.).

⁴² *Another Big Win for Religious Freedom in Canada*, ADF INT'L (Dec. 13, 2015), <https://adfinternational.org/detailspages/press-release-details/another-big-win-for-religious-freedom-in-canada>.

⁴³ *Id.*

⁴⁴ Etienne, *supra* note 11.

aspects they were disappointed with by stating: “We are very disappointed that the decision did not engage with the human rights issues at stake in the case, instead deciding the case on procedural grounds B.C. lawyers voted twice and made it very clear that they want an inclusive profession that respects equality.”⁴⁵ This disappointment, as stated by Milne, is non sequitur, however. The Court’s ruling is surely a step forward for religious rights and privately funded organizations that embrace subsequent religious practices, but is not a step back for the LGBT community or the legal community at large. This decision does not, as Milne states, make the legal profession any less inclusive or respectful of equality. This decision will not impede upon the rights of any member of any minority class, be it based upon race, gender, orientation, or what have you, to join the legal profession.⁴⁶ The only implication this has upon the community at large is that people who will not adhere to TWU’s rules may be denied admission by TWU; since TWU only has roughly 4,000 students enrolled in the totality of its programs, it does not appear that the general public provides a significant demand for entry into the school.⁴⁷ This ruling does not reach out into the general public and place restrictions upon anyone else, but rather it merely provides a safe-haven for evangelical Christians to attend a school of likeminded people and still be able to attain a law degree. Quite contrary to Milne’s logic, if the school were denied accreditation then at that point the profession would be failing to respect equality. If Milne were searching for far-reaching equality and broader inclusion of minorities within the legal profession, then West Coast LEAF should have instead intervened on behalf of TWU.

CONCLUSION

The Court correctly decided in favor of TWU and this decision serves as a great advancement for religious rights in Canada. This decision is not restrictive upon the general public, as proponents of the LSBC’s side fear, but serves to loosen the restrictions upon evangelical Christians and other religious minorities. By extending accreditation to TWU, which is otherwise academically qualified, the Court has much less excluded people from TWU than it has included people of a religious minority in the legal profession, thereby ultimately promoting equality and diversity within the profession. Allowing TWU to have more restrictive admissions based upon religious beliefs will not hinder a single person from outside of the evangelical Christian subculture from pursuing a legal career. Furthermore, this decision does not cross into the realm of state

⁴⁵ *Id.*

⁴⁶ See Robertson, *supra* note 39 (“TWU law graduates will only enrich the diversity that we celebrate as Canadians.”).

⁴⁷ *Trinity W. Univ. v. Law Society of B.C.*, [2015] BCSC 2326 para. 4 (B.C.).

sanctioned religion. In fact, one may safely speculate that per this ruling any privately funded school promoting a religious subculture may use the religion as a basis to restrict the admission process and still become accredited so long as the educational curriculum is sufficient and is not otherwise incompatible with any standing laws. One may not draw the conclusion, however, that a state funded school would be allowed to place similar restrictions on the admission process, lest that then become a form of state sponsored religion. The LSBC and its supporting parties would be wise to refrain from further action, acknowledging that this decision is actually in furtherance of equality and expanding the scope of inclusion within the legal profession, which is the essence of what they are supposedly aspiring for; to do otherwise would not be to promote the rights of others, but only to hinder the rights of evangelical Christians that desire to learn the same law as all other Canadians but in an environment of likeminded people.