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## Trinity Western University: Your Tax Dollars at Work

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**Case Commented On:** *Trinity Western University v Nova Scotia Barristers' Society*, [2015 NSSC 25](#)

Trinity Western University (“TWU”) claims it is a private religious institution. This is the explanation offered by the courts for denying students, staff and faculty at TWU protection under the *Canadian Charter of Rights and Freedoms*. This protection is denied even though it is generally accepted, even by supporters of TWU, that TWU’s Community Covenant, “indeed treat[s] LGBT people in a way that would have profoundly negative effects of [sic] their lives.” See *Trinity Western University v Nova Scotia Barristers' Society*, [2015 NSSC 25](#) [*NS Barristers' Society*] at para 251).

What does it mean for a university to be publicly funded? I am a tax scholar, so I offer a definition supported by tax policy. TWU is publicly funded because it receives significant tax benefits as a result of its registered charity status. TWU is tax exempt, and therefore underwritten by public funding. The tax exemption is equivalent to a direct subsidy to TWU, since it represents tax revenue forgone, and governments must make up the shortfall elsewhere. TWU also issues charitable tax receipts that allow (and encourage) donors to give more money to TWU than they otherwise could, since the state gives donors a kickback on their taxes for doing so.

For reference, the objectionable terms of the [Community Covenant](#) that TWU students and employees are required to sign are as follows:

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

...

- sexual intimacy that violates the sacredness of marriage between a man and a woman

and,

Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God’s intention that it be enjoyed as a means for marital intimacy and procreation.

The Community Covenant binds employees and students: “Sincerely embracing every part of this covenant is a requirement for employment. ... Students sign this covenant with the commitment to abide by the expectations contained within the Community Covenant”.

## How TWU’s Tax Subsidies Work

*[Those who are already familiar with the mechanics of charitable tax credits and the concept of tax expenditures can safely scroll down to the next heading, “**TWU’s Registered Charity Status Should Be Revoked**”]*

In the late 1960s, Stanley Surrey, at various times a Harvard Law School professor and Assistant Secretary of the US Treasury for Tax Policy, revolutionized the world’s understanding of tax policy by identifying tax expenditures as items of government spending. It is because of Stanley Surrey’s contributions to tax policy that the Canadian Department of Finance publishes an annual [Tax Expenditures and Evaluations](#) budget, estimating the amount of revenue foregone by the Canadian government in offering various tax preferences, or expenditures.

Government revenue foregone is equivalent to spending; e.g., the Child Fitness Tax Credit is projected to cost an [estimated \\$115,000,000 in 2013 alone](#). The Child Fitness Tax Credit, by reducing tax payable by taxpayers who qualify, is equivalent to writing cheques to qualifying taxpayers to the tune of a projected \$115,000,000 in 2013. That is the amount the federal government would have collected from families whose children are involved in qualifying activities – but chose not to collect in order to encourage parents to enroll their children in fitness activities. Tax spending measures like the Child Fitness Tax Credit are often sold to the public as tax cuts, when they are in fact a form of government spending that reduces government revenue and therefore reduces annual surpluses, or increases annual deficits.

The federal government’s annual expenditure budget comes with some caveats. Finance’s calculations, meant to estimate the increase in revenue if the tax spending measures were removed, assume no change in the underlying tax base as a result of removing each expenditure measure addressed. Removal of one of these expenditure measures could change the behavior of taxpayers, might require other changes in government policy, and could impact the economy generally. Nevertheless, the estimates of expenditures on charitable donations are large enough to be significant even if they are not exact. Charitable donations are the very first item in the [2013 federal tax expenditure budget](#), and figures on expenditure estimates and projections, below, are sourced from that document unless otherwise noted.

The government has made a policy decision to underwrite private donations to charity. TWU is a registered charity. Donations to TWU qualify for the Charitable Donations Tax Credit, a tax subsidy provided to taxpayers who donate to registered charities and receive charitable donation receipts. Federally, the charitable tax donation credit is calculated as 15% of the first \$200 of donations (the lowest federal rate), and 29% (the highest federal rate) of amounts donated over \$200. (The highest tax rate is used to compute the tax credit for donations over \$200, even if the taxpayer is not earning enough income to be taxed at the highest rate, federally). Thus, if an individual donates \$1,000 to a registered charity, the federal portion of their credit will be calculated as follows:

$$\begin{aligned} & \$200 \times .15 \\ & = \$30 \end{aligned}$$

$$\begin{aligned} & \$800 \times .29 \\ & = \$232 \end{aligned}$$

$$\begin{aligned} & \text{Total federal credit:} \\ & \$30 + \$232 \\ & = \$262 \end{aligned}$$

The value of the federal portion of the credit alone is \$262: this is the amount the individual can subtract from their federal tax payable. The credit is economically equivalent to a system where there is no subtraction from tax payable, and the federal government instead writes a cheque to the taxpayer for \$262. (The credit is non-refundable, so a taxpayer who would not otherwise owe taxes federally does not receive this benefit; also note the credit is available for up to 75% of an individual's net income donated in a year, until the year of death when it can be claimed against 100% of net income).

The amount spent on reductions of tax for charitable donors by the federal government in 2013 alone is a projected \$2,225,000,000, or \$2.225 billion. That figure does not include the double tax benefit of donating publicly listed securities to registered charities: those donations qualify for a charitable donation tax credit and the donors are exempt from capital gains tax on any accrued gains on the shares. Charitable tax credits for the donation of publicly listed securities (it is mostly high net worth individuals who can afford to make these types of donations) are projected to cost the federal government \$125,000,000 in 2013 alone, and the non-taxation of capital gains on those shares is projected to cost the federal government, and by extension all Canadian taxpayers, \$32,000,000. [TWU's Schedule 5: Gifts In Kind](#) tells us that TWU received publicly traded securities that qualified for this additional tax benefit in its 2014 fiscal period. However, the redacted version of TWU's Registered Charity Information Return does not tell us the value of receipts issued for those securities or the total benefit to donors from the non-taxation of their capital gains.

The new federal First-Time Donor's Super Credit, intended to incentivize first-time charitable donors, allows a total credit of 40% of the first \$200 donated and 54% of donations over \$200, up to \$1,000. So a donation of \$1,000 would yield a federal credit of \$512 (\$80 on the first \$200 and \$432 on the next \$800). This figure does not include provincial credits, so that the total credit would end up refunding the charitable donor well over 50% of his or her donation. The First-Time Donor's Super Credit is projected to cost \$20,000,000 in 2013. Query who will take advantage of this credit? Low income individuals who donate for the first time (typically young people) might give \$10 or \$20 to a friend who is doing a bike ride for the Heart and Stroke foundation. If even such a small donation has been made since 2007, it disqualifies the taxpayer from taking advantage of the First-Time Donor's Super Credit. I leave it to the reader to speculate on what socio-economic segment of the Canadian population can afford to give a full \$1,000 as a first time donation, *and* claim the credit against tax otherwise payable.

Alberta has an especially generous provincial tax credit for charitable donations. We have a flat income tax rate of 10%, and we use that rate to calculate the credit for donations up to \$200. We use a much higher rate of 21% for donations over \$200. That high rate is intended to provide a total credit of 50% (when the 21% is combined with the federal 29% rate) of donations over \$200. In combination with the First-Time Donors' Super Credit, our provincial credit is far more generous than even a 50% credit. The provincial portion of the charitable tax donation credit in Alberta, for someone who does not qualify for the First-Time Donor's Super Credit, on \$1,000 would be calculated as follows:

$$\begin{aligned} & \$200 \times .10 \\ & = \$20 \end{aligned}$$

$$\begin{aligned} & \$800 \times .21 \\ & = \$168 \end{aligned}$$

$$\begin{aligned} & \text{Total Alberta Credit: } \$168 + \$20 \\ & = \$188 \end{aligned}$$

So for an individual resident in Alberta who does not qualify for the First-Time Donor's Super Credit, the total tax credit available to the donor is:

$$\begin{aligned} & \$262 \text{ [federal credit]} + \$188 \text{ [Alberta credit]} \\ & = \$450 \end{aligned}$$

An individual resident in Alberta who does qualify for the First-Time Donor's Super Credit would receive the following:

$$\begin{aligned} & \$512 \text{ [federal credit plus super credit]} + \$188 \text{ [Alberta credit]} \\ & = \$700 \end{aligned}$$

An individual in Alberta who qualifies for the federal First-Time Donor's Super Credit therefore receives a tax benefit of 70% of their total donation of \$1,000. The CRA has a [charitable tax credit calculator](#) for any donation amount, depending on your province of residence and whether or not you are a first time donor.

At first glance, it appears that this tax credit benefits the donor alone. However, in tax policy it is recognized that taxes and tax subsidies can be passed on to parties not legally targeted by a tax measure. For example, property taxes can be shifted from land owners to tenants with an increase in rent, and tax subsidies might not benefit the parties who are legally entitled to claim them. In my Tax Policy class, I use the example of Manitoba's [Odour-Control Tax Credit](#): it provides farmers with a credit for purchasing equipment that reduces odour, a negative [externality](#) that results from farming activity. But vendors of odour-control equipment might respond to this tax credit by increasing their prices, since they know farmers will be refunded part of the equipment cost by the government of Manitoba. We have no way of knowing, without further research, whether farmers or vendors of odour-control equipment benefit from the credit, even though farmers are legally entitled to claim the credit on their tax returns.

Similarly, it is generally assumed that the charitable donation tax credit benefits charities: the tax credit increases the ability of donors to give. Donors know they will receive some proportion of their donation back in the form of a reduced tax liability, and therefore can afford to give more. The federal and provincial governments, through charitable donation tax credits, are underwriting the charitable sector. Through tax dollars foregone by the government, all Canadian taxpayers are increasing the donation power of high-income individuals to charities.

One argument to justify this spending might be that it gives some control over social spending back to individual taxpayers. (The private sector is thought to distribute resources in the economy more efficiently than the government does). It is also an incentive to donate. However, in the US it has been noted that high-income individuals have a tendency to donate their wealth

to causes that benefit other privileged individuals: for example, arts and education. High-income individuals also [donate less, as a percentage of total income](#). Query whether, in a system where an incidental purpose of the income tax is to redistribute income, the government should use public funds to underwrite charitable donations that wealthy individuals make to benefit other relatively privileged individuals. Query whether TWU, as a registered charity, should also be exempt from income tax while its donors receive generous tax credits. While the Canadian Department of Finance does not estimate the value of the income tax exemption for registered charities, the revenue forgone in the non-taxation of other non-profit organizations is estimated. I would side with the literature in the US (e.g., Austin Caster, ““Charitable” Discrimination: Why Taxpayers Should Not Have to Fund 501(C)(3) Organizations that Discriminate Against LGBT Employees” (2011) 24 Regent University L Rev 403), that considers the non-taxation of charitable organizations to be an expenditure no different from the non-taxation of other non-profit entities.

### **TWU’s Registered Charity Status Should Be Revoked**

All of this is troubling when considering the debate over whether TWU is entitled to a law school accredited by bar associations across Canada because TWU is a registered charity. It can issue charitable donation receipts that entitle donors to the credits described above. All registered charities have to file Registered Charity Information Returns that are available to view in redacted form [on the CRA’s website](#). In its 2014 fiscal period alone, TWU received \$10,0585,806, or [13% of its total revenue](#), in donations for which a charitable receipt was issued. Donors would likely have received somewhere between 20% and 70% of their donations as a tax subsidy from the public purse. TWU also received [\\$1,054,623 in direct government funding](#) in 2014 alone. These figures are alarming in light of the constant refrain that TWU is a private institution, and therefore exempt from the application of the *Charter* (See *Trinity Western University v British Columbia College of Teachers*, [2001 SCC 31](#) [*TWU v BCCT*]). Canadian taxpayers do underwrite a portion of TWU’s budget.

The Canadian public should not be compelled to assist an institution that espouses values that are harmful to gay and lesbian individuals, and that excludes gay and lesbian individuals from employment and education. Note that I refer throughout to gay and lesbian rather than LGBT individuals, unless quoting another source. This is deliberate: to my knowledge no one has yet analyzed the impact of TWU’s Community Covenant on bisexual and trans individuals. The *NS Barristers’ Society* case uses “LGB” and “LGBT” interchangeably, sometimes within the same paragraph.

There has been a great deal of news coverage lately on the CRA’s audits of other registered charities. Allegations have been made that the CRA is targeting environmental and left-leaning charities, although without a full list of charities under audit (which the CRA cannot make public), it is impossible at this point to prove with 100% certainty that the CRA’s audit choices are a result of political interference. However, the Broadbent Institute has already come forward with a report entitled, [“Stephen Harper’s CRA: Selective Audits, “Political” Activity, and Right-Leaning Charities.”](#) No right-leaning charity has come forward to say that it is also under audit, and that alone is considered suspect. Also suspect is that some right-leaning think tanks, namely the C.D. Howe Institute and the Macdonald-Laurier Institute, claim that 0% of their spending is on political activity. These two charities have stated [they are not under audit](#).

In order to obtain registered charity status, a charity must define its purpose as entirely within charitable purpose categories that have been defined over hundreds of years of jurisprudence.

The four categories are relief of poverty, advancement of education, advancement of religion, and other purposes beneficial to the community. Canada takes its precedent on the “four heads” of charity from the UK case, *Commissioners for Special Purposes of Income Tax v Pemsel*, [1891] AC 531. TWU’s mandate, as written, is within the education and religion categories. However, there are further obligations to maintain registered charity status. A charity has very limited scope to engage in non-partisan political activity that is ancillary and incidental to its charitable purposes. Substantially all of a charity’s activities must be charitable (“substantially all” is interpreted by the CRA to mean 90% or more), and its activities must be legal and cannot be contrary to public policy. (See, e.g., *Everywoman’s Health Centre Society (1988) v Canada*, [1991] FCJ 1162 (FCA) [*Everywoman’s Health Centre Society*]).

Reforms to Canada’s *Income Tax Act* in 1986 have been understood as incorporating the CRA’s interpretation of “substantially all” activities as 90% of activities into the legislation. The reforms followed, and appeared to codify, a restrictive approach to whether political activity was “incidental”, taken by the Federal Court of Appeal in upholding the revocation of Scarborough Legal Services’ registered charity status (Samuel Singer, [\*Reforming the Advocacy Rules in Canadian Charity Law: Legislative Amendments, Judicial Action or Administrative Discretion?\*](#) (LLM Thesis, McGill University Faculty of Law, 2011) [Singer] and *Re Scarborough Community Legal Services and the Queen*, [1985] 2 FC 555). Courts have been known to reject a strict application of the 90% rule in other areas where “substantially all” appears in the *Income Tax Act*; however, in this instance the incorporation of that test by Parliament appears deliberate. Therefore, it might be difficult to argue that TWU’s legal fees and other expenditures to uphold the legality of a discriminatory policy cause it to fail the “substantially all” test if they represent less than 10% of TWU’s expenditures.

The *Income Tax Act* deems an expenditure on political activities to be non-charitable (ss. 149.1(1.1)). A charitable foundation will be considered to be constituted for charitable purposes to the extent of resources devoted to political activities where the charity devotes substantially all of its resources to charitable purposes and the political activities are ancillary and incidental to its charitable purposes (ss. 149.1(6.1); the provision for a “charitable organization” is similar, ss. 149.1(6.2). These are the provisions introduced in the 1986 reforms). There is much debate in the charity law literature over whether the “ancillary and incidental” test has superseded the “substantially all”/90% test in charity law jurisprudence. (For a summary and discussion see Singer, *supra*). Can it be said that TWU’s [activities to defend its right to exclude gay and lesbian students](#) are “ancillary and incidental” to its charitable purposes, when these activities are what TWU is currently best-known for in the media, in Canada and [even in the US](#)?

## **TWU’s Political Activities**

TWU is now devoting resources to appealing several law societies’ refusals to accredit TWU’s proposed law school. Arguably, such resources are being spent to defend and not promote TWU’s discriminatory Community Covenant. The funds are being spent to ensure, [from TWU’s perspective](#), that the legal precedent set by the Supreme Court of Canada in *TWU v BCCT* is applied consistently to allow its request for accreditation of its law school. The [CRA’s interpretation of the jurisprudence](#) on political activity is that it includes work to “retain” an existing law, policy, or government decision. The Nova Scotia Supreme Court decision on TWU’s law school accreditation, *NS Barristers’ Society*, appears to go beyond retaining existing law: it expands freedom of religion to include religious freedom to discriminate. The lopsided nature of the *NS Barristers’ Society* decision has also been pointed out [elsewhere](#). Meanwhile, TWU claims it spends 0% of its budget on political activities, and therefore does not complete

Schedule 7: Political Activities, when filing its [Registered Charity Information Return](#). TWU [advocates](#) for the religious right to exclude gay and lesbian individuals, but in answer to the Information Return's question, "Did the charity carry on any political activities during the fiscal period"? TWU has answered: "No".

TWU's [Registered Charity Information Return](#) does tell us that TWU carried on fundraising activities in its 2014 fiscal period, including, among other activities, "Advertisements / print / radio / TV commercials", "Internet", "Mail campaigns", "Targeted contacts", "Telephone / TV solicitations", and, most alarming of all these, "Cause-related marketing". What causes, exactly, was TWU marketing to solicit donations? What was the content of the solicitations TWU disseminated through such varied means? Were all these solicitations in furtherance of "Cause-related marketing"? Were those causes related to TWU's agenda to create the first explicitly, outspokenly straights-only law school in Canada? If so, those solicitations should be categorized as political activities for the purposes of charity and tax law, since TWU is pursuing its agenda through the courts while receiving funding from Canada's public coffers.

Something urgent and compelling must have solicited extraordinary [donations to TWU in its 2014 fiscal period](#) (the most recent period for which information is available). Of the four fiscal periods on the CRA website that list receipted charitable donations as a percentage of TWU's total revenue, the 2014 fiscal period has significantly higher receipted donations both in absolute terms, and as a percentage of TWU's total revenue. In absolute terms, the receipted donations in the 2014 fiscal period (\$10,585,806) are almost twice the total receipted donations in the 2013 fiscal period (\$5,498,766).

Why is taxpayer money funding charitable donation tax credits to TWU's donors, who almost doubled their donations to TWU in the 2014 fiscal period? Should the \$1,983,418 that TWU reports it spent on "Fundraising" in the 2014 period be properly characterized as expenses related to political activities? The only way for these questions to be answered for the taxpaying public is for the Canada Revenue Agency to audit TWU, and for TWU to agree to make public the results of that audit.

### **Revocation of TWU's Registered Charity Status on Public Policy Grounds**

Even if we accept that TWU's charitable status cannot be revoked for engaging in political activities, it can still be found to be engaging in activities contrary to public policy. The prohibition on registered charities pursuing activities contrary to public policy has long been established in UK case law, and incorporated into Canadian law. (See e.g. *National Anti-Vivisection Society v Inland Revenue Commissioners*, [1948] AC 31 (HL) and *Everywoman's Health Centre Society*, *supra*).

In *Everywoman's Health Centre Society*, the charity appealing to keep its registered charity status was a free-standing abortion clinic. The Minister of National Revenue argued that charitable status should be revoked for lack of a public policy in favour of abortion, and lack of public consensus on whether providing abortions was a benefit to the public. The Minister argued,

in the absence of clear statements of public policy on the issue of abortion, the Society's activities cannot be said to accord with public policy: the failure of Parliament to replace the provisions of the *Criminal Code* that were struck down in the *Morgentaler* decision, leads the respondent to submit that “it cannot be concluded that first trimester abortion by choice of the patient, while clearly legal, reflects public policy on abortion” (at para 14).

The court found that Parliament’s failure to replace the provisions on abortion struck down in *R. v. Morgentaler*, [1988] 1 SCR 30, could not constitute a policy. If anything, failure to repeal or replace those provisions constituted an absence of policy. Where there is no public policy for a charity to contravene, its charitable status cannot be revoked on public policy grounds:

It is one thing to act in a way which offends public policy; it is a totally different thing to act in a way which is not reflected in any, adverse or favourable, public policy. An activity simply cannot be held to be contrary to public policy where, admittedly, no such policy exists. (*Everywoman’s Health Centre Society* at para 15).

TWU’s activities, by contrast, contravene public policy both as embodied in the *Charter* and in provincial human rights legislation that protects gay and lesbian individuals from discrimination. It is true that in *TWU v BCCT*, the Supreme Court noted that the *Charter* could not apply to TWU, and that TWU was exempt from parts of BC human rights legislation (*TWU v BCCT*, at para 25). However, the existence of the *Charter* is not a mere failure to express a government policy, as was the case for the *Criminal Code* provisions referenced in *Everywoman’s Health Centre Society*. Rather, the *Charter* enshrines some of our most important public values in the Constitution itself. There is an explicit public policy prohibiting discrimination, both in the *Charter* and in human rights legislation. That policy exists despite the fact the *Charter* and some parts of BC human rights were found not to apply to TWU in *TWU v BCCT*.

### **An Open Letter to the Canada Revenue Agency: Audit TWU**

In Canada we are waiting to find out whether TWU has the right to accreditation for its law school despite policies that discriminate against both students and employees who are gay or lesbian. In *NS Barristers’ Society*, TWU won an appeal of the Nova Scotia Barristers’ Society’s rejection of TWU’s accreditation application (or, more accurately, the Nova Scotia Barristers’ Society’s agreement to accreditation only if TWU’s Community Covenant was amended).

In the meantime, consider this post an open letter to the CRA. The public deserves an inquiry into how TWU is spending taxpayer money to advocate in the media, before law societies, and now in the courts, the position that it is acceptable – in fact, essential to freedom of religion – to discriminate against gay and lesbian students and staff. These activities are contrary to public policy; therefore, TWU’s charitable status should be revoked. Then the taxpaying public will no longer be compelled to fund an institution that is hostile to gay and lesbian equality.

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