

March 18, 2015

Trinity Western University: Policing Gender and Requiring LGBTQI+ People to Pay for It

By: Saul Templeton

This post is a follow-up to my previous post, [Trinity Western University: Your Tax Dollars at Work](#). The first two parts respond to issues raised in the comments to that post. The first part explains my position on the “irreducible conflict” between freedom of religion and freedom from discrimination on the basis of sexual orientation. The second part deals with whether a line can, or should, be drawn between TWU and other religious institutions and charities that discriminate. (Answer: all charities that discriminate on a *Charter* protected ground should have their charitable status revoked where the discrimination meets the charity law test of actions contrary to public policy). The third and last part explores TWU’s history of exploiting Canada’s charitable tax credit regime.

A note on terminology: my last post referred to TWU’s treatment of gay and lesbian individuals, because the courts have really only analyzed TWU’s Covenant’s impact on those two identities in the queer community. The courts have not truly included bisexual people in their analysis, and the “T” is honoured more in its omission than its inclusion. In this post I will expand the analysis, so I use the acronym LGBTQI+, for lesbian, gay, bisexual, trans, queer/questioning, and intersex. The “+” acknowledges that there are many other identities within the queer community.

My comments here mostly expand on the “T” and the “I”. I use “trans” throughout to stand for transgender and transsexual. “Trans*” is often used to refer to a broader range of trans identities, e.g., agender and non-binary. But in this piece I am using “trans” more specifically. I will refer to non-binary identities when I am writing specifically about them. This is not intended to exclude those other identities from the conversation, but to acknowledge that my analysis is narrow. There is room for further analysis of the Covenant’s impact on other identities.

The Underlying Substantive Issue (or, “Irreducible Conflict”)

I did not raise this issue in my previous post because it is not relevant to the question of whether TWU’s charitable tax status should be revoked. (The question of whether TWU should keep its charitable tax status engages charity law, which doesn’t require a balancing of *Charter* rights to determine that TWU is acting contrary to public policy). However, I will provide my answer here. The “irreducible conflict” is, in my view, a mis-framing of the issues. The problem of institutional discrimination against gay and lesbian individuals runs deeper than discrimination on the basis of sexual orientation alone: the [Community Covenant](#) polices meaningless gender

categories. All sexual activity cannot be categorized as either heterosexual or homosexual, because [not all human beings are male or female](#). This is both a logical and a practical problem with the Covenant: the numbers of students and alums of TWU practically guarantee that some of their student body was, is, or will be intersex. Trans people also present a logical conundrum for the Covenant. These problems betray a further layer of discrimination on the basis of intersex difference, gender expression and gender identity. They also reveal a dilemma that makes it impossible for TWU to justify discriminating against gays and lesbians.

TWU and its supporters frame (or, in my view, mis-frame) this debate as a conflict between:

1. Freedom to agree to abide by a set of religious prescriptions for behaviour in accordance with scripture; and
2. Freedom to engage in sexual intercourse outside of marriage and to engage in same-sex sexual intercourse, whether in or outside of a legal marriage.

I think the above is a fair phrasing of TWU's, and its supporters', general position. To put it another way, TWU lumps all consensual sex acts that do not accord with its interpretation of the bible into a category of chosen behaviour, from which any person could choose to abstain.

I will assume for the sake of argument that everyone could choose not to have consensual sex outside of marriage. The real objection to TWU's Community Covenant is that gay and lesbian individuals cannot study or work at TWU, and enjoy a healthy, consensual sex life with another adult, even if they are married to the person they are having consensual sex with. This is a violation of gay and lesbian individuals' right to be free from discrimination on the basis of sexual orientation. To sum up simply: this debate has been framed as one of religious freedom vs. freedom from discrimination on the basis of sexual orientation.

Discrimination against gays and lesbians is, at least in part, a result of societal norms about appropriate behaviour for each gender. Society, and parts of the bible, have defined these roles as male and female. Prohibiting homosexual sex is based on the assumption that "male" and "female" are watertight compartments, and that we can always determine which compartment a person fits into. Thus, the TWU debate is as much about policing the gender binary as it is about discrimination against gays and lesbians.

The categories of male and female are probably taken for granted by most readers. They appear obvious to most people, because we are raised in a culture that divides us into two sets of social and aesthetic roles. But the categories are really only aesthetic. Gender roles vary across cultures, and there is a wide range of ways a person could be intersex that are [based in biology](#). This is the case even if TWU community members truly believe that "male" and "female" exist as watertight compartments and that the bible requires human beings to be cast into binary roles.

Actually there is a good tax analogy here: most people who have a basic understanding of investment think they know the difference between a dividend and a capital gain. A dividend is a distribution of (usually) retained earnings from a corporation, and a capital gain arises on the disposition of capital property for proceeds of disposition in excess of what a person paid for the property. We are at the point in the academic term where, in my Tax Policy course, we demolish the idea that these categories always apply or have much meaning at all in economic terms. The implication for tax policy is that we might not bother with different tax treatment for dividends and capital gains. Some jurisdictions do, in fact, impose a flat rate of tax on all returns to savings

regardless of whether they arise in the form of capital gains, dividends or interest. This is known as a dual income tax, since a separate set of rates is applied to returns to labour.

(You can ignore this paragraph if you don't get as excited about tax analogies as I do. A simple example of the problem is that, absent complex anti-avoidance rules, a parent company might try to strip out capital gains on shares of its subsidiary by having the subsidiary distribute tax-free intercorporate dividends up to the parent company. This reduces the fair market value that a third party would pay for shares of the subsidiary, so that the subsidiary could be sold and no capital gain would arise. We have complex "safe income" rules to prevent this kind of tax avoidance. The rules attempt to carve up what part of the surplus value of the subsidiary should be treated as dividends and what part should be treated as capital gains, but the limits of each category are not obvious. Even tax practitioners cannot predict how the CRA will interpret and apply the safe income rules. This is evidenced by the practice of distributing dividends in tranches to prevent the dividend distribution from being entirely re-characterized as a capital gain.)

All sorts of creative tax planning goes into arbitraging the different tax treatment of these two types of return on investment, by trying to characterize dividends as capital gains or vice versa. But it is all an enormous waste of very talented people's abilities. Nothing of real value to the economy is produced by all the efforts of these brilliant minds shifting assets around on paper. (Some tax planners will tell you that tax arbitrage can be a deal maker in the M&A context, but query whether it is efficient for tax loopholes to subsidize transactions that would not occur if tax laws were applied as intended. And in any case, a lawyer's fee is simply a transaction cost. It is the businesses that provide value to the economy.)

Similarly, nothing of value is produced by policing people's gender identities or gender expression. Not only is a great deal of effort simply wasted on enforcing the gender binary, efforts that are not productive or useful to anyone, these efforts actually harm people who do not fit within the rigid boundaries of the gender binary. (I should note here that I do not think questioning the validity of sex and gender categories would make it impossible to protect women's rights, or enforce broader protections for gender identity and expression. It is still possible to identify specific instances of discrimination on the basis of sex and gender and address them with constitutional and legislatively mandated remedies.)

The objections here might be: first, that policing the gender binary has value to TWU's community because it accords with TWU's interpretation of biblical requirements; and, second, that it is actually possible to determine who is a man and who is a woman because chromosomes give us the answer. These objections are related because the first objection is rendered meaningless by my response to the second. A person's [genotype](#) and [phenotype](#) do not actually tell us which gender a person is. Only an individual can define their own gender. Many intersex people do identify strongly with a particular gender, including binary genders. Many others strongly identify as neither sex.

There is incredible variation, occurring naturally, in the configuration of human sex chromosomes and in the development of observable human sex characteristics. Not everyone has sex chromosomes that correspond with the XX or XY categories, or even has the same combination of sex chromosomes in [every cell of their body](#). People whose genotype and/or phenotype do not correspond with social definitions of gender categories may refer to themselves as [intersex](#). There is no agreement on who fits into the category of intersex, just as there is no universal agreement on which people should be categorized as male or female. See the Intersex Society of North America's [website](#).

Some intersex people might not even be aware of being intersex until later in life. Doctors may have surgically interfered with their genitals at birth (a practice that intersex advocates continue to oppose) and therefore the person may not become aware of their intersex difference until adulthood. Furthermore, some characteristics of being intersex simply do not develop until later in life. [Shon Klose](#) was recently in the news telling their story of discovering their intersex difference as a result of a physical exam that was an entry requirement for a nursing program. The harm that was done to Klose as a result of this discovery – harm Klose suffered solely on the basis of their intersex difference – is movingly documented in their news story. The news article also points out intersex individuals may be as common as individuals with red hair, according to some estimates. (I use “their” and “they” here because the English language is evolving to accommodate the use of “their” and “they” to refer to individuals who do not identify as either male or female, or identify as somewhere in between. This is how Shon Klose [self-identifies](#)).

I was hesitant, in writing this post, to ask what would happen to an individual who was discovered to be intersex as part of the admissions process at TWU. First, because I cannot predict how TWU would decide its Community Covenant applies to someone like Shon Klose. (though I will consider some hypotheticals). But mainly I hesitate because I find it deeply troubling that someone with a non-binary gender identity might even find it necessary to ask TWU’s administration whom they are allowed to marry and engage in consensual sex with. It should not be up to a university administration to make this decision for students and staff, especially when intersex individuals already experience such extreme forms of discrimination at the hands of medical professionals and by a close-minded society more generally.

If intersex individuals are anywhere near as common as [individuals with red hair](#) (approximately 1.7% of the population), it is quite probable that there are intersex individuals enrolled at TWU right now, since its annual enrollment is approximately [4,000](#) students. Even [one of the lowest estimates of intersex differences occurring in 1 in 2,000 people](#) would suggest that, even if there are no intersex individuals enrolled at TWU now, some of their [over 18,000](#) alumni are intersex. And it is likely that TWU will have intersex students in the future. (We could also ask about staff and faculty but the question of how TWU will treat its students is closer to the heart of the debate about whether TWU’s law school should be accredited).

Some of these students may not even know about their own intersex difference, and may be performing a gender role that does not accord with society’s prescriptions for people with their genotype and/or phenotype. (There may not even be a prescription, whether biblical or societal). What if one of these students is in what appears to be a marriage of one man and one woman, but then discovers their biology does not fit neatly into either category? Is sexual intimacy within this marriage no longer permitted? Has the couple already, unknowingly, violated the Covenant because they had consensual sex within marriage, but one spouse is neither “male” nor “female”? Is this marriage invalid according to the Covenant? What if the intersex spouse decides to change their gender expression to accord more closely with their feelings about their newly discovered intersex difference? Is that individual required to divorce and re-marry someone of another (supposedly opposite) sex? Divorce is also strongly discouraged by TWU’s Community Covenant, which requires members, “[within marriage \[to\] take every reasonable step to resolve conflict and avoid divorce](#)”.

Again, I cannot claim I am able to predict what TWU’s interpretation of the bible would require here. That TWU would have any say in an intersex student’s sex life does offend my own sense

of what kindness, compassion and mercy (all characteristics that TWU members must commit to cultivate) require in the treatment of individuals who are in a vulnerable social position.

I will ask instead how TWU would treat trans individuals who either identify as trans when they apply to study at TWU, or who begin to transition as students. I will be optimistic and hope that trans students would be treated with the kindness that is a basic requirement in all religions I am aware of. I will be optimistic and assume they would not be denied an education merely for being trans. I do balk at the question of what kinds of consensual sexual relationships TWU would prescribe (or prohibit) for trans individuals who decide to marry. I do not think it is even logically sound to prescribe or prohibit consensual sexual activity according to gender categories that are rendered absurd by the range of intersex difference that occurs naturally in the human population, and by the existence of individuals who cannot survive in the gender they were assigned at birth.

To all of this one might object: the examples of intersex and trans individuals represent outliers. One could argue: freedom of religion still permits TWU to require students who do conform to a socially prescribed gender to reserve sexual intimacy for heterosexual marriage (perhaps as that is described in, e.g., [Ephesians 5:22-33](#)). I will concede that most students will probably conform to the gender binary.

However, TWU must still tackle the practical question of how it will deal with trans and intersex students. In law we are concerned with justice and human rights, but in particular we are often concerned with defending the rights of members of marginalized minorities. TWU's student body is large enough that it almost certainly includes, or will include, trans and intersex students who may not discover or disclose their identities until they are partway through a degree. (Query what would happen if a trans person living in their true gender was "outed" while studying at TWU. Some trans people are religious, and there are Christian communities in which [trans people are accepted into membership and ministry](#)).

Individuals who are intersex or trans obviously have no choice about their sex or gender. I could give TWU the benefit of the doubt and assume it would not consider being trans, or transitioning, as a prohibited "choice". That attitude recently resulted in the death of [Leelah Alcorn](#) in the US and is surely the source of a great deal of suffering more generally. TWU does consider homosexual sex to be a choice that gays and lesbians could refrain from making. So perhaps TWU would also consider transition optional even though that position flies in the face of scholarly and medical literature on the subject.

Even if TWU rejected transition as contrary to its Covenant, it could not take the position that intersex people have chosen to be intersex. If intersex individuals do not fit into either the role of a "man" or "woman" in a marriage, the result under TWU's Covenant would be that these individuals could never have consensual sex. (Though, as I have noted above, some intersex individuals do identify strongly with a binary sex. Query whether these intersex individuals' identities would be subject to approval by TWU.) This prohibition would be based solely on characteristics inherent in intersex people. There is no option for many intersex people to deny their biology (even if they could deny their gender identity) and enter into a marriage that fits the Covenant's definition. Even if TWU takes the position that the gender binary can be enforced socially, there will always be individuals who, due to inherent characteristics, do not fit in either gender box.

TWU has held steadfast to compulsory heterosexuality, even though its law school could have been accredited in Nova Scotia absent legal proceedings if it had just dropped compulsory heterosexuality from its Covenant. But we can imagine that TWU might decide to make exceptions for intersex individuals on compassionate grounds, especially if an intersex person is already married when they discover their intersex difference. The argument that “TWU is not for everyone” and that people who don’t like the Covenant should simply study somewhere else does not hold for these students. They might discover they are intersex mid-degree, and there is a compelling case to be made that they should not be expelled or forced to divorce as a result. But if sex within an intersex person’s marriage is permitted, it follows that gays and lesbians should not be excluded from marriage either.

Neither intersex people nor gays and lesbians have any choice about being LGBTQI+. So what would justify treating some sexual minorities, some of whom have no choice but to live outside biblically prescribed gender roles, with greater human dignity than others? Suggesting that gays and lesbians could simply go elsewhere, or enter into straight marriages, denies them either education or employment or a part of their humanity – a part of intersex people’s humanity that would be allowed even though it violated the Covenant. If TWU would solve this practical problem by making exceptions for intersex people and not for gays and lesbians, there would be an inconsistency in the application of its moral code. TWU would be forced to concede that the sanctity of marriage does not always arise between one man and one woman.

How will TWU resolve these conflicts? Should TWU require prospective students to undergo a physical examination and genetic test prior to acceptance at TWU? Should prospective students be made to swear an oath that they are not, and never will identify as, trans in order to prevent possible retroactive violation of the sanctity of marriage? Obviously these investigations into students’ gender and sex would constitute unacceptable invasions of privacy. But so does TWU’s interference in prescribing the gender of individuals having sex consensually behind closed doors.

I will not get into the legal details of the balancing exercises the courts have done with the *Charter* rights at stake in the “irreducible conflict”. However, I will suggest that the courts, including the Supreme Court of Canada, have failed to account for enough of the letters in LGBTQI+ when balancing competing rights. There is even room here for someone to do an analysis of how bisexual, questioning and genderfluid people (among others) would be impacted by the Covenant, and a deeper analysis of how trans people weigh in. But in particular the prevalence of intersex people in the population, even if we assume the [lowest estimates to be correct](#), offers compelling arguments on the LGBTQI+ side of the scale.

No one can argue that intersex people have a choice about their intersex status. (It is rare to hear anyone argue that being gay or lesbian is a choice, but it is reasonable to assume that attitude still exists, maybe even among jurists). And, importantly, no one can argue that intersex people can just decide to study or work elsewhere, because intersex people might discover their intersex status while studying or working at TWU.

It is my hope that the next time the courts engage in the balancing of *Charter* rights at TWU, they at least consider the serious harm that TWU’s Covenant does to intersex people. Intersex people are already so invisible in our society that to have a university policy that does not contemplate their existence is, I think, a harm in itself. It is time for us to take seriously what gender-based prohibitions on sex do to harm the people behind the rest of the letters in “LGBTQI+”, who are so often ignored.

Drawing a Line Between TWU and Other Religious Institutions and Charities

The second issue is whether a line can be drawn, on a principled basis, between TWU and other religious institutions that espouse values restricting sexual intimacy to heterosexual relations within marriage. The answer is “yes”; there is already a large body of charity jurisprudence that makes this kind of distinction. Disputes that cannot be resolved between a taxpayer and the CRA go to the courts for resolution. As discussed in my [earlier post](#), it is a very old principle in charity law that an organization cannot be said to be charitable if it engages in activities contrary to public policy. There is a difference between holding harmful beliefs and excluding people from higher education, not to mention that TWU is actively pursuing its right to exclude gay and lesbian people from a higher education through the media and the courts.

Revoking TWU’s charitable tax status for pursuing activities contrary to public policy would not set a precedent that would revoke the charitable tax status of all religious institutions supporting heterosexual marriage. The ordinary tests in the *Income Tax Act* and in charity law jurisprudence would apply. Religious charities should have their charitable tax status revoked if more than 10% of their expenditures are on political activities (this is a simplification, see my previous post for full detail), or if they are pursuing activities contrary to public policy, as defined by the courts through hundreds of years of jurisprudence imported from the UK. It is important to note that the balancing of rights that happens in *Charter* litigation is not applicable to the legal test of whether an institution should lose charitable tax status.

But even if more religious institutions that actively promote intolerance were subject to audit, the broad audit would not be troubling when the tax benefits received by charities are understood as paid for by the public, including by LGBTQI+ individuals. It is the CRA’s responsibility to administer and enforce most tax laws in Canada. This responsibility includes ensuring that charities are not misusing public funds for political purposes or for activities contrary to public policy.

I point out again that charitable tax credits are considered tax expenditures. This means the federal government accounts for revenue foregone in the form of reductions to the tax bills of those entitled to the credits. This is equivalent to direct government spending: essentially, the government underwrites the charitable sector by giving tax kickbacks to donors. This increases the donors’ ability and willingness to donate, and therefore directly benefits registered charities like TWU. For a more detailed explanation of the tax expenditure concept, see my [previous post](#). In addition to tax credits for donors, registered charities like TWU receive significant public subsidies in the form of exemptions from income tax. TWU is also exempt from property taxes that would otherwise be levied under multiple provincial statutes per section 14 of BC’s *Trinity Western University Foundation Act*, [SBC 1989, c 82](#). Other taxpayers and owners of real property in BC must make up this shortfall, and therefore subsidize TWU to the extent of the tax it would otherwise pay.

Religious freedom does not extend a religious right to receive funding from the entire taxpaying public. Denying a religious organization access to public funds, in the form of tax exemptions and charitable tax credits for donors, can hardly be characterized as a curtailment of freedom of religion. Revoking charitable tax status would simply remove the requirement on all other taxpayers to subsidize the religious organization. That is a fair result if the religious organization is actively pursuing an agenda to deny LGBTQI+ people access to legal education. If TWU retains its charitable tax status, LGBTQI+ taxpayers will continue to be forced to subsidize the only

law school in Canada that explicitly discriminates against sexual minorities. In fact, LGBTQI+ taxpayers are currently underwriting TWU's legal fees in defending its right to exclude LGBTQI+ people from accessing a legal education at TWU.

A further objection was raised that the reasons I am calling for the revocation of TWU's charitable status could apply to any charity that discriminates on a *Charter*-protected ground. That is accurate, but not problematic. Law professors in the US have identified a principle in US law, similar to our own "contrary to public policy" test, that should be used to [revoke the tax-exempt status of racist fraternities](#). But the US faces the same problem we do: the IRS, like the CRA, cannot audit every organization claiming tax benefits.

The example given in the Canadian context was that the Vancouver Rape Relief Society, and other women's shelters that discriminate against trans women on the basis of gender, could lose their charitable tax status. I think the comment I already made on this point is worth repeating here, since trans women are subjected to some of the most egregious forms of discrimination in our society. This has been demonstrated in Canada most recently by Senator Plett's [amendments to Bill C-279](#), so that in its current form trans people could be effectively banned from using public washrooms. It should be noted that these amendments are specifically intended to target trans women, not trans men. Others have pointed out, [more eloquently than I could](#), the [absurdity](#) of these amendments, and that they are evidence of a particularly vicious form of misogyny – transmisogyny – that it is apparently acceptable to openly promote in our highest levels of government.

Here are my [comments](#) on the Vancouver Rape Relief Society:

I do think the Vancouver Rape Relief Society should lose its charitable tax status. To deny a trans woman a volunteer position in her own community, solely on the basis of gender, is a prohibited form of discrimination under the relevant human rights legislation. The BC Court of Appeal said as much in *Vancouver Rape Relief Society v Nixon*, 2005 BCCA 601. It simply found it could not grant Ms. Nixon relief because BC exempts non-profit organizations from the provisions that would otherwise protect her (para. 9). Maybe there would be some justice for Ms. Nixon, and all trans women, if trans people were no longer forced to subsidize the Vancouver Rape Relief Society, and its donors, with their tax dollars. So if anyone in the CRA is reading this, I hope they will also consider this comment an open letter requesting an audit of the Vancouver Rape Relief Society on the basis that it is engaging in activities contrary to public policy.

Trans women are some of the most vulnerable people in our society, since they exist at the intersection of transphobia and misogyny. In the US, the trans community lost seven trans women to murder in the first seven weeks of 2015 alone. Six of these murdered women were women of colour (see [here](#)). The prevalence of violence against trans women, particularly trans women of colour, is heartbreaking. These losses make it particularly sad, and bitterly ironic, that trans women are so often excluded from women's shelters.

Personally, I will only donate to women's shelters that have an explicit policy of welcoming trans women. I have [this shelter's page](#) bookmarked in my laptop's browser for that reason.

I would ask the reader to consider the consequences of denying shelter to a trans woman who is fleeing from violence.

TWU's History of Exploiting Canada's Charitable Tax Credit Regime

In the early 2000s, TWU was involved in an aggressive charitable tax credit scheme to give parents of TWU students government-funded kickbacks on tuition. (Some of the payments for which receipts were illegally issued were made by grandparents and family friends of TWU students. For simplicity I will refer to payments made by, and receipts issued to, parents or family). The scheme worked by disguising tuition payments as charitable donations by funneling them through a separate registered charity (though funds were comingled) and back to the students as "bursaries". Students were instructed to solicit "donations" that would be made out not to TWU, but to the National Foundation for Christian Leadership (NFCL). The NFCL also funded a handful of other Christian colleges and seminaries, though the tax disputes that went through the courts involved only "donors" who contributed on behalf of students of TWU. Students received a fundraising tip sheet that included suggesting to potential payors (typically their parents), "that God does not want to see students graduate with huge burdensome student loans" (*Coleman v Canada*, [2010 TCC 109](#) at para 3. *Coleman* was affirmed in *Ballard v Canada*, [2011 FCA 82](#), leave to appeal refused, [\[2011\] SCCA No 196](#). Note that throughout I have used quotation marks around terms the taxpayers used for the scheme, where those words do not reflect the economic reality of the situation, as this was the convention used in *Ballard*).

On paper, the NFCL specified that donations raised by a particular student could not be designated to reduce that particular student's tuition. However, letters sent to students and their parents stipulated how much the students would have to raise in donations to cover 100% of their tuition and other costs – the NFCL's fundraising material represented that raising 125% of the student's total costs would entitle him or her to the maximum bursary amount (*Coleman* at para 3). The NFCL's materials also represented that "donors" could expect to receive charitable donation tax credits covering up to 45% of payments made to the NFCL (*Coleman* at para 3).

Participating students received a "bursary" of 80-100% of the lesser of the value of their tuition and other costs or the value of the parents' payments to NFCL (*Coleman* at paras 4 and 35). Only 5-10% of students did not receive a benefit in return for the payment they had solicited; however, in each of those cases the student was not granted a benefit because they failed to meet the criteria to qualify for funds (*Ballard* at para 12). These criteria set a fairly low bar: students had to, for example, pay a fee to NFCL of \$25 per semester, enroll in a minimum number of courses, and maintain a cumulative grade average over 63% (*Coleman* at para 3).

The Tax Court of Canada, affirmed by the Federal Court of Appeal, found that these donations to the NFCL could not be characterized as "gifts" under the common law as it then applied under the relevant provisions of the *Income Tax Act* dealing with charitable donation tax credits (*Income Tax Act* s. 118.1, *Ballard* at para 5).

(Note that donations made after December 20, 2002 are subject to statutory rules that prevent a gift from being vitiated if the donor receives an "advantage" of 80% or less of the value of the donation. Instead, the value of the gift that can be claimed for the purposes of applying the charitable tax credit is reduced by the value of an "advantage" received in return for the donation. See s. 248(30)-(32). All the "donations" in issue in *Coleman* were either made prior to December 21, 2002, or the "bursary" provided to a student was well in excess of 80% of the

“donation”. Therefore the common law definition of “gift” was applied to all “donations”, per s. 248(30)).

To paraphrase, a “gift” at common law occurs when:

1. Property owned by the donor;
2. was voluntarily transferred; and
3. no benefit or consideration flowed back to the donor

(*Coleman* at para 36, citing *Friedberg v Canada*, [1991] FCJ No 1255).

Coleman turned on the third branch of the test. A benefit received by a donor vitiates a gift when the benefit has a sufficient link to the donation. A donor who expects a benefit in return for a donation cannot be said to have the requisite donative intent for a “gift” to be made out under common law. In *Coleman*, the “donors” expected a benefit in the form of a “bursary” for the TWU student who solicited the donation. Justice Campbell Miller of the Tax Court of Canada framed this expectation as follows:

What is disturbing is that the objective evidence points so very clearly to an understanding, indeed a knowledge, at the time of donation, that 80 to 100% of monies they donated would go to cover the education cost of those students who solicited the funds - primarily their offspring (*Coleman*, para 35).

The Federal Court of Appeal, in *Ballard*, upheld the decision of the Tax Court. The FCA distinguished its reasoning only on the basis that Justice Campbell Miller’s finding that there was no uncertainty about the receipt of “bursaries” was “not entirely accurate” (*Ballard* at para 13). However, this inaccuracy did not rise to the level of palpable and overriding error, since on the facts the “donors” before the court knew the students were within the criteria for receipt of their “bursaries”. Therefore these “donors” were certain of receipt (*Ballard*, paras 13 and 24). The decision of the Tax Court dismissing the appeals of the “donors” was thus upheld, such that the denial of their charitable tax credits was maintained.

Today, the NFCL is still a [registered charity](#). However, it has received no donations in any of its fiscal periods reported on the CRA’s website back to 2010. Its only expenses in each fiscal period were professional fees under \$300. This is unsurprising, since the tax credit scheme the NFCL was used for has been defunct since the Tax Court and Federal Court of Appeal’s decisions in *Coleman* and *Ballard*.

Determining that TWU’s tax credit scheme was invalid involved a different legal analysis from the one that would determine TWU’s ineligibility for charitable tax status. However, TWU’s willingness to engage in such a blatantly abusive tax credit scheme speaks to the institution’s lack of respect for the taxpaying public. It is particularly egregious that TWU would characterize tuition payments as charitable donations, because nothing about this scheme disentitled students of TWU to tuition tax credits. The scheme allowed parents and students to double-dip, since TWU’s tuition gave rise to both a charitable tax credit and a tuition tax credit.

TWU has unusually high tuition fees because of its supposed lack of public funding. In 2011, tuition fees were between [\\$16,000 and \\$20,000](#) per year. (TWU calculates its tuition according to [credit hours](#)). There is no limit in s. 118.5 of the *Income Tax Act*, the section that implements the tuition tax credit, on the quantum of fees eligible for the credit. This means that TWU students are subsidized by tuition tax credits on the entire amount of their tuition. TWU fees are roughly 3 times greater than fees at other public universities in Canada. Part of the tax value of

tuition amounts can be transferred to parents in the year the tuition expense is incurred. Remaining credits are carried forward to be used to offset future taxes. The credit is worth 15% of the face value of tuition fees at the federal level alone. BC adds an additional 5.05%. (Provinces calculate provincial personal credits at different rates).

The tuition tax credit effectively provides a government subsidy of roughly 20% of the full amount of TWU's tuition fees in BC. This subsidy for TWU's tuition continues today. TWU's aggressive tax planning, impugned in *Coleman* and *Ballard*, just added another layer of charitable tax credits to which "donors" to the NFCL were not entitled to in the first place.

Recall that TWU claims it is a private university in order to maintain its exemption from the *Charter* protections for gay lesbian individuals. *Trinity Western University v British Columbia College of Teachers*, [2001 SCC 31](#) [*TWU v BCCT*] was released by the Supreme Court in 2001. The *Coleman* and *Ballard* decisions deal with "donations" made in 2002 and 2003. The facts in *Coleman* tell us that TWU was issuing these questionable charitable receipts for what were, in substance, tuition payments at least as early as 2001 (*Coleman*, para 16). [Another source](#) refers to the scheme being in effect since at least 2000, and an estimated total of \$12 million in tax receipts issued under the scheme. I should emphasize again that the NFCL's own promotional materials advertised that the scheme could reduce tuition costs by up to 45% (*Coleman* para 3). In other words, TWU and parents of TWU students knew the scheme constituted a tax subsidy to the tune of almost half of their students' tuition, and the scheme was in fact advertised to parents that way. These receipts funded TWU's students' tuition directly out of public tax revenue.

Every public university in Canada is characterized as public because the government subsidizes part of students' tuition. Yet TWU, an institution that claimed to be private when *BCCT v TWU* went before the Supreme Court, advertised at the same time that up to 45% of its students' tuition could be paid for by the government for the period throughout which invalid charitable tax receipts were issued. This subsidy existed separate and apart from the subsidies TWU continues to receive from the taxpaying public through its exemptions from income and property tax, from the ability of its students to claim tuition tax credits, and its ability to issue charitable tax receipts for donations unrelated to tuition.

We can only hope that the CRA managed to collect all the inappropriately claimed tax benefits received by "donors" to the NFCL, with interest. Even if the CRA was able to recoup all the tax benefits received as a result of TWU's exploitative tax scheme, it would have recouped those benefits from the parents of TWU students, not from TWU. Note that *Coleman* and *Ballard*, the parties reassessed by the CRA, were individual taxpayers who had made payments to the NFCL. The windfall benefit to TWU, that students were better able to afford TWU's high tuition rates because of an illegitimate tax subsidy to students' families, has been retained.

TWU's willingness to exploit the Canadian tax system through aggressive (and ultimately unsound) tax planning further undermines the claim it made before the Supreme Court of Canada that it is a private institution. Aggressive tax planning made TWU better off at the expense of all Canadian taxpayers. Meanwhile the "donors" to the NFCL bore the risk of reassessment by the CRA.

In my view, the claim that TWU is a private institution is every bit as artificial as was TWU's scheme to issue charitable tax receipts for tuition payments. Its claim that it is a charitable organization is on shaky ground, at best, as long as it discriminates against LGBTQI+ people, contrary to public policy. (See my [previous post](#) for an explanation of charity law as it applies to TWU's charitable tax status). As discussed above, I strongly suggest the courts consider the impact of the Covenant on trans and intersex, as well as lesbian and gay students the next time they have the opportunity to comment on the balance of LGBTQI+ rights with religious freedom.

To subscribe to ABlawg by email or RSS feed, please go to <http://ablawg.ca>
Follow us on Twitter [@ABlawg](#)

