

When Charter Rights Collide: Trinity Western University at the British Columbia Court of Appeal

What happens when two rights and freedoms guaranteed by the *Canadian Charter of Rights and Freedoms*[\[1\]](#), such as equality rights and the freedom of religion, come into conflict with each other? How do the courts strike a balance between the rights?

The British Columbia Court of Appeal was tasked with engaging in such a balancing exercise in the case of *Trinity Western University v Law Society of British Columbia*, where the equality rights of lesbian, gay, bisexual, transgender, and queer (LGBTQ) individuals collided with the religious freedoms of evangelical Christians.[\[2\]](#)

This article gives an overview of the dispute between the Law Society of British Columbia (LSBC) and Trinity Western University (TWU), and how the Court of Appeal weighed the *Charter* rights in conflict.

Trinity Western University and the Covenant

TWU is a private, evangelical Christian school located in Langley, B.C. that would like to establish its own law program.[\[3\]](#)

Before being admitted to TWU's law program, students are required to agree to a Community Covenant ("Covenant").[\[4\]](#) The Covenant stipulates that students may only engage in sexual conduct that occurs within a heterosexual marriage, meaning that pre-marital sex and sexual intimacy within a same-sex marriage is not allowed.[\[5\]](#) A student who violates the Covenant can face significant consequences, including suspension or expulsion from TWU.

The dispute

Law societies have the role, granted to them by provincial governments, to set legal education requirements and to decide who can enter the legal profession within their respective provinces.[\[6\]](#) The LSBC refused to recognize graduates of TWU's proposed law program as having the legal education required to practice law in B.C.[\[7\]](#) The refusal to "accredit" TWU's law graduates means that the graduates will be unable to apply to practice law in B.C. immediately after completing their law degree.[\[8\]](#)

TWU challenged the LSBC's accreditation decision in the B.C. courts, arguing that the Law Society's decision infringes the religious freedoms of its prospective Christian students (as well as the rights of TWU's faculty, and potentially, the University itself) because the Covenant is an integral part of the beliefs and way of life at TWU.[\[9\]](#) Meanwhile, the Law Society argued that approving of TWU's law school, which discriminates against LGBTQ

students “in terms of admission to, and life at, TWU,” would amount to a failure to protect LGBTQ equality rights.[\[10\]](#)

The role of the Law Society of British Columbia

When making its decision about the accreditation of graduates, the LSBC is exercising powers given to it by the B.C. government in the *Legal Profession Act*.[\[11\]](#) Therefore, as with all government decisions, the decision must comply with the *Charter*.[\[12\]](#) In complying with the *Charter*, the LSBC’s decision must reflect a reasonable balance between the LSBC’s objectives (which include “protecting the rights and freedoms of all persons”) and the *Charter* rights of TWU’s prospective Christian and LGBTQ students.[\[13\]](#) The LSBC’s decision must be balanced –denying accreditation must not disproportionately impact religious freedoms in an attempt to protect equality rights.

What the courts decided

At the Supreme Court of British Columbia, the Court set aside the LSBC’s decision to refuse to recognize the education of TWU’s law graduates.[\[14\]](#) The LSBC appealed the Supreme Court’s decision to the British Columbia Court of Appeal (BCCA).

A key issue before the BCCA was whether the Law Society’s decision appropriately balanced its objectives and the rights and freedoms in question. [\[15\]](#) That is, did it properly weigh the impact of the decision on religious freedoms versus protecting LGBTQ students from discrimination?

The BCCA found that the LSBC failed to engage in a proper balancing of its objectives and sections 2(a) and 15 of the *Charter* – religious freedom and equality rights. It also determined that the LSBC’s decision disproportionately harmed religious freedoms compared to the impact that accrediting TWU’s graduates would have on LGBTQ equality rights.

How the BCCA weighed the rights in conflict

Freedom of Religion

Section 2(a) of the *Charter* guarantees freedom of religion. This guarantee means that an individual is free to hold and practice the religious beliefs of their choice and to be free from government constraints on those beliefs.[\[16\]](#)

In this case, the BCCA found that the LSBC’s accreditation decision has a severe negative impact on the religious freedoms of TWU’s prospective Christian students. [\[17\]](#) The LSBC’s decision has stopped TWU from establishing its law program because the B.C. government revoked its approval of the program immediately following the decision.[\[18\]](#) Therefore, Christian students are now denied the opportunity to study law within a community that fosters their sincerely held religious beliefs and values.[\[19\]](#)

Equality Rights

Section 15 of the *Charter* protects members of the LGBTQ community against laws and government actions that discriminate against them on the basis of their sexual orientation.^[20]

The equality rights of LGBTQ students are engaged in this case because the LSBC's decision affects whether or not those students will be protected from discrimination.^[21] LGBTQ students are unlikely to sign a Covenant that restricts sexual conduct to married, heterosexual individuals. Because those LGBTQ students are unlikely to agree to the Covenant, they will be unable to attend TWU's law school.^[22] LGBTQ students who do attend TWU will "have to either 'live a lie to obtain a degree' and sacrifice important and deeply personal aspects of their lives, or face the prospect of disciplinary action."^[23]

The BCCA concluded that an approval of TWU's law school would indirectly result in discrimination against LGBTQ students in terms of access to a legal education and the legal profession. However, in the Court's view, the impact on those students would be minimal.^[24] LGBTQ students would still have options available to them, outside of TWU, for attending law school.^[25] Also, while LGBTQ individuals will be less likely than heterosexual students to enter TWU's law program, an overall increase in the number of law school seats available across Canada could improve the chances of LGBTQ students being admitted elsewhere.^[26] The LSBC's decision to deny accreditation to TWU's graduates, on its own, will not increase the law school opportunities available to LGBTQ students.^[27]

The Court of Appeal's conclusion

The BCCA ultimately found that the LSBC's refusal to accredit TWU graduates was unreasonable because it had a severe detrimental impact on religious freedoms that outweighed the minimal positive effect of the decision on LGBTQ students.^[28] As a result, the LSBC's decision was overturned.

What the future holds in store

Since the release of the BCCA ruling in November 2016, the LSBC has appealed the decision to the Supreme Court of Canada.

The Supreme Court has agreed to hear both the BCCA case, as well as the decision in the appeal from the Ontario Court of Appeal, in November 2017. Although there is no set date for a decision, Canada's highest court will ultimately need to determine how to resolve this clash of religious freedoms and equality rights.

^[1] Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 .

^[2] 2016 BCCA 423 .

^[3] *Ibid* at para 5.

[4] *Ibid* at para 7; Trinity Western University, “Community Covenant Agreement” (2014), online: <<https://www8.twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>> .

[5] *Covenant, ibid.*

[6] See e.g. *Legal Profession Act*, SBC 1998, c 9, ss 3, 21(1)(b) ; *Legal Profession Act*, SNS 2004, c 28, s 4(2)(a)-(c); *Law Society Act*, RSO 1990, c L-8, s 4.1, 4.2.5.

[7] *Trinity Western BCCA*, *supra* note 2 at para 30. The provincial law societies in Ontario and Nova Scotia also refused to accredit the graduates of TWU’s proposed law program, and have subsequently been challenged by TWU in the courts of their respective provinces.

[8] *Ibid* at para 168. It has been noted that graduates of TWU’s law program may still be able to practice law in provinces where the governing law society has refused to recognize TWU as an “approved” or “accredited” faculty if students meet certain entrance requirements, similar to those set for foreign trained lawyers. See Elaine Craig, “The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program” (2013) 25:1 CJWL 2013 at 167.

[9] *Trinity Western BCCA*, *ibid* at paras 102-107.

[10] *Ibid* at paras 170-171.

[11] *Supra* note 6.

[12] *Doré v Barreau du Quebec*, 2012 SCC 12 at paras 35, 55-58 ; *Trinity Western BCCA*, *supra* note 2 at para 80.

[13] *Doré*, *ibid* at paras 56-58; *Loyola High School v Quebec (AG)*, 2015 SCC 12 at paras 4, 39; *Trinity Western BCCA*, *ibid*, 164-166; *LPA SBC*, *supra* note 6, s 3.

[14] *Trinity Western University v The Law Society of British Columbia*, 2015 BCSC 2326 at para 152.

[15] *Trinity Western BCCA*, *supra* note 2 at para 98, 120, 133.

[16] *Ibid* at para 99, citing *R v Big M Drug Mart Ltd*, [1985] 1 SCR 295 at 346-347, Dickson J.

[17] *Ibid* at para 168.

[18] *Ibid* at paras 31, 168. Also note that even if B.C.’s Minister of Advanced Education re-approved the opening of TWU’s law program, a program whose graduates are unable to apply to practice law in the major markets of B.C. and Ontario may be viewed by the University as pointless, and could effectively stop the program from opening.

[19] *Ibid* at paras 116, 167-168.

[20] *Ibid* at para 108; *Vriend v Alberta*, [1998] 1 SCR 493 at paras 90, 101-104, 107.

[21] *Trinity Western BCCA*, *ibid* at paras 108, 113, 170.

[22] *Ibid* at para 171.

[23] *Ibid* at para 172.

[24] *Ibid* at paras 179, 191.

[25] *Ibid* at para 178.

[26] *Ibid* at para 179.

[27] *Ibid* at paras 175, 180.

[28] *Ibid* at para 191.