Legally Speaking:

Balance, Section 1 of the Charter, and Catholic Education Rights

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Religious institutions in secular communities are often challenged to justify their values and decisions when they conflict with other societal values. In such cases, Courts have weighed competing but equal rights and freedoms by analyzing each right in their own context in order to determine whether one should prevail over the other.

Section 1 of the Charter: Legal Test

The balance between religious and other societal values is achieved in Canadian Constitutional Law by the application of section 1 of the *Charter* which reads: "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." This section permits, for example, certain types of discrimination when that discrimination cannot be prevented without discriminating against another group also protected by the *Charter*.

On the "reasonable limits prescribed by law" portion of section 1, the party wishing to rely upon justification for the breach of a *Charter* right must show that the provisions of the imposed law are "reasonably accessible to those which it affects", precise in that they enable those whom it affects to regulate their conduct pursuant to the law, are not vague, in that they provide a sufficiently clear standard, and are a proper exercise of discretion, in that the discretion granted by the law is appropriately constrained by legal standards (*Canadian Federation of Students* v. *Greater Vancouver Transportation Authority*, 2009 S.C.C. 31).

Further, a section 1 *Charter* defence requires proof on the "demonstrably justified in a free and democratic society" portion of section 1 that the provisions of the law are pressing and substantial, that the means employed in the law are rationally connected to that objective, minimally impair the rights of those which it adversely affects and produce salutary effects which outweigh the deleterious effects of a breach (*R* v. *Oakes*, [1986] 1 S.C.R. 103, and *Dagenais* v. *Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835).

Trinity Western University: Balancing Competing Rights in Religious Educational Institutions

A number of recent cases of significant importance for religious rights are currently being adjudicated before the Courts in Canada. Trinity Western University (TWU) is a private, evangelical Christian, postsecondary institution, which requires all students, staff and faculty at TWU to sign a "community covenant" forbidding sex outside of heterosexual marriage. In June 2012, TWU submitted a proposal to establish a law school with a Juris Doctor degree program to the Federation of Law Societies of Canada (the Federation).

Six law societies have granted accreditation – Alberta, Saskatchewan, Manitoba, New Brunswick, Prince Edward Island, and Newfoundland and Labrador.

Three law societies - British Columbia, Nova Scotia, and Ontario - have refused accreditation and have been challenged by TWU in Court. The Courts in these three provinces have arrived at inconsistent decisions.

The issue before the Courts was whether the Law Society met its statutory duty to reasonably balance conflicting Charter rights: the rights, freedoms and aspirations of lesbian, gay, bisexual, transgendered and queer (LGBTQ) persons; and, the religious freedom and rights of association of evangelical Christians who sincerely hold the beliefs described in the Covenant.

Nova Scotia

In *The Nova Scotia Barristers' Society v. Trinity Western University,* 2016 NSCA 59, the Court held that the law society's decision not to accredit TWU was unauthorized by the *Legal Profession Act* and its valid regulations. The Court did not comment on whether there was an infringement of TWU's freedom of religion under the *Charter.* The soci-

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ety representing Nova Scotia's lawyers did not seek leave to appeal to the Supreme Court of Canada, and as such, Nova Scotia must accredit TWU. However, the crux of the appeals in both BC and Ontario involves a collision between freedom of religion and equality, both of which receive equal protection under the *Charter*.

B.C.

In *Trinity Western University v The Law Society of British Columbia*, 2016 BCCA 423, the B.C. Court of Appeal turned to s. 1 to determine whether the violation of freedom of religion by the Law Society of British Columbia (LSBC) in denying accreditation was a 'reasonable limit' of that right. The conflicting *Charter r*ight implicated by the LSBC's decision is the equality right of LGBTQ persons under the law, guaranteed by s. 15 of the *Charter*.

The first step required TWU to "establish the sincerity of his or her belief in a religious doctrine, practice or obligation". The second step was for the Court to determine whether a significant infringement of the belief had occurred as a result of governmental action. The evidence supported the view that the Covenant is an integral and important part of the religious beliefs and way of life advocated by TWU and its community of evangelical Christians. According to Dr. Samuel H. Reimer, Professor of Sociology at Crandall University in Moncton, New Brunswick, the evangelicals' faith, like any moral code, is not limited to their private lives. They carry their beliefs and moral values into the public sphere, including work, education and politics.

Intervenors in support of TWU's position included the Roman Catholic Archdiocese of Vancouver and allied groups. These intervenors asserted that a secular state supports pluralism and that a democratic society requires that groups have space to hold and act on their beliefs.

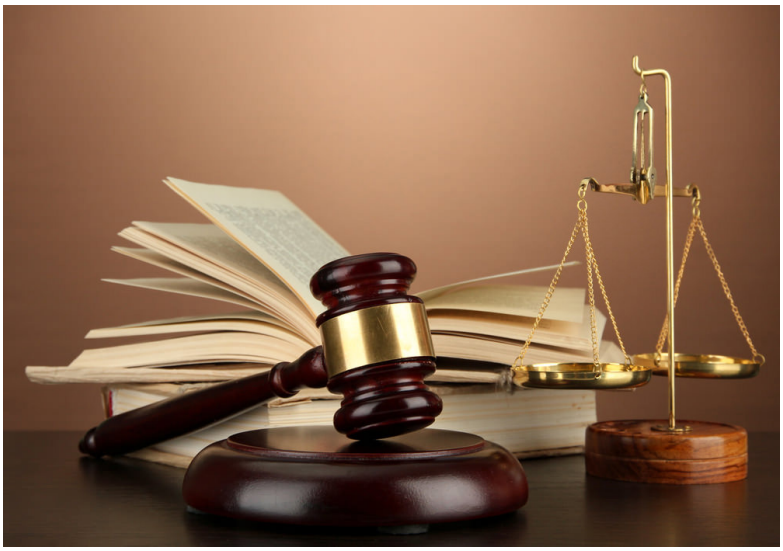
The LSBC led evidence from various experts touching on the impact of the Covenant on LGBTQ persons. In their opinion, TWU's admissions policy and the Covenant perpetuate and exacerbate existing stigmatization and marginalization of LGBTQ persons.

The Court stated that under the *Charter*, no right is absolute and that "[e]ach must be measured in relation to other rights and with a view to the underlying context in which the apparent conflict arises" (para 114).

In applying the appropriate balance, the Court stated that the key word is "proportionality"; the discretionary administrative decision must not interfere with the *Charter* guarantee more than is necessary. If the decision disproportionately impairs the guarantee, it is unreasonable.

The evidence before the Law Society demonstrated that while LGBTQ students would be unlikely to access the 60 additional law school places at TWU's law school if it were approved, the overall impact on access to legal education would be minimal. Some students who would otherwise have occupied the remaining 2,500 law school seats would choose to attend TWU, resulting in more options for all students. Further, denying approval would not enhance access to law school for LGBTQ students.

On the other hand, the Court found that a decision not to approve TWU's law school would have a *severe* impact on TWU's rights. The qualifications of students graduating from TWU's law program would not be recognized and graduates would not be able to apply to practice law in British Columbia. The practical effect of non-approval is that TWU cannot operate a law school and cannot therefore exercise fundamental religious and associative rights that would otherwise be guaranteed under s. 2 of the *Charter*.



The Court held that if regulatory approval is to be denied based on the state's fear of being seen to endorse the beliefs of the institution or individual seeking a license, permit or accreditation, no religious faculty of any kind could be approved. Licensing of religious care facilities and hospitals would also fall into question. It further stated that: "[i]n a diverse and pluralistic society, government regulatory approval of entities with differing beliefs is a reflection of state neutrality. It is not an endorsement of a group's beliefs."

In its conclusion, the Court held that LSBC's decision not to approve TWU's law school was unreasonable because it limited the right to freedom of religion disproportionately more than was reasonably necessary to meet the Law Society's public interest objective.

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The BC Court of Appeal relied on the leading Supreme Court case in religious educational rights, *Loyola High School v. Quebec (Attorney General),* [2015] 1 SCR 613, for the principle 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".

In addition, the BC Court of Appeal accurately concluded (para 193): "A society that does not admit of and accommodate differences cannot be a free and democratic society — one in which its citizens are free to think, to disagree, to debate and to challenge the accepted view without fear of reprisal. This case demonstrates that a well-intentioned majority acting in the name of tolerance and liberalism, can, if unchecked, impose its views on the minority in a manner that is in itself intolerant and illiberal".

The most important implication for Catholic education is the recognition that government regulatory approval or denial will be held to a high standard. The Court held that: "[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" (para.185).

LSBC recently filed an application for leave to appeal the BC Court of Appeal decision to the Supreme Court of Canada.

Ontario

The Ontario Court of Appeal in *Trinity Western University v. The Law Society of Upper Canada,* 2016 ONCA 518 came to the opposite conclusion when applying section 1 of the *Charter*. The Court held (para 143):

> Taking account of the extent of the impact on TWU's freedom of religion and the LSUC's mandate to act in the public interest, the decision to not accredit TWU represents a reasonable balance between TWU's 2(a) right under the Charter and the LSUC's statutory objectives. While TWU may find it more difficult to operate its law school absent accreditation by the LSUC, the LSUC's decision does not prevent it from doing so. Instead, the decision denies a public benefit, which the LSUC has been entrusted with bestowing, based on concerns that are entirely in line with the LSUC's pursuit of its statutory objectives.

As evidence of reasonableness, the Ontario Court of Appeal cited a 1983 U.S. case in which the federal government had taken away the tax-exempt status from Bob Jones University, which barred black students until 1971, and after 1971, only admitted blacks if they were married. The University relied on its religious principles, which opposed interracial dating and marriage. The school lost the case at the U.S. Supreme Court.

The Ontario Court of Appeal stated that it agreed with the submissions by intervenor groups Out on Bay Street and OUTlaws: "The Covenant is a document that discriminates against LGBTQ persons by forcing them to renounce their dignity and self-respect in order to obtain an education" (paras. 118-119).

TWU is currently seeking leave to appeal of the Ontario Court of Appeal's decision to the Supreme Court of Canada. In its Memorandum of Argument seeking leave to appeal, TWU argues that: the Ontario Court of Appeal decision raises issues of national and public importance; Courts in three provinces have reached conflicting decisions and law societies across Canada have adopted different approaches to whether TWU law school graduates will be accepted; the LSUC and Ontario Court of Appeal decisions raise the issue of whether a public body can impose Charter obligations on a private entity; and, the LSUC and Ontario Court of Appeal decisions raise the issue of the scope of the "public interest" mandate of self-regulating professional bodies, and whether that mandate can be used to deny professional recognition for members of a discrete religious community.

TWU also argues that this case provides an opportunity for the Supreme Court of Canada to revisit and clarify the justification of Charter breaches under *Doré v. Barreau du Québec,* [2012] 1 S.C.R. 395 and *Loyola High School v. Quebec (Attorney General),* [2015] 1 SCR 613.

Loyola: Supreme Court of Canada Decision on Religious Education Rights

Loyola is currently the leading case from Canada's highest court on Catholic Education rights on the application of "justification" pursuant to section 1 of the *Charter.* This case involved Loyola High School, a private English-speaking Catholic high school for boys established in 1848 by the Jesuit Fathers. Loyola brought a judicial review application against the decision of the Quebec Minister of Education, Recreation and Sports refusing its request for an exemption from the province's strictly secular Ethics and Religious Culture Program ("ERC") in favour of teaching a Catholic-permeated religion program, which it believed was "equivalent" to the objectives of the ERC.

In its ground-breaking decision of March 19, 2015, the Supreme Court of Canada held that refusing an exemption to Loyola breached the guarantee of freedom of religion pursuant to section 2(a) of the *Canadian Charter of Rights and Freedoms*, and the equivalent section 3 of the *Quebec Charter*, and was not saved by section 1 of the *Charter* as justifiable in a free and democratic society.

The Majority and Concurring Decisions of the Court

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agreed on the law with respect to the fundamental right to religious freedom in a secular society. The Majority Decision stated: "Part of secularism ... is respect for religious differences. 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…A secular state respects religious differences, it does not seek to extinguish them" (para. 43).

However, the Court also stated that this does not mean that religious differences trump core national values in each instance. There may be some religious values that

are not "compatible with Canada's fundamental values" ... "especially basic human rights, the equality of all citizens before the law, and popular sovereignty" (para. 46).

The Majority Decision emphasized that the right to religious freedom includes the right "that parents have ... to choose establishments that, according to their own convictions, best respect the rights of their children" including to a denominational education (para. 54).

The Court held that "to tell a Catholic school how to explain its faith undermines the liberty of the members of its community who have chosen to give effect to the collective dimension of their religious beliefs by participating in a denominational school" (para. 62), "it amounts to requiring a Catholic institution to speak about Catholicism in terms defined by the state rather than by its own understanding of Catholicism" (para. 63), and "it also interferes with the rights of parents to transmit the Catholic faith to their children" and the "rights of parents to guide their children's religious upbringing" (para. 64 & 65).

In conclusion, the Court held that freedom of religion under section 2(a) of the *Charter* "is not limited to religious belief, worship and practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion" including "the right to manifest religious belief ... by teaching and dissemination" (para. 132).

In attempting to achieve a balance between the objectives of promoting the goals of the ERC and the religious freedom of the members of the Loyola community, the Court held that the Minister's decision was unreasonable (paras. 69, 79 & 143): "The Minister's denial of an exemption from the ERC program-which has the effect of requiring Loyola to teach its entire ethics and religion program from a neutral, secular perspective infringes Loyola's freedom of religion in violation of s. 2(a) of the *Charter*" (para. 145). In addition, the Court found that the Minister's decision did not meet the proportionality test as it did not minimally infringe the claim to religious rights.

The Canadian *Charter* promotes the active engagement of diversity in religious views, the promotion and respect of all religious views in relationship to one another; it promotes religious pluralism, rather than relativism or syncretism. Its protection of conscience and religion it is both individual and collective in nature, not based upon an expressed separation of Church and state, and plural in experience and intent. It recognizes a broad definition of both religion and freedom of religion, and places particular emphasis on the protection of the minority with respect to religious rights. However, freedom of religion in Canada is not absolute. It is subject to justification, in that rights may be infringed where that infringement is pressing and substantial, rationally connected to a legitimate objective, minimally impairs the rights of those which it adversely affects, and where the salutary effects of the breach of rights outweigh the deleterious effects. In this very Canadian way, the individualistic protection of rights in the *Charter* is balanced by the traditional communal, pluralistic values of the Canadian Constitution.

It remains to be seen whether the Trinity Western University cases will alter the path carved by *Loyola* for religious rights in educational institutions. The balancing act will likely be played out before the Supreme Court of Canada where the Court will again weigh the competing Charter rights of religious freedom and equality.