

## Trinity Western Decision Fails to Clarify Approach to Balancing Conflicting Charter Rights

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**Case Commented On:** *Trinity Western University v The Law Society of Upper Canada*, [2016 ONCA 518 \(CanLII\)](#)

Two days before Canada Day, the Ontario Court of Appeal upheld the Law Society of Upper Canada's decision to not accredit the proposed law school at Trinity Western University—a private Christian university in British Columbia which requires all prospective law students to abstain from gay sex. Many progressives hailed the decision as a victory for equality, and it undoubtedly was. But while the outcome was progressive in this case, its reasoning need not result in progressive outcomes in future cases. For this reason, we critique the Court's reasons for failing to discuss the appropriate approach to balancing conflicting *Charter* rights.

### BACKGROUND

Two aspects of the background to the *Trinity Western University v The Law Society of Upper Canada*, [2016 ONCA 518 \(CanLII\)](#) decision (*TWU ON*) enable a fully informed discussion of the contentious issues at play, namely:

1. The statutory mandate of the Law Society of Upper Canada (respectively, the “Mandate” and “LSUC”); and
2. The decision under review (the “Decision”), allegedly made pursuant to that Mandate.

We note parenthetically that Nova Scotia's legal regulatory body—the Barristers' Society—decided, like LSUC, to not accredit TWU (*The Nova Scotia Barristers' Society v Trinity Western University*, [2016 NSCA 59 \(CanLII\)](#) at para 2; “*TWU NS*”). However, interestingly, the Nova Scotia Court of Appeal, unlike the Ontario Court of Appeal, overturned that regulatory decision on the basis that it fell outside the scope of its statutory mandate, which is to regulate legal practice in Nova Scotia, not legal education in British Columbia (*TWU NS* at para 4). As its decision turned on the scope of the Barristers' Society's mandate, the Nova Scotia Court of Appeal expressly abstained from discussing the issue of balancing conflicting *Charter* rights—the focus of this post.

### 1. LSUC Mandate

LSUC holds exclusive authority over prescribing qualifications to practice law in Ontario (*TWU ON* at para 34; see also the *Law Society Act*, [RSO 1990, c L.8](#), the “*LSA*”). It wields this authority by maintaining the “standards of learning, professional competence and professional conduct” that lawyers must attain (the “Regulatory Standards”). Specifically, the *LSA* provides the following with respect to LSUC's Mandate to administer those Regulatory Standards:

1. Maintaining Standards: Ensuring that all lawyers meet the Regulatory Standards ([section 4.1\(a\)](#)).
2. Applying Standards Equally: Ensuring that the Regulatory Standards apply equally to all lawyers with respect to a particular legal service in a particular area of law ([section 4.1\(b\)](#)).
3. Guiding Principles: Having regard to the following principles when carrying out its functions under the *LSA*:
  - a. Advancing the cause of justice and the rule of law ([section 4.2.1](#)).
  - b. Facilitating access to justice for the people of Ontario ([section 4.2.2](#)).
  - c. Protecting the public interest ([section 4.2.3](#)).
  - d. Acting in a timely, open and efficient manner ([section 4.2.4](#)).
  - e. Ensuring that the Regulatory Standards and restrictions on who may provide legal services are proportionate to the significance of the regulatory objectives sought to be realized ([section 4.2.5](#)).

Critically, reading sections 4.1(a) and 4.2.3 together provides that LSUC’s Mandate involves maintaining the Regulatory Standards with a view to “protecting the public interest”. The core issue on appeal was whether LSUC’s decision to deny TWU’s accreditation appropriately balanced conflicting *Charter* rights in light of LSUC’s mandate to maintain its Regulatory Standards for the “public interest.”

## **2. Decision Under Review**

On April 24, 2014, the LSUC benchers voted 28–21 against accrediting TWU’s proposed law school (at para 10). This is the Decision under review.

First, TWU and a prospective TWU law student—Mr. Volkenant—applied for judicial review of the Decision in front of a three-judge panel of the Ontario Divisional Court. On July 2, 2015, that panel dismissed the application (see [2015 ONSC 4250 \(CanLII\)](#)).

Second, TWU appealed the Divisional Court’s decision to the Ontario Court of Appeal (at para 12)—the subject of this post.

## **ONTARIO COURT OF APPEAL JUDGMENT**

The Ontario Court of Appeal held that the Decision was reasonable, and accordingly, upheld the Decision (at para 145).

This post focuses on how the Court grappled (or rather, failed to grapple) with the balancing of conflicting *Charter* rights. To that end, our analysis is limited to two parts of the Court’s judgment:

1. Identifying the conflict between two *Charter* rights—(1) LGBTQ students’ equality rights, and (2) TWU and its students’ religious freedom; and
2. Reconciling those conflicting rights.

## 1. Identifying the *Charter* Rights Conflict (The Easy Part)

The Court held—and we agree—that this case is a clear instance of genuine conflict between *Charter* rights.

First, the equality rights of LGBTQ students are undeniably violated by [TWU’s Community Covenant](#), which requires all students to abstain from “sexual intimacy that violates the sacredness of marriage between a man and a woman” and states that “according to the Bible, sexual intimacy is reserved for marriage between one man and one woman”—thus prohibiting gay sex in all circumstances (see paras 23–24 and 115). At one layer (and there are many; see [Saul Templeton’s post](#) on the Covenant’s implications for trans and intersex students), lesbian, gay, and bisexual students may only attend TWU Law at “considerable personal cost” (at para 116). This is because, to attend TWU Law, lesbian, gay, and bisexual students must either:

1. contractually renounce a foundational part of their identity; or
2. lie about their true identities, attempt to conceal those identities while at TWU, and face dire consequences if they are unable to. (see paras 115–19)

The discrimination is clear: the Covenant uniquely and adversely affects sexual minorities. Equality discourse in Canada is far past the days where arguments claiming that [discrimination against pregnant people “is not created by legislation but by nature”](#) (at p 190) should actually persuade anyone. And yet, that the Covenant discriminates against sexual minorities is still somehow disputed ([by some](#)). To be frank, antiquated and unpersuasive arguments that assert the absence of discrimination on the basis of formal equality need to stop. The Supreme Court has clearly and repeatedly affirmed that equality rights seek to achieve substantive equality (i.e. treating people with a view to promoting equality of result), not formal equality (i.e. treating people the same)—see e.g. *Withler v Canada (Attorney General)*, [2011 SCC 12 \(CanLII\)](#) at para 43; *Alberta (Aboriginal Affairs and Northern Development) v Cunningham*, [2011 SCC 37 \(CanLII\)](#) at paras 38–40; and *R v Kapp*, [2008 SCC 41 \(CanLII\)](#) at paras 14–16. Indeed, the Supreme Court has rejected a purely formal understanding of equality ever since its first section 15 decision where it held that “identical treatment may frequently produce serious inequality” (see *Andrews v Law Society of British Columbia*, [\[1989\] 1 SCR 143 \(CanLII\)](#) at 164). Accordingly, if you want to effectively advance freedom of religion, arguing that discrimination founded in religious doctrine treats everyone “equally” is, quite rightly, a recipe for defeat. Religious freedom is important, and balancing *Charter* rights is complex. But being disingenuous about obvious discrimination does not move our dialogue about balancing *Charter* rights forward, it simply avoids the conversation altogether.

Second, the religious freedom of TWU and Mr. Volkenant is clearly violated by the Decision (see para 101).

The legal test for a violation of religious freedom under the *Charter* involves two steps, namely:

1. Sincerity: the Court must conclude that the complainant’s religious beliefs are sincere.
2. Interference: the Court must conclude that the complainant’s ability to act in accordance with their beliefs has been interfered with more than trivially.

(at para 88, citing *Mouvement laïque québécois v Saguenay (City)*, [2015 SCC 16 \(CanLII\)](#) at para 86).

Both of these steps were met here, though with less clarity in the institutional context of TWU than in the individual context of Mr. Volkenant.

With respect to Mr. Volkenant:

1. on sincerity, the Court held that Mr. Volkenant was sincere in his belief that studying law in a Christian setting would further the practice of his faith (at para 90) and would enable him to pursue his legal education in a community that embraces his same Christian values (at para 91); and
2. on interference, the Court held that the Decision interfered with Mr. Volkenant’s religious freedom because not accrediting TWU indirectly discourages him from attending TWU given his interest in ultimately practicing law in Ontario (at paras 29 and 98)—though the Court also held, somewhat confusingly, that it was “premature” to assess this interference (at para 96).

With respect to TWU:

1. on sincerity, the Court held that TWU was sincere in its belief that the Covenant fosters benefits to the TWU community (at para 90); and
2. on interference, the Court held that the Decision interfered with TWU’s religious freedom because not accrediting TWU would discourage students who wish to practice law in Ontario from attending TWU, thus affecting its ability to attract students (at para 98).

The Court also noted that, while the extent to which religious institutions can independently seek *Charter* protection in respect of their religious freedoms is inconclusive in the case law, such protection is available in this case because the religious activity at issue—accrediting a Christian law school—cannot be pursued without the vehicle of a collective institution like TWU (at paras 93–94).

In sum, the TWU dispute provides a clear example of two *Charter* rights in conflict. But how does the Court reconcile those conflicting *Charter* rights?

## **2. Reconciling the *Charter* Rights Conflict (The Hard Part)**

The Court’s analysis of whether the Decision was reasonable turned on whether it appropriately balanced, on one hand, TWU and Mr. Volkenant’s freedom of religion, and on the other hand, the equality rights of LGBTQ students (at paras 112–13).

The Court ultimately held that the Decision was “clearly” reasonable (at para 129) because it appropriately balanced these conflicting *Charter* rights (at para 145). The Court reached this conclusion following what it describes as five reasons, but which, on our reading, are actually nine discrete observations (The “Observations”):

1. Excellent Process: that LSUC’s two-stage process—which included (1) TWU’s application; (2) reports from the Federation of Law Societies of Canada; (3) three legal opinions designated to provide guidance to the benchers; and (4) approximately 210 submissions from lawyers and the public—was “excellent” (at paras 122–24).
2. Benchers’ Speeches Reflect Fair Balancing: that a review of the benchers’ speeches—some of which the Court excerpted in its reasons—make it clear that they fairly balanced the conflicting rights (at para 125).
3. Benchers’ Speeches Complemented by Legal Opinion: that the benchers’ speeches cannot be too strictly reviewed because they must be analyzed in conjunction with the legal opinions designated to provide them with guidance (at para 126).
4. Benchers’ Speeches Complemented by Democratic Process: that the benchers’ speeches cannot be too strictly reviewed because they must be analyzed in conjunction with the full “democratic process” underlying the Decision (at para 127).
5. LSUC Can Scrutinize Admissions Processes: that LSUC, as the second gatekeeper to the legal profession—after law schools—is entitled to scrutinize the admissions processes of law schools (at paras 130–32).
6. LSUC Can Weigh Its Human Rights Obligations: that LSUC, in balancing the conflicting *Charter* rights, may “attach weight” to its obligations under the Ontario *Human Rights Code*, [RSO 1990, c H.19 s 6](#), which provides a right to “equal treatment with respect to membership in any [...] self-governing profession without discrimination because of [...] sexual orientation, gender identity, [or] gender expression” (at para 133).
7. Distinguishing Forms of Infringed Religious Freedom: that there is an important distinction “between state action that interferes with religious belief itself and state action that denies a benefit [i.e. accreditation] because of the impact of that religious belief on others” (at paras 134–38).
8. International Treaty Obligations: that the Decision’s reasonableness is supported by Canada’s international human rights obligations, which provide that the “[f]reedom to manifest one’s religion or beliefs may be subject to [...] the fundamental rights and freedoms of others” (at paras 139–40).
9. No Violation of State Neutrality: that the Decision did not violate the state’s duty of neutrality because that duty does not preclude the state from “tak[ing] positions on policy disputes that have a religious dimension (at paras 141–42).

Following the Observations, the Court briefly remarked that the Decision represents a “reasonable balance” between the conflicting *Charter* rights at issue because (at para 143):

1. the harm to TWU is relatively minor given that it (1) can still operate a law school, and (2) the harm in question is the denial of a public benefit; and
2. preventing harm to LGBTQ students is “entirely in line” with LSUC’s Mandate.

Lastly, the Court noted that the Decision followed a 28-21 vote at Convocation, suggestive of this particular *Charter* rights reconciliation “giv[ing] rise to a number of possible, reasonable conclusions” (at para 144).

## COMMENTARY

We are generally happy with the outcome in this appeal. However, we have some concerns with the reasons underlying that outcome, namely:

1. they fail to adequately discuss the appropriate approach to balancing *Charter* rights;
2. they have been received as progressive, but are in fact, largely neutral with respect to social justice; and
3. they support a surprisingly broad scope of indirect regulatory intervention in the context of legal education.

### 1. Insufficient Discussion of How to Balance *Charter* Rights

Our first concern is that the Court inadequately discusses the proper approach to balancing competing *Charter* rights. In the end, the Court held that “LSUC’s decision in this case required a careful analysis and balancing of the appellants’ *Charter* rights with other *Charter* values” (at para 68). And yet, the Court rarely (if ever) points to how the benchers (or the Court) substantively performed that purported balance in this case. Rather, the focus of the judgment is on the benchers’ “excellent” process in reaching the Decision and how LSUC was entitled to make (but not necessarily reasonable in making) the Decision. A review of the Observations—summarized above—makes the absence of substantive discussion regarding balancing *Charter* rights clear.

The Court’s first observation—that LSUC’s decision-making process was excellent (at para 122)—is procedural, not substantive, and therefore fails to outline any framework for substantive *Charter* rights balancing. Admittedly, a robust process that consults relevant stakeholders is more likely to fairly balance the conflicting interests of those stakeholders (and is therefore more likely to manifest in a reasonable decision). But this observation still falls short of explaining how that balancing process actually functions in general, or functioned in this case.

The Court’s second observation—that the benchers’ speeches reflected a “fair balancing of the conflicting rights” (at para 125)—is simply false. Any evidence of a “fair balancing” is conspicuously absent from the excerpts of speeches provided by the Court (which, if anything, should have been particularly persuasive in demonstrating the balancing process of the benchers given that it was a Court-curated selection of excerpts meant to advance the Court’s view that a fair balancing occurred). Specifically:

1. Bencher Wardle’s remark that this was a “difficult decision” as a “practicing Catholic” does not reflect any actual balancing of conflicting rights (at para 124).

2. Bencher Mercer’s remarks that the dispute raises multiple issues including freedom of religion and equality, Bencher Wardle’s remarks that there are multiple “fundamental rights at stake”, and Bencher Bredt’s open-ended question—“[w]hat does the law tell us about how we are to balance the right not to be discriminated against on the basis of sexual orientation with TWU’s right to freedom of religion?—merely show that they were aware that *Charter* rights were in conflict, not that any balancing of those rights took place (at para 125).
3. Bencher Mercer’s remarks that “freedom to control [...] the sexual conduct of others” should receive “lesser protection” and Bencher Minor’s remarks that “there is no compelling reason to afford the claim for religious rights [...] a higher acknowledgement than the rights of those who would enter into the law school process” are conclusory and fail to meaningfully balance the *Charter* rights in conflict (at para 125).

In sum, while these excerpts show that the benchers were aware that *Charter* rights were in conflict, and that this conflict should be resolved in favour of equality, the middle step—reasonably balancing those rights—appears to be absent, no matter how “thoughtful, respectful, and even eloquent” the speeches were (at para 124).

The Court’s third and fourth observations—that the benchers’ speeches were complemented by formal legal opinions provided to them (at para 126) and a robust democratic process (at para 127)—would be persuasive if the Court actually supplemented the speeches with portions of the legal opinions or democratic process which evidence the balancing of *Charter* rights absent from those speeches. Other than a cursory reference to the areas explored in those opinions (at para 44) and a “democratic process” with a nebulous “record” (at para 127), the Court provides no detail regarding how those opinions or that process resulted in a surrogate balancing of *Charter* rights on LSUC’s behalf. Indeed, the Court’s affirmation of the Divisional Court’s holding that “[t]he Benchers were all well aware of the clash between religious rights and equality rights that the question before them presented” (at para 126) simply shows that the benchers were, as we noted in the preceding paragraph, aware of the *Charter* rights conflict, not reasonably balancing those rights.

The Court’s fifth, sixth, and ninth observations—that LSUC is entitled to scrutinize admissions processes (at paras 130–32), weigh its human rights obligations (at para 133), and take positions on policy disputes with a religious dimension (at paras 141–42)—merely show that LSUC would have been permitted to consider those factors in conducting its fair balancing, not that such a balancing actually occurred.

Lastly, the seventh and eighth observations—that limiting religiously motivated discrimination is less problematic than infringing religious belief itself (at paras 134–38) and that international treaty obligations favour the Decision (at paras 139–40)—admittedly show that the decision may have been reasonable in outcome, but nevertheless fail to show how such a balance was actually considered by the benchers in practice.

In sum, largely absent from all of the Observations is a meaningful balancing of the *Charter* rights in issue. Specifically, there is little evidence of discussion by the benchers, or the Court (other than its brief remarks at para 143), of assigning weight to the relative harms to religious freedom and equality rights in this instance, and how best to reconcile those conflicting harms. Absent such a framework, future similar conflicts are seemingly immune from review as long as

decision-makers adopt similar procedures as LSUC did here.

To be clear, we appreciate that reasonableness review refers “both to the process of articulating the reasons and the outcome”, such that some of the Observations support the reasonableness of the outcome in this case (see *Dunsmuir v New Brunswick*, [2008 SCC 9 \(CanLII\)](#) at para 47; “*Dunsmuir*”). Regardless, in our view, the Court’s reasonableness review is lacking because it dodges the core issue in dispute, namely, the balancing of conflicting *Charter* rights. Put differently, the Court spends inadequate time on the proper approach to balancing *Charter* rights to be able to claim that its analysis demonstrates the “justification, transparency and intelligibility” of the Decision (*Dunsmuir* at para 47).

## **2. Judgment Does Not Guarantee Progressive Balancing of *Charter* Rights**

Our second concern is that the Court’s judgment does not guarantee progressive *Charter* rights balancing in future decisions (a guarantee that the authors recognize is their personal preference, and not necessarily an “error” of the Court). In particular, our concern is that this judgment will be misconstrued as progressive. Rather, it is deferential. And deference on appeal is only as progressive as the decision-maker below.

The Court arguably held that a decision about balancing conflicting *Charter* rights is immune from review if representatives selected through a mostly democratic process conduct broad consultations before making that decision. In other words, the Court held that, if LSUC had voted in favour of accrediting TWU, judicial review would have similarly upheld the decision. In this way, *TWU ON* stands as a precedent that could simultaneously preserve Alberta’s decision to grant TWU accreditation and Ontario’s decision to deny it. Indeed, the Court alluded to the fact that it would have upheld the reverse decision in its concluding remarks, when it described the decision not to accredit TWU as a “reasonable conclusion” (at para 145), and the dispute over TWU’s accreditation as one of those “questions that come before administrative tribunals [which] do not lend themselves to one specific, particular result” (at para 144).

This deference flows primarily from the Court’s lack of guidance regarding how to review proportional balancing of conflicting *Charter* rights. The Court’s review is largely process-oriented, which provides limited substantive guidance with respect to the actual process of balancing *Charter* rights, and in particular, limited guidance regarding: (1) how adjudicators should assign weight to conflicting *Charter* violations so that they can balance those violations proportionately; and (2) the degree of disproportionality required in that balancing process to justify appellate intervention. Without such guidance, and given the Court’s emphasis on process, it is unclear how disproportionate balances could be overturned when an adjudicator’s processes are sound. For example, based on *TWU ON*, how would a Court review a decision (albeit unlikely) of a law society, after broad consultation, deciding to accredit a religious university that excludes black students? Based on much of the Court’s reasons, it is not clear that such a decision could be overturned. In other words, the acute progressive victory that *TWU ON* represents today is an unpredictable precedent that may result in regressive and disproportionate *Charter* rights balancing in the future.

## **3. Broad Scope of Indirect Regulatory Intervention in Legal Education**

Our third concern—which goes beyond the rights balancing issues addressed earlier—is that the Court’s judgment supports a surprisingly broad scope of indirect regulatory intervention, particularly in the context of legal education. The breadth of this intervention is, in our view, best



illustrated by the hypothetical example of a law society denying accreditation to a law school on the basis that its tuition is too high. In *TWU NS*, the Nova Scotia Court of Appeal quoted the lower court's decision to point out that the Nova Scotia Barristers' Society:

has no authority whatsoever to dictate directly what a university does or does not do. It could not pass a regulation requiring TWU to change its Community Covenant any more than it could pass a regulation purporting to dictate what professors should be granted tenure at the Schulich School of Law at Dalhousie University, what fees should be charged by the University of Toronto law School, or the admissions policies of McGill (at para 32; emphasis added).

However, select portions of *TWU ON* leave the opposite impression.

When discussing the scope of LSUC's Mandate, the Court described how "LSUC over its long history has strived to remove discriminatory barriers to access to the legal profession" and affirms that LSUC has "acted to remove all barriers to the legal profession except one – merit" (at para 109). Given increasingly high rates of tuition, we beg to differ.

Further, when describing LSUC's important gatekeeping role, the Court affirmed Dickson CJ's remarks from a 1986 speech that:

[I]t is incumbent upon those involved in the admission process to ensure equality of admissions. [...] Canada is a country which prides itself on adherence to the ideal of equality of opportunity. If that ideal is to be realized in our profession then law schools, and ultimately the legal profession, must be alert to the need to encourage people from minority groups and people from difficult economic circumstances to join our profession (at para 131; emphasis added).

The Court claims that "all law schools currently accredited by [LSUC] provide equal access to all applicants in their admissions processes" (at para 132). But, from a financial standpoint, this is surely not the case.

Economic class is a significant barrier to accessing legal education in Canada—one that continues to grow. In particular, tuition fees have risen precipitously in the last 20 years. For example, the fees for a first year of study at the University of Toronto Faculty of Law [now sit at \\$34,734.82](#). Osgoode Hall Law School is [not far behind](#)—in the 2015–2016 school year fees totaled \$24,745.44, [up more than \\$2000.00](#) from the year before. These climbing prices have grave consequences for those seeking to become lawyers who do not come from affluent families. Indeed, such a price is [prohibitive to accessing legal education for many students](#), thus reserving legal education to the economic upper class.

Given the above, could an argument be made for LSUC denying accreditation to schools like the University of Toronto and Osgoode Hall on the basis of their significant tuition fees? In our view, based on the Court's deferential reasoning in *TWU ON*, it could.

First, these law schools would have no religious freedom argument to use as a means of justifying the arguably discriminatory impact of their high tuition. Second, the decision to deny their accreditation—if it followed the right procedures—could presumably meet enough of the

criteria outlined in *TWU ON*. In particular, with broad consultations, commissioned opinions regarding financial barriers to accessing legal education and whether softening those barriers is in the “public interest” (surely it is), and the unqualified recognition in *TWU ON* that LSUC is entitled to scrutinize how a school’s policies adversely affect certain minority groups, there is at least a defensible argument pursuant to *TWU ON* that such a decision by LSUC would merit deference. Our point here is not that LSUC should deny accreditation to law schools with high tuition. Rather, our point is that the Court’s ruling in *TWU ON* gives rise to a much broader scope of regulatory intervention than we imagine was initially intended (a problem that can go unnoticed when that arguable regulatory overreach results in a politically favourable outcome like the denial of accreditation to a discriminatory law school like TWU).

## CONCLUSION

The Court opened its judgment in *TWU ON* with two critical questions: in the context of conflicting *Charter* rights, “[w]ho strikes the balance and what is it?” (at para 14). In our view, those questions remain largely unresolved. Even worse, the failure to adequately resolve those questions creates the risk that regressive and disproportionate balancing of *Charter* rights will survive judicial scrutiny in the future.

The accreditation of TWU is undoubtedly an issue of significant national importance, as the myriad ongoing appeals across Canada demonstrate. With any luck, a further appeal to the Supreme Court will provide greater guidance in the complex terrain of balancing *Charter* rights. Progressives may have won the battle for the *Charter* in this case. But without clearer principles animating the judicial approach to balancing *Charter* rights, the war for the *Charter* continues.

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