

2020

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Citation Information

Moon, Richard. "The Law Society of British Columbia v. Trinity Western University: Complicated Answers to a Simple Question." *The Supreme Court Law Review: Osgoode's Annual Constitutional Cases Conference* 94. (2020).

<https://digitalcommons.osgoode.yorku.ca/sclr/vol94/iss1/13>

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The Law Society of British Columbia v. Trinity Western University: Complicated Answers to a Simple Question

Richard Moon*

I. INTRODUCTION

Trinity Western University (TWU) is an evangelical Christian university, located in Langley, British Columbia. The university offers a variety of programs, including professional programs in nursing and education. In 2010, after many years of planning and preparation, TWU applied to the various provincial law societies for accreditation of a law program.

The graduates of an accredited program are eligible to take provincial law society exams, and, if they pass these exams, to be called to the bar in the particular province following a brief articling period. The graduates of an unaccredited program may still be called to the provincial bar but must satisfy some additional requirements. While many of the provincial law societies were prepared to accredit the TWU program, the law societies of British Columbia (LSBC) and Ontario (LSUC/LSO) declined to do so.¹

TWU had for some time required its students to sign a covenant that prohibited them from engaging in certain behaviours, including sexual intimacy outside heterosexual marriage. The law societies of British Columbia and Ontario were concerned that this covenant would have the

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¹ Nova Scotia Barristers' Society (NSBS) also declined to accredit the TWU program. However the provincial Court of Appeal held that the NSBS in refusing accreditation had acted beyond its powers — *Trinity Western University v. Nova Scotia Barristers' Society*, [2015] N.S.J. No. 32, 2016 NSCA 59 (N.S.C.A.). The NSBS did not appeal the decision.

effect of excluding gay and lesbian students from the program and, as a consequence, would limit their access to the legal profession.²

TWU brought separate judicial review applications against the LSO and the LSBC, arguing that each had acted outside its powers when it refused to accredit the proposed law program. TWU claimed that the statutory authority of the law societies, to regulate the legal profession in the public interest, did not empower them to assess the school's admissions practices. TWU also argued that the decision of the law societies not to accredit the program breached the TWU community's rights under the *Canadian Charter of Rights and Freedoms*, and in particular section 2(a), freedom of religion.³

The Supreme Court of Canada heard the two cases together and released its decision in each at the same time.⁴ The administrative law issues in the two cases were not the same, since the decision-making process followed by each of the law societies was different.⁵ However, this comment will only address the freedom of religion issue, which was the same in both cases. A majority of the Supreme Court of Canada held that the decision not to accredit the TWU program was reasonable, and that any interference with the TWU community's religious freedom was justified in order to prevent discrimination against gay and lesbian students in entry to law school and the legal profession.

The majority's reasons, written by Abella J., were most fully developed in the British Columbia case, and so my comments will focus on that judgment. In both cases, separate concurring judgments were written by McLachlin C.J.C. and by Rowe J. A dissenting judgment was written jointly by Brown and Côté JJ.

Each of the judgments formally adheres to the standard model of Charter adjudication and its reliance on balancing or proportionality. In determining whether the LSBC's refusal to accredit the TWU program, the Court first considered whether the refusal amounted to a restriction

² In its reasons the Supreme Court of Canada uses the term LGBTQ. I have chosen to use the term "lesbian and gay" since the discrimination in this case was on the grounds of sexual orientation.

³ Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter "Charter"].

⁴ *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293 (S.C.C.) [hereinafter "*LSBC v. TWU*"]; *Trinity Western University v. Law Society of Upper Canada*, [2018] S.C.J. No. 33, [2018] 2 S.C.R. 453 (S.C.C.) [hereinafter "*TWU v. LSUC*"].

⁵ Notably the LSBC passed a resolution denying accreditation to the TWU program following a referendum of the Society's members on the issue.

on the religious freedom of the TWU community contrary to section 2(a) of the Charter and second, after finding a breach of section 2(a), they considered whether the breach was justified under section 1 of the Charter (or whether it was reasonable for the LSBC to conclude that the reasons for restriction were proportionate to the school's religious freedom interests).

I will argue, however, that the task for the courts in this and other religious freedom cases is not to balance competing civic and religious interests, but is instead to mark the boundary between the spheres of civic and spiritual life. More particularly, in this case, the issue was whether TWU (in applying to operate an accredited law program) should be viewed as a private religious institution that is free to govern itself according to its own norms, or whether, because its actions may directly impact outsiders to the religious group, it should be viewed as performing a public role and therefore subject to non-discrimination and other civic norms. The different judgments begin with different assumptions about the public/private character of TWU (or at least its proposed law program) and so never really address the key issue and never really engage with each other.

In Part II of the article, I provide a short description and critique of the earlier Supreme Court of Canada judgment in *Trinity Western University v. British Columbia College of Teachers*,⁶ and note that the focus in that case was on the graduates — the output — of the TWU teacher training program and whether they might, as teachers, be more likely to engage in discrimination against LGBTQ students. In the two cases, which are the subject of this comment, the focus instead is on the applicants — the input of the program — and whether the Covenant would have the effect of excluding gay and lesbian students not simply from the program but also from the legal profession. Part III of the article describes and discusses the different judgments in the case, and notes that the conclusions reached in the majority and dissenting judgments rest on different assumptions about the character of TWU (or its proposed law program) as either public or private and suggests that the public/private character of the institution is the very thing that is at issue in the case. Part IV considers the reasons for, and the general scope of, religious accommodation under section 2(a) of the Charter. It argues that the state's obligation to make space for religious practice (and sometimes to compromise its policies) rests on a concern about the status and

⁶ [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.) [hereinafter "*TWU v. BCCT*"].

vitality of religious groups. It further argues that accommodation claims are not resolved through the balancing of competing civic and religious interests; and that instead the task for the courts in these cases is to mark the boundary between civic and religious spheres of life — to define the scope of personal and communal religious practice that should be insulated from legal regulation. This part focuses in particular on the claim of religious associations or communities to be free to operate according to their own norms and practices, and insulated from public anti-discrimination requirements. It argues that the central issue in such cases is whether the association should be viewed as private — because its actions impact only members of the group — or whether instead it should be seen as performing a public role because its actions directly impact outsiders or non-members. This then leads to the discussion in Part V about whether TWU, when operating an accredited law program, should be regarded as a private religious association that is insulated from public anti-discrimination norms or instead as public and subject to anti-discrimination norms because its admissions criteria directly impact outsiders to the community. It argues that because admission to law school continues to be a significant barrier to entry into the legal profession in Canada, the TWU Covenant would have an impact on non-members. Part VI considers whether TWU's recent decision to remove the Covenant addresses the concerns raised in the case and suggests that the answer to this may not be straightforward. And finally in Part VII, I make a few brief observations about the future of religious freedom jurisprudence in the wake of this decision.

II. THE EARLIER TWU DECISION

In 2001, the Supreme Court of Canada considered a similar issue raised in *LSBC v. TWU* and that also involved TWU. In *Trinity Western University v. British Columbia College of Teachers* (BCCT), the Court held that the BCCT acted outside its powers when it refused to accredit a teacher-training program at TWU.⁷ The BCCT believed that the program would not adequately prepare students to teach in the public-school

⁷ *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772 (S.C.C.). I have discussed the case more extensively in R. Moon, "The Supreme Court of Canada's Attempt to Reconcile Freedom of Religion and Sexual Orientation Equality in the Public Schools" in D. Rayside and C. Wilcox, eds., *Faith, Politics and Sexual Diversity* (Vancouver/Toronto: UBC Press, 2011).

system in British Columbia because it affirmed the view that homosexuality was sinful. In making this decision the BCCT referred specifically to the Contract of Responsibilities signed by teachers and students that prohibited “homosexual behaviour” and other activities. According to the BCCT, an institution that wishes to train teachers for the public school system must “provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students”, which, because of the Contract, the TWU program did not do.⁸

The majority of the Supreme Court of Canada, in a judgment written by Iacobucci and Bastarache JJ., accepted that the denial of accreditation “places a burden on members of a particular religious group ... preventing them from expressing freely their religious beliefs and associating to put them into practice.”⁹ In the majority’s view, the BCCT decision meant that TWU must abandon its religiously based “community standards” if it is to run a program that trains teachers for the public school system. Graduates of TWU “are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers...”¹⁰ “The issue at the heart of this appeal, said the majority, “is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system”.¹¹

The majority, however, found no reason to deny accreditation to the TWU program. The majority agreed that if a teacher engages in discriminatory conduct, he/she “can be subject to disciplinary proceedings”; but maintained that the right of gays and lesbians to be free from discrimination is not violated simply because a teacher holds discriminatory views.¹² In the majority’s view, “the proper place to draw the line in cases like the one at bar is generally between belief and conduct.”¹³ A teacher may believe that homosexuality is sinful or wrongful, but as long as she/he does not act on those views, denying benefits to, or imposing burdens on, particular individuals because of their sexual orientation, she/he will not be found to have breached their right to equality. The majority found no evidence that any TWU graduate

⁸ *TWU v. BCCT, id.*, at para. 11.

⁹ *Id.*, at para. 32.

¹⁰ *Id.*

¹¹ *Id.*, at para. 28.

¹² *Id.*, at para. 37.

¹³ *Id.*, at para. 36.

had acted in a discriminatory way in the classroom. And so the limitation on the religious freedom of the staff and graduates of TWU (the denial of accreditation) was imposed in the absence of any evidence that the program had a detrimental impact on the school system. In the absence of “concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C.” the BCCT had no grounds to deny accreditation to TWU and interfere with the religious freedom of TWU instructors and students to hold certain beliefs.¹⁴

The majority judgment seemed to say that had there been evidence of clear and direct acts of discrimination on the part of TWU graduates, the BCCT would have been justified in refusing to accredit the TWU teacher-training program. Yet, it is not clear why this should be so. Once the Court distinguished between anti-gay/anti-lesbian belief and action, and accepted that a teacher may hold such beliefs, provided she/he does not act on them, why was it relevant whether any TWU graduates had engaged in acts of discrimination? If belief and action are separable in this way (public action as wrongful and personal belief as not), then TWU, even though it supported anti-gay and anti-lesbian views, should not be held responsible for any discriminatory actions taken by its graduates. Similarly, the improper actions of some graduates should not affect the accreditation of other graduates who may believe that homosexuality is immoral but refrain from engaging in acts of discrimination. The tension in the majority’s reasoning, I suspect, reflects a deeper uncertainty about the distinction between belief and action in the school context.

While the distinction between belief and action is central in human rights codes (which prohibit acts of discrimination in the market but do not otherwise regulate an individual’s beliefs or the decisions she/he makes concerning private matters), it may not be applicable to the role of a teacher in a public school. An important part of a teacher’s role is to teach his or her students basic values, including tolerance for different religious belief systems and respect for the equal worth of all people. As the majority in *TWU v. BCCT* observed, “... Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance.”¹⁵ Teachers, though, do not simply instruct students in these values. They are role models and counsellors. If sexual-orientation equality is to be affirmed in the public

¹⁴ *Id.*

¹⁵ *Id.*, at para. 13.

schools, teachers must do more than simply refrain from direct acts of discrimination against gay and lesbian students. A teacher when confronted with bigoted words from students about gays and lesbians should contradict those words or when approached by a student who is struggling with her/his sexual identity should provide support and reassurance or direct her/him to an individual or group that can offer support. Because the public values of the school curriculum (broadly understood) are taught by example and because they must be affirmed in different ways, it may be that a teacher who is not personally committed to these values cannot perform her/his role effectively.

This is not to say that individual teachers should be closely examined on their views about sexual-orientation equality (or racial or gender equality). A serious probe into the individual's thoughts or attitudes about sexual orientation might involve too great an invasion into his/her personal sphere. Nor should we preclude an individual from teaching in the public schools simply because we suspect she/he may be racist or homophobic — because, for example, she/he belongs to a particular church or attended a particular religious school. But this is not the same as saying that it is all right to employ an anti-gay or anti-lesbian teacher provided he/she refrains from explicit acts of discrimination in the classroom. A teacher should be excluded from the schools, if she/he has indicated in his/her public statements or actions that he/she regards homosexuality as sinful or objectionable, even though there is no evidence that he/she has directly discriminated against gays and lesbians in the classroom. She/He should be excluded because discrimination is sometimes subtle and difficult to prove but also because a teacher should do more than simply tolerate gays and lesbians.

In *Ross v. New Brunswick School District No. 15*, the Supreme Court of Canada held that an individual who holds racist views, as evidenced by her words or actions outside the classroom, may be disqualified from serving as a classroom teacher in the public schools.¹⁶ Justice La Forest, for the Court, upheld the decision of an adjudicator, appointed under the *New Brunswick Human Rights Act*, that ordered the School Board to remove from the classroom a teacher who had expressed in a public setting racist views, which he claimed were religiously based. In *Ross*, there was no evidence that the teacher had treated any minority students in his class unfairly, or differently from other students, or had deviated from the curriculum and taught racist views. However, because Mr. Ross

¹⁶ [1996] S.C.J. No. 40, [1996] 1 S.C.R. 825 (S.C.C.) [hereinafter "*Ross*"].

had expressed racist opinions at public meetings and in the local media, students in his school (and the general community) had come to know of his views. The Court found that Mr. Ross's public racist statements had "poisoned" the learning environment in the school.¹⁷

The Court in *Ross* recognized that a teacher is a role model, an authority figure, and a conduit for public values. Public knowledge of Mr. Ross's racist views mattered because his support for such views might have legitimized them in the minds of some students and undermined the school's affirmation of racial equality. If all that is expected of a teacher is that he/she refrain from teaching racist views, then it might be possible to separate what he/she says and does in the classroom from what he/she says and does outside, on his/her own time. There are very few jobs from which an individual would be dismissed because she/he (publicly) expressed racist views after work hours (unless contrary to the *Criminal Code*). Moreover, there are views that a teacher is not permitted to express inside the classroom but is free to express outside. For example, a teacher should not expressly support the Liberal Party, or the Communist Party, inside the classroom but is permitted to do so outside. We expect the teacher in the classroom to remain neutral on issues of partisan politics. But in the case of racial equality, we expect more than formal neutrality in the classroom. We expect the teacher to positively support the value of equality. A teacher who publicly affirms racist views cannot perform this role. It would seem even more obvious that a teacher-training program that affirms such views does not adequately prepare its graduates to teach in the public school system.

This takes me to the more fundamental error in the Court's decision. The issue in the *TWU* case was not whether a particular graduate and prospective teacher might be anti-gay or anti-lesbian because he/she attended an educational institute that affirmed anti-gay or anti-lesbian views. It was, instead, whether a teacher-training program that affirmed values that are incompatible with those of the civic curriculum should be denied accreditation because it will not adequately prepare its students to teach in the public school system — a system in which gays and lesbians should be treated with equal respect and not simply tolerated. Had the BCCT denied accreditation to a teacher training program that had a racist element in its curriculum, it seems unlikely that the BCCT's decision would have been overturned by the Court, even though not every graduate of the program would carry the lesson of racism with him.

¹⁷ *Id.*, at paras. 40-41.

A program that taught or affirmed values so fundamentally at odds with the basic civic values of the public school system would not be accredited. Yet TWU sought accreditation for a program that supported values the BCCT thought were incompatible with the civic mission of the public schools — based on the public commitment to sexual-orientation equality expressed in both provincial and federal human rights codes. The existence of TWU, and more specifically its teacher-training program, rests on a belief that the values of those who teach are important in the education process. TWU recognizes that its students will become better Christians, or Christian school teachers, if they are taught in an environment that is fully Christian in its values and practices. This is why TWU requires that all instructors adhere to its code of conduct. Even if anti-gay views are not an explicit part of the teacher-training program, they form part of the ethos of TWU.

Perhaps because of this decision, the law societies in *LSBC v. TWU* and *TWU v. LSUC* did not rely on the argument that a law school that teaches its students that homosexuality is wrongful or immoral will not properly prepare lawyers for practice in the general community. Instead they justified the decision not to accredit the TWU law program on the discriminatory impact of the Covenant on admission to the program and to the legal profession.¹⁸

III. THE JUDGMENTS IN *LSBC v. TWU*

1. The Majority Judgment of Justice Abella

Justice Abella, writing for the majority, held that, when deciding whether or not to accredit a law program, the LSBC “was entitled to be concerned that inequitable barriers on entry to law schools would effectively impose inequitable barriers on entry to the profession and risk decreasing diversity within the bar.”¹⁹ She noted that the Law Society’s

¹⁸ The majority in *Trinity Western University v. British Columbia College of Teachers*, [2001] S.C.J. No. 32, [2001] 1 S.C.R. 772, at para. 25 (S.C.C.), rejected in a cursory way the claim that the Contract would have a discriminatory effect on gay and lesbian applicants.

¹⁹ *Trinity Western University v. Law Society of British Columbia*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293, at para. 39 (S.C.C.). And *id.*, at para. 31: “In our view, the *LPA* [*Legal Profession Act*] requires Benchers to consider the overarching objective of protecting the public interest in determining the requirements for admission to the profession, including whether to approve a particular law school.” And *id.*, at para. 41: “Limiting access to membership in the legal

overarching statutory objective was “to uphold and protect the public interest in the administration of justice” and that this was stated “in the broadest possible terms.”²⁰ She rejected TWU’s claim that the law society, in refusing to accredit its program, was intervening in the internal affairs of a private religious association, because she viewed the Covenant as a barrier not simply to entry into law school, but also to entry into the legal profession.

Justice Abella accepted that the LSBC’s decision not to accredit the TWU program breached the religious freedom of the members of the TWU community and of the evangelical students who might wish to attend TWU to study law. She noted that the members of the TWU community believed that it was important to study with others who share their Christian beliefs “or are prepared to honour those beliefs in their conduct”.²¹ Justice Abella acknowledged that the mandatory covenant “makes it easier” for evangelical Christians “to adhere to their faith”, because it created “an environment where their moral discipline is not constantly tested.”²² It followed then that the LSBC decision not to accredit the TWU program interfered with “the right of TWU’s community members to enhance their spiritual development through studying law in an environment defined by their religious beliefs”.²³

However, Abella J. went on to find that the decision by the LSBC to deny accreditation to the TWU law program was reasonable and that it reflected “a proportionate balancing of *Charter* protection with the statutory mandate”.²⁴ She found that the LSBC’s decision did not significantly limit religious freedom, first, because it only denied approval to the TWU program as long as it included the mandatory covenant and second, because (she thought) the TWU community regarded the Covenant as desirable but not essential to their spiritual life — “as preferred (rather than necessary) for their spiritual growth.”²⁵

profession on the basis of personal characteristics, unrelated to merit, is inherently inimical to the integrity of the legal profession.”

²⁰ *Id.*, at paras. 32-33.

²¹ *Id.*, at para. 65. And further, *id.*, at para. 70:

...It is clear from the record that evangelical members of TWU’s community sincerely believe that studying in a community defined by religious beliefs in which members follow particular religious rules of conduct contributes to their spiritual development. In our view, this is the religious belief or practice implicated by the LSBC’s decision.

²² *Id.*, at para. 72.

²³ *Id.*, at para. 75.

²⁴ *Id.*, at para. 79.

²⁵ *Id.*, at para. 88. She also noted *id.*, at para. 87, that “the limitation in this case is of minor significance because a mandatory covenant is, on the record before us, not absolutely required for

In her view, the Law Society’s refusal to accredit a program with such a covenant did not prevent evangelical Christians from practising their religion “as and where they choose.”²⁶

On the other side of the balance, Abella J. found that the LSBC decision to deny accreditation to the TWU program “significantly advanced ... the public interest in the administration of justice ... by maintaining equal access to and diversity in the legal profession.”²⁷ She recognized that gay and lesbian students would be deterred from applying to the program because of the Covenant’s ban on same-sex intimacy. The consequence of this is “that the 60 law school seats created by TWU’s proposed law school will be effectively closed to the vast majority of LGBTQ students” with the further consequence that qualified LGBTQ candidates may be prevented from entering the legal profession.²⁸ Even though the TWU program will create more law school spaces, the Covenant means that “LGBTQ individuals would have fewer opportunities relative to others” thereby “undermin[ing] true equality of access to legal education, and by extension, the legal profession.”²⁹

Justice Abella acknowledged the collective or shared dimension of religious belief and practice; yet her focus remained on the individual.³⁰ Her account of the communal dimension of the freedom seemed to involve no more than a recognition that an individual’s beliefs and practices are often shared with others and that an individual may sometimes attach value to worshipping with others or joining with others to pursue common spiritual aims. The individual remains the locus of belief and the focus of protection in the majority’s section 2(a) analysis. This enabled the majority to discount collective practice as simply a preference of individual believers. The (individual) members of the TWU community might prefer to teach or study in an environment in which others share and adhere to the same beliefs/practices, but the majority

the religious practice at issue: namely, to study law in a Christian learning environment in which people follow certain religious rules of conduct.”

²⁶ *Id.*, at para. 102.

²⁷ *Id.*, at paras. 92-93.

²⁸ *Id.*, at para. 93.

²⁹ *Id.*, at para. 95.

³⁰ *Id.*, at para. 64 accepted that “...[t]he protection of individual religious rights under s. 2(a) must ... account for the socially embedded nature of religious belief, as well as the ‘deep linkages between this belief and its manifestation through communal institutions and traditions’”. Religious adherents must be free to “come together and create cohesive communities of belief and practice”.

saw this as a kind of second-order belief about joining with others.³¹ Yet, as I will discuss shortly in Part IV, it is difficult to account for the value of religious belief/practice from an external or secular perspective (and the obligation of the state to make effort to accommodate religious practices or norms) without recognizing the deep connection between the individual adherent and the religious community or tradition with which she/he associates.³²

2. The Concurring Judgment of Chief Justice McLachlin

Chief Justice McLachlin agreed with the majority that the Law Society's decision not to accredit the proposed TWU law program breached the spiritual community's religious freedom — and in particular “its members’ beliefs that they must be in an institution with others who share or respect their practices on sexual relations.”³³ However, McLachlin C.J.C. took issue with the majority's discounting of this communal practice as simply a preference of individual believers. The Chief Justice saw a contradiction in the majority's approach, which on the one hand acknowledged “the deep sincerity of the [TWU community's] belief in a religious practice and then, on the other hand, doubt[ed] that sincerity by calling the practice relatively insignificant.”³⁴ She observed that studying in a religious learning environment, in which the members have agreed to live in a certain way, is a long and “passionately held tradition.”³⁵ She also noted that religious schools such as TWU have a tradition of “welcoming non-adherents as students, provided they agree to abide by the norms of the community” and that a

³¹ For a thoughtful discussion of the institutional standing of TWU to bring such a claim see K. Chan, “Identifying the Institutional Religious Freedom Claimant” (2017) Vol. 95, No. 3 Cdn Bar Rev. 707.

³² In a few previous judgments, such as *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613 (S.C.C.), the Supreme Court of Canada has made general observations about the communal dimension of religious freedom and the standing of religious organizations to bring challenges under s. 2(a) of the Charter. But, as in *LSBC v. TWU, id.*, the Court in these cases simply recognizes that individuals sometimes perform religious practices in combination with others. There is little or no recognition of the constitutive character of religious adherence or membership.

³³ In the view of McLachlin C.J.C., *LSBC v. TWU, id.*, at para. 125, the LSBC decision (at para. 129) “places a burden on the TWU community's freedom of religion: (1) by interfering with a religious practice (a learning environment that conforms to its members' beliefs); (2) by restricting their right to express their beliefs through that practice; and (3) by restricting their ability to associate as required by their beliefs.”

³⁴ *Id.*, at para. 131.

³⁵ *Id.*, at para. 130.

student who did not agree with the school's practices did not have to attend, and further that if they did decide to attend and agreed to conform to its practices, they could not be said to have been compelled to do so.³⁶

Nevertheless, McLachlin C.J.C. thought that the Law Society's decision not to accredit the TWU program was reasonable. In her view, "the most compelling law society objective" was not to ensure diversity in law school or legal practice (since the TWU program would make not much of a difference to diversity in the profession) but was instead "the imperative of refusing to condone discrimination against LGBTQ people, pursuant to the LSBC's statutory obligation to protect the public interest."³⁷ She thought that accrediting the TWU program was incompatible with the Law Society's "duty to combat discrimination".³⁸ She concluded that the Law Society's decision not to accredit the program "represents a proportionate balancing of freedom of religion, on the one hand, and the avoidance of discrimination, on the other."³⁹

Yet the Law Society's decision to accredit the TWU program could be seen as condoning a discriminatory program only if the Law Society has the authority or responsibility not to accredit such a program. There is a circularity to her claim. If, as McLachlin C.J.C. argued, the interference with TWU's religious freedom is not minor then that must be because the School is a religious institution that should be free to operate according to its own norms and to decide its own rules for membership. But, if, as the Chief Justice also argued, the LSBC was justified in declining to accredit the program, that must be because TWU (in operating a law program) is not simply a private religious organization and so can be required to respect public anti-discrimination norms.

3. The Concurring Judgment of Justice Rowe

Justice Rowe, in his concurring judgment, found no breach of section 2(a) and so did not need to assess the competing civic and religious

³⁶ *Id.*, at para. 133.

³⁷ *Id.*, at para. 137.

³⁸ *Id.*, at para. 147. Chief Justice McLachlin noted that balancing in s. 2(a) cases is often difficult, because religious belief/practice is generally absolute, making compromise impossible. The Court then is put to a hard choice — either to recognize the religious practice or not (either to accredit or not) and cannot simply trade-off the competing interests. She may be pointing here to the reality that these issues are not resolved through balancing and instead require the courts to distinguish the spheres of religious and civil life.

³⁹ *Id.*, at para. 108. However, *id.*, at para. 112 she disagreed with the majority's general approach and in particular its understanding and application of the *Doré* proportionality analysis: *Doré v. Barreau du Québec*, [2012] S.C.J. No. 12, 2012 SCC 12 (S.C.C.).

claims or to engage in any form of balancing or proportionality analysis.⁴⁰ According to Rowe J., freedom of religion under the Charter, prohibits the state from interfering with the individual's "most personal beliefs ... that speak to the core of who we are and how we choose to live our lives".⁴¹ In his view, freedom of religion is about "personal autonomy or choice" and is based on the idea that no one should be "forced to adhere or to refrain from a particular set of religious beliefs".⁴²

He accepted that religion has a communal aspect that is protected under section 2(a); but like the majority, he regarded the communal aspect of religion as simply an expression of individual choice — the freedom to choose to worship with others or to pursue certain spiritual objectives together with others.⁴³

Justice Rowe acknowledged that the LSBC decision may have interfered with the belief of TWU community members that "the proscription of sexual intimacy outside marriage" should be imposed "on all students attending the proposed law school at TWU".⁴⁴ However, he regarded this as simply a preference on the part of the TWU members and took the view that section 2(a) protects only practices that the individual sincerely believes are required. It is difficult, though, to reconcile this view with earlier Supreme Court of Canada judgments such as *Syndicat Northcrest v. Amselem*,⁴⁵ in which the Court seemed to say that section 2(a) protects religious practices even if they are not understood by the individual or group to be mandatory. Justices Brown and Côté in their dissenting judgment note that the majority in *Amselem* stated that "[i]t is the religious or spiritual essence of an action, not any

⁴⁰ *LSBC v. TWU, id.*, at para. 155, Rowe J. described law school admission as the "first point of entry" into the profession and in this way tied access to law school to access to the profession.

⁴¹ *Id.*, at para. 209. Religion, according to Rowe J. at paras. 212-213, "at its core, involves a profoundly personal commitment to a set of beliefs and to various practices seen as following from those beliefs" and so "the focus of religious freedom ... is personal choice ... made freely." It follows from this then that religious freedom is "defined by the absence of constraint."

⁴² *Id.*, at para. 251: "For this reason, it [freedom of religion] protects against interference with profoundly personal beliefs and with the voluntary choice to abide by the practices those beliefs require."

⁴³ In Rowe J.'s view, in *LSBC v. TWU, id.*, at para. 219, a religious community or institution is a voluntary association of individual believers who choose "to join together on the basis of their common faith" and to adopt and adhere to certain "rules and membership requirements". It followed then that while the members of the TWU community may have s. 2(a) rights, TWU itself, as an institution, did not have rights under s. 2(a).

⁴⁴ *Id.*, at para. 228.

⁴⁵ [2004] S.C.J. No. 46, 2004 SCC 47 (S.C.C.) [hereinafter "*Amselem*"].

mandatory or perceived-as-mandatory nature of its observance, that attracts protection.”⁴⁶

Moreover, said Rowe J., even if section 2(a) protected religious preferences, in this case the preference or belief is concerned with the conduct of non-believers — of “those who have *freely* chosen not to believe” and so “falls outside the scope of the freedom.”⁴⁷ The “coercion of non-believers” is not protected under the Charter.⁴⁸ The freedom, he emphasized, “does not protect measures by which an individual or a faith community seeks to impose adherence to their religious beliefs or practices on others who do not share their underlying faith.”⁴⁹ His view of the Covenant and its impact on non-believers, rests on an assumption that TWU is not simply a private religious association, with an entirely voluntary membership.⁵⁰

4. The Dissenting Judgment of Justices Côté and Brown

The dissenting judges, Côté and Brown JJ., disagreed with the majority on the two central issues before the Court. First, they thought that the Law Society’s authority to regulate the profession in the public interest did not allow it to intervene in the internal operations of a law school, including the School’s admissions policies. Second, the dissenting judges held that the Law Society’s decision not to accredit the proposed program breached the section 2(a) rights of the TWU community and that this breach was not justified under section 1 of the Charter.

According to the dissenting judges, the Law Society’s role in assessing the proposed law program is simply “to ensure that individual

⁴⁶ *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293, at para. 317 (S.C.C.) — quoting *Amselem*. Justice Iacobucci, writing for the majority in *Amselem*, *id.*, at para. 75, also said this: “... For the purposes of determining if freedom of religion is triggered or whether there is a non-trivial interference therewith, there is no distinction between sincere belief that a practice is required and sincere belief that a practice, having a nexus with religion, engenders a connection with the divine or with the subject or object of a person’s spiritual faith.”

⁴⁷ *LSBC v. TWU*, *id.*, at para. 239 (emphasis added).

⁴⁸ *Id.*

⁴⁹ *Id.*, at para. 251.

⁵⁰ *Id.*, at para. 242.

[B]y means of the mandatory Covenant — the claimants seek to require others outside their religious community to conform to their religious practices. I can find no decision by this Court to the effect that s. 2(a) protects such a right to impose adherence to religious practices on those who do not voluntarily adhere thereto.

graduates are fit to become members of the legal profession because they meet minimum standards of competence and ethical conduct.”⁵¹ The Law Society’s public interest mandate enables it to regulate the legal profession in the province, but “does not extend to the governance of law schools” and their admissions policies and does not entitle it “to police human rights standards in law schools.”⁵² Moreover, said the dissenting judges, tolerance for religious diversity is itself a matter of public interest: “...Acceptance by the LSBC of the unequal access effected by the Covenant would signify the accommodation of difference and of the TWU community’s right to religious freedom, and not condonation of discrimination against LGBTQ persons.”⁵³

The dissenting judges, though, went on to say that even if the LSBC’s public interest mandate was broader and allowed the Law Society to consider factors “other than fitness”, the decision not to accredit TWU’s proposed program “unjustifiably limited the TWU community’s freedom of religion.”⁵⁴

The dissenting judges stressed the importance of the “relational or communal” dimension of religious freedom, which involves “more than simply aggregating individual rights claims under the amorphous umbrella of an institution’s ‘community’”.⁵⁵ They noted that the members of the TWU community sincerely believed that “studying,

⁵¹ *Id.*, at para. 267.

⁵² *Id.*, at paras. 273 and 288. They further noted, *id.*, at para. 290, that the Law Society’s role as gatekeeper to the legal profession does not extend “all the way back to the law school’s threshold.” And *id.*, at para. 291:

...Any harms to marginalized communities in the context of legal education must be considered by provincial human rights tribunals, by legislatures, and by members of the executive, which grant such institutions the power to confer degrees. The LSBC is not a roving, free-floating agent of the state. It cannot take it upon itself to police such matters when they lie beyond its mandate.

Indeed, the dissenting judges assumed, *id.*, at para. 268, that the TWU covenant is “a code of conduct protected by provincial human rights legislation”. But, of course, the *Human Rights Code* does not give general protection to a religious organization’s rules; it simply exempts the organization’s rules from the application of the Code’s anti-discrimination requirements. In other words, it does not protect TWU’s norms and practices from other forms of regulation or oversight — and certainly does not entitle its law program to law society accreditation. And as later noted, the dissenters’ assertion assumes that the Covenant is an internal rule of a private religious association.

⁵³ *Id.*, at para. 269.

⁵⁴ *Id.*, at para. 268.

⁵⁵ *Id.*, at para. 315. Justices Bown and Côté further noted, *id.*, at para. 327 that, “In our view, however, the majority fails to appreciate that the unequal access resulting from the Covenant is a function of accommodating religious freedom, which itself advances the public interest by promoting diversity in a liberal, pluralist society.” In their view, *id.*, at para. 335, the purpose of TWU’s admissions policy was not to exclude LGBTQ students but instead “to establish a code of conduct which ensures the vitality of its religious community.”

teaching and working in a post-secondary educational environment” where all participants agree to adhere to certain principles and practices, was spiritually important.⁵⁶ According to the dissenting judges, section 2(a) protects “the freedom of members of the TWU community to express their religious beliefs through the Covenant and to associate with one another in order to study law in an educational community which reflects their religious beliefs.”⁵⁷ They thought that the refusal to accredit the TWU law program was a profound interference “with the constitutionally guaranteed freedom of a community of co-religionists to insist upon certain moral commitments from those who wish to join the private space within which it pursues its religiously based practices.”⁵⁸ In their view, the LSBC’s denial of accreditation to the TWU program “undermines the core character of a lawful religious institution and disrupts the vitality of the TWU community.”⁵⁹

The dissenting judges also found that this interference with TWU’s section 2(a) rights was not justified under section 1. They thought that the majority undervalued the religious claim of TWU by treating it as simply an individual preference rather than as a collective right to live in a community of shared values. The dissenting judges accepted that religious practices may be limited when they cause injury to others, but found that in this case because the Covenant was simply an internal matter, there was no “legally cognizable injury.”⁶⁰

5. The Assumptions Underlying the Different Judgments

The conclusions reached in the majority and dissenting judgments rest on very different assumptions, that are unarticulated and undefended,

⁵⁶ *Id.*, at para. 319. And, *id.*, at para. 322: “For members of the TWU community, religious belief and education are inextricably linked”.

⁵⁷ *Id.*, at para. 316 (emphasis in original).

⁵⁸ *Id.*, at para. 261.

⁵⁹ *Id.*, at para. 324, citing *Loyola High School v. Quebec (Attorney General)*, [2015] S.C.J. No. 12, [2015] 1 S.C.R. 613, at para. 67 (S.C.C.). In the dissenting judges’ view *LSBC v. TWU*, *id.*, at para. 268, the decision not to accredit the proposed program “is a profound interference with religious freedom” and inconsistent with “the state’s duty of religious neutrality.” They insisted, *id.*, at para. 332, that secularism “... [p]roperly understood ... connotes pluralism and respect for diversity, not the suppression of full participation in society by imposing a forced choice between conformity with a single majoritarian norm and withdrawal from the public square.” The dissenting judges, *id.*, at para. 333, defined the scope of state power narrowly: “Simply put, the secular state is a neutral state, which refrains from espousing ‘values’ that undermine or go beyond what is necessary for the civic participation of all.”

⁶⁰ *LSBC v. TWU*, *id.*, at para. 332.

about the character of TWU (or its proposed law program) as either public or private. But the public/private character of the institution is the very thing that is at issue in the case. The consequence of this — of assuming rather than determining the character of the institution or the law program — is that the two judgments never actually engage with each other.

The majority viewed the proposed TWU program as public in character, because it understood admission into an accredited law program to be part of the process for determining who enters the legal profession. The majority thought that, in operating an accredited law school and deciding who to admit to the School, and ultimately to the legal profession, TWU would no longer be acting as simply a private religious organization and its covenant would no longer be simply an internal rule, applicable only to members of the religious community.

The dissenting judges, on the other hand, assumed that TWU is a private religious institution that should be free to regulate its internal affairs according to its spiritual norms.⁶¹ In the view of the dissenting judges, any interference with a religious association's internal operations or with its ability to access the benefits of public life, amounts to a breach of the association's religious freedom. The dissenting judges did not consider whether TWU's entry into public life — its participation in deciding who enters the legal profession — might mean that it was no longer acting simply as a private religious organization serving or overseeing only those who choose to be members of the spiritual community.

Both judgments then went on to engage in a superficial balancing of religious and civic interests. Yet, in neither judgment was much said about the substance of the competing claims or interests. Because the majority thought the desire to study in a religious community was simply an individual preference they were able to uphold the restriction with little explanation. For the dissenting judges, because TWU was a private religious organization any rule regulating entry was simply an internal matter, and so caused no real injury to others.

⁶¹ For example, *Brown and Côté JJ., id.*, at para. 265 (emphasis in original):

[A] court of law, particularly when dealing with claims of constitutionally guaranteed rights including freedom of religion, must have regard to the legal principles that guide the relationship between citizen and state, between private and public. And those principles exist to *protect* rights-holders from values which a state actor deems to be 'shared', not to give licence to courts to defer to or impose those values.

IV. RESTRICTION AND ACCOMMODATION

1. Reasons for Accommodation

Religious accommodation (exempting a religious practice from ordinary law) may rest on a variety of concerns. Charles Taylor and Jocelyn Maclure argue that accommodation may be necessary to prevent the “moral harm” that occurs when individuals are required to act in a way that is inconsistent with their deepest convictions or commitments, both religious and non-religious.⁶² Yet, in a democracy, the strongly or deeply-held views of citizens on civic issues shape public policy, with the consequence that the views of some citizens prevail over those of others. In only very exceptional circumstances have the courts been willing to excuse an individual from performing his/her legal duties simply because she/he is opposed to the law on moral grounds.⁶³ Indeed, most of the accommodation claims that come before the courts involve religious rituals or practices (forms of collective worship or markers of cultural identity or group membership) rather than religious/moral convictions. These practices may not even be binding on the individual and so are not easily described as “deeply-held”, at least not in the way this term is often used.

The justification for accommodation (and the treatment of a religious practice as a matter of identity rather than choice) rests more credibly on a concern about the status or vitality of religious groups, rather than on the value of individual liberty. Accommodation should be made for the practices of different religious groups, because these groups are a source of identity and meaning for their members. Indeed, if the individual’s religious beliefs or moral commitments are deep or rooted (and ought to be insulated from politics), it is because they are part of (and grew out of) a shared religious tradition or group culture to which his/her identity (his/her world view and sense of place in the world) is tied.⁶⁴ Religious association lies at the core of the individual’s worldview. It orients the individual in the social world, shapes his/her perception of the natural

⁶² J. Maclure and C. Taylor (Trans. Jane Marie Todd), *Secularism and Freedom of Conscience* (Cambridge, MA: Harvard University Press, 2011).

⁶³ The most obvious example is conscientious objection to military service. For a discussion see R. Moon, “Conscientious Objections in Canada: Pragmatic Accommodation and Principled Adjudication” (2018) 7 OJLR 274.

⁶⁴ R. Moon, “Religious Commitment and Identity: *Syndicat Northcrest v. Amselem*” (2005), 29 S.C.L.R. (2d) 201-220, at 216.

order, and provides a framework for her/his actions. More practically, accommodation should sometimes be made to avoid the marginalization of such groups within the larger community. If the law prevents the members of some religious groups from fully participating in society, their identification or connection with that society may be negatively affected and this in turn may result in social conflict. The ties between religious group members, which may be intergenerational and comprehensive, make the group particularly vulnerable to suspicion, discrimination, and marginalization. Accommodation may seem particularly appropriate when the restrictive law supports dominant cultural practices, some of which (such as holidays) may be religious in origin.

The Court, as earlier noted, has had difficulty acknowledging the group or collective character of religion — and religious freedom — for reasons that are understandable. Within any religious community or tradition there is an enormous diversity of belief and practice. The followers of a religious tradition may interpret scripture or apply the practices of the tradition in different ways, and yet still understand themselves to be members of that tradition — as Christians or Jews or Buddhists. They may identify with a religious tradition or belief system in different ways, with different levels of commitment and degrees of involvement. This is a reminder of the way in which religion is both a matter of cultural identity and personal commitment — that it is a system or tradition that individual members understand, and identify with, in particular or personal ways. The challenge for the courts has been to fit this complex conception of religious adherence (as a matter of both personal judgment and cultural identity) into a constitutional rights framework that draws a distinction between individual choices that should be protected as a matter of liberty (subject to limits in the public interest) and collective identity that should be respected as a matter of equality. The liberal rights framework imposes this distinction between judgment (choice) and identity (attribute) on the rich and complex experience of religious commitment — the commitment of an individual to a religious tradition or shared spiritual life.

2. Balances and Boundaries

Despite what the Court says, religious accommodation claims are not, and cannot be, resolved through the balancing of civic and religious

interests. A court has no way to attach value or weight to a religious belief/practice. From a secular or public perspective, a religious belief/practice has no necessary or recognizable value; indeed, it is said that a court should take no position concerning its value — that the court should remain neutral on the question of religious truth. The belief/practice is significant, from a civic-secular perspective, because it matters “deeply” to the group and its members or because it is part of their cultural identity. There is no way to balance this concern about group identity and marginalization against the purpose or value of the restrictive law.⁶⁵

The courts’ task is not to trade off or balance competing values/interests but is instead to mark out a protected space for religious communities or ways of life — to define the scope of personal or communal religious practice that can be practically insulated (and excluded) from legal regulation. Religious freedom, as a constitutional right in a democratic political system, must be limited in what it protects to matters that can be viewed as private and outside the scope of politics.⁶⁶ The protection of religious freedom then requires the courts to draw a line between the spheres of spiritual and civic life.

⁶⁵ Richard Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), at 134ff [hereinafter “Moon, *Freedom of Conscience*”]. In this way religious freedom is different from rights, such as freedom of expression, which is protected because there is value in the activity of expression (its contribution to democracy, knowledge, individual agency). Limits on freedom of expression rest on public values or interests, such as preventing the spread of hatred, or protecting individual reputation. In deciding whether to uphold a limit on expression, the courts must make a judgment about the reasonable trade-off between these competing public/civic values or interests.

⁶⁶ I have discussed elsewhere the distinction between civic and spiritual spheres of life: Moon, *Freedom of Conscience*, *id.*, and R. Moon, “Freedom of Religion under the Charter of Rights: The Limits of State Neutrality” (2012) 45 UBC L. Rev. 495-545, at 497. Where the line between the civic and spiritual elements of a religious belief system is drawn by the courts will reflect their views about the nature of human welfare, and the proper scope of political action. The claim that a religious belief or value may play a role in political decision-making when there is a parallel secular argument (when the same or a similar position can be stated in non-religious terms) points to this distinction between spiritual and civic. When a religious value or position (supporting the eradication of poverty or banning drug use, public nudity, or abortion) has a secular analogue, it will be seen as addressing a public or civic concern — as seeking to advance the public interest or to prevent harm to others. Even if these reasons are set out in scripture (and valued by believers on that basis) they can be understood by non-believers as concerned with public welfare, and so as civic values. However, when there is no parallel secular argument, we are likely to see the religious position as simply a matter of honouring God’s will. In other words, a religiously motivated action will be viewed as a spiritual practice (as the worshipping or honouring of God) if non-adherents cannot understand it as relating to human welfare. If the state were to support Sunday Sabbath observance or a particular form of prayer or the wearing of hijab or if it were to ban the consumption of pork, it would be seen as supporting a spiritual practice contrary to freedom of religion. These actions are viewed as exclusively spiritual, as acts of worship, because they cannot be understood by

Religious practices (forms of worship) that are “personal” in character are sometimes indirectly or incidentally limited by state action. In such cases, the courts may require the state to compromise in a minor way its pursuit of a particular objective to make space for the religious practice, without directly challenging the state’s authority to govern in the public interest and to establish public norms. The courts, in seeking to protect religious life, may sometimes carve out “private” space for a religious practice (that is viewed as personal to the individual), by drawing the line between spiritual and civic, so that the practice is exempted from the application of an otherwise justified law. A police uniform requirement may have the effect of excluding individuals who wear head coverings for religious reasons or a school schedule may not take account of the holidays of some religious groups. An exemption to a uniform requirement made for an individual who wears a turban or hijab as an expression of his or her faith or identity will have an impact on state policy, but only a minor one. Allowing a government employee to take a day off work for a religious holiday that is not included in the list of statutory holidays will not disrupt the unit’s operations in any significant way. These practices may be viewed as personal and treated as private since they are not concerned directly with public policy and do not noticeably compromise the state’s objectives.⁶⁷

3. The Autonomy of Religious Organizations

Sometimes the accommodation claim is made not by an individual, who is seeking exemption for a specific practice, but instead by a religious organization or institution, which is insisting upon significant autonomy in the governance of its internal affairs. In these institutional autonomy cases, the key question for the courts is whether the exemption from state law will impact the rights and interests of non-members — of outsiders to the spiritual community. The right of the Catholic Church, for example, to exclude women from the priesthood (to discriminate against women) is not decided by balancing the

non-believers as advancing human good. If lawmakers are permitted to draw on particular religious values when formulating public policy, they should also be free to reject or repudiate these values. In other words, (religiously grounded) civic values should be neither excluded nor insulated from political judgment.

⁶⁷ Moreover, we know that police or other uniform requirements or statutory holidays often reflect, or already take account of, the cultural and religious practices of historically dominant groups.

religious claim or interest against the claim to gender equality. As a private religious organization or institution, the Catholic church should be free to govern its internal affairs according to its own rules or norms and not be subject to public anti-discrimination requirements. Similarly, a religious school may dismiss a teacher who enters a same-sex relationship contrary to church doctrine, not because the religious interests of the group or school outweigh the public value of sexual orientation equality but simply because the school is understood to be a private religious organization.⁶⁸

The courts have generally treated religious organizations as voluntary associations (of individuals pursuing common ends) that should be free to operate as they choose. If the members of a group have voluntarily submitted to the group's rules or decision-making processes, then the state ordinarily ought not to intervene. An individual's membership in the group may be seen as voluntary as long as she/he is free to leave the group (and live under ordinary state law) if she/he disagrees with the group's actions. But, of course, individuals are often born into religious communities and feel bound to the community by ties of kinship and friendship. More significantly, the individual's identity may be tied to the group so that exit is difficult even when there are few material barriers.

The state then may sometimes intervene in the affairs of a religious community characterized by hierarchy and insularity, when that community seeks to enforce practices that are thought to be harmful to some of its members, even though the members have, in at least a formal sense, chosen to be or to remain part of the community.⁶⁹ The deep communal connections that are an important part of the value of religious life and commitment (a source of meaning and value for adherents) may also be the source of what the courts regard as harm — the lack of meaningful choice or opportunity open to the members of such communities or the oppression of vulnerable group members.⁷⁰ In most of these institutional autonomy cases, though, the issue is simply this: do the actions of the organization impact outsiders to the group — a matter

⁶⁸ See *Caldwell v. St. Thomas Aquinas High School*, [1984] S.C.J. No. 62, [1984] 2 S.C.R. 603 (S.C.C.).

⁶⁹ For an extended discussion of the limits of exit, see R. Moon, *Freedom of Conscience and Religion* (Toronto: Irwin Law, 2014), ch 4.

⁷⁰ I have elsewhere explored this tension between these two views of religious groups — as a voluntary association and as a source of identity for its members. The protection of the group's autonomy rests on the group being viewed in both these ways — even if they are not entirely compatible perspectives: *id.*

of drawing the line between the civil sphere (of government action) and the private or communal sphere (of religious practice).

The issue in, the *LSBC v. TWU* case then, is whether the School (in operating a law program) should be viewed as a private/voluntary religious institution that is free to govern itself according to its own norms, or whether it should be viewed as public, or at least as performing some form of public role, and appropriately subject to public anti-discrimination norms (because its actions directly impact outsiders to the religious group). Another, more specific, way to frame the issue is to ask, if the TWU program is accredited, whether the Covenant should be viewed as an internal rule (a rule that applies to the internal operations of a voluntary religious association) or as a rule that applies to individuals who are not part of (or have not simply chosen to be members of) the TWU spiritual community.

The majority judges assumed that, if TWU were to run an accredited law program, its religious norms, including the Covenant's ban on same-sex relationships, would be enforced against outsiders to the religious community.⁷¹ The dissenting judges, in contrast, viewed TWU as a private organization and all its actions, therefore, as private/internal in character and properly insulated from public norms. Indeed, the dissenting judges seemed baffled that the majority could think otherwise. But that is precisely the issue at stake. At no point did the dissenting judges consider the impact of the TWU program on entry to legal practice — except to say that — the exclusion of gay and lesbian students from TWU's proposed law school is the result simply of the Legislature's accommodation of the TWU community.⁷²

⁷¹ *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293, at para. 101 (S.C.C.):

...Being required by someone else's religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful. Being required to do so offends the public perception that freedom of religion includes freedom from religion.

And, *id.*, at para. 103 (emphasis in original):

...The refusal to approve TWU's proposed law school prevents *concrete*, not abstract, harms to LGBTQ people and to the public in general. The LSBC's decision ensures that equal access to the legal profession is not undermined and prevents the risk of significant harm to LGBTQ people who feel they have no choice but to attend TWU's proposed law school.

⁷² *Id.*, at para. 35.

V. IS TWU A PRIVATE RELIGIOUS ORGANIZATION?

The question of whether TWU, in operating an accredited law program, should be viewed as public or private, or its covenant as civic action or internal regulation, is not an easy one. Religious organizations operate in the larger world and their actions will almost always have some impact on outsiders. The question is what kind or degree of impact is sufficient to say that the organization is no longer operating as simply a private/voluntary religious association?

According to its mandate and objectives, TWU is a religious institution.⁷³ Yet, as Rowe J. pointed out,

...Although TWU teaches from a Christian perspective, its statutory mandate requires that its admissions policy not be restricted to Christian students. ... TWU admits students from all faiths and permits them to hold diverse opinions on moral, ethical, and religious issues.⁷⁴

Moreover, the School has special privileges granted to it by the state. It has the power to grant degrees. It is eligible to apply for money under various infrastructure programs. Its students are eligible for state-supported grants and loans. Yet none of these seem (or has been thought) to make TWU “public”, and subject to non-discrimination requirements. The reason for this may simply be that there are plenty of undergraduate places open to students.

But TWU now wants to train lawyers and so is seeking accreditation for a law program. TWU can, of course, run a law program without law society approval but its graduates will not be eligible to practice law, or at least they will only be eligible if they go through some additional steps. The LSO and the LSBC have not issued a general condemnation of TWU and its beliefs about homosexuality. They have not sought to interfere with the operation of TWU as a Christian university. They have simply refused to accredit TWU’s law program — a program that in their judgment would have an exclusionary impact on gays and lesbians

⁷³ As noted in Victor M. Muñoz-Fraticelli, “The (Im)possibility of Christian Education” (2016), 75 S.C.L.R. (2d) 209-221, at 216, TWU seemed to argue against its own interests when it claimed to be public and accessible.

⁷⁴ *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293, at para. 240 (S.C.C.). He continued: “... TWU itself states that it is open to ‘all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University’s Christian identity’: TWU Covenant, A.R., vol. IV, at p. 539.” This point was earlier made by Kathryn Chan, “Identifying the Institutional Religious Freedom Claimant” (2017) 95 C.B.R. 707.

seeking entry into the legal profession. The LSO and LSBC consider the accredited law schools to be part of the system for selecting and training lawyers. At the same time, TWU as a religious institution, should not be denied access to a public good or a role in the public sphere.

Admission to law school has often been seen as a significant gateway to the profession in Canada. Admission has been competitive, with only a small percentage of applicants gaining entry to law school.⁷⁵ Until recently, at least, once someone was admitted to law school they were almost certainly going to be called to the bar, since failure rates at both law school and the bar exams were very low. If accredited law schools play an important role in determining who enters the legal profession in Canada, then the accreditation of the TWU program would mean that its norms (and, in particular, its covenant) will be applied to individuals who have not simply chosen to be part of the TWU spiritual community and will have the effect of excluding gay and lesbian students from the profession. In establishing requirements for admission into the law program, TWU will be performing a role that impacts individuals outside the religious community. If this is so, then it must be permissible for a law society, when deciding whether to accredit a program, to consider whether the program's admission policy is discriminatory.

But is it still the case that law school admission is a significant gateway to the profession? There is at least a case to be made that it is not. Any institution of higher education, either private or public, that wants to deliver a law program is free to apply to the various law societies for accreditation. TWU, quite understandably, argues that the unwillingness of other bodies or institutions to establish a law program should not affect its ability to do so. The limited number of law school places is not TWU's responsibility. At the same time, though, the law societies do not create law schools and must decide whether to accredit a program that is proposed by a public or private university in the current context of limited law school places.

⁷⁵ Elaine Craig, "TWU Law: A Reply to Proponents of Approval" (Fall, 2014) 37 *Dalhousie L.J.* 621, at 633:

... The argument that gays and lesbians can simply go elsewhere to become lawyers is problematic. As TWU noted in its effort to demonstrate to the BC government that there is a need for more law schools in the province: 'Canada has the lowest number of law schools per capita of any Commonwealth country.... [Applications] currently vastly outnumber the spaces available. Law school seats are a finite public good. Some LGBTQ students may not have the option to attend another Canadian law school. Moreover, as a matter of equality, meaningful access to a legal education in Canada should not differ depending on a student's sexual orientation.'

There have, at least until recently, been relatively few law schools in Canada, first because private universities are exceptional here, and second, because provincial governments have been reluctant to fund new law programs in public universities. But that may be changing. In the last few years new law schools have been established and granted funding by the provinces.⁷⁶ Several existing law schools have increased the number of students they accept into their first year program. Perhaps admission to law school is no longer a (the) significant barrier to entry to the legal profession — because, on the one side, there are so many accredited law school places in Canada (and it is increasingly possible to study abroad and be admitted to practice in Canada), and, on the other side, graduation from law school no longer ensures employment as a lawyer in Canada. And of course there are other significant barriers to law school entry that receive far less attention from the law societies — most notably the very high cost of tuition at many accredited schools, which recent evidence suggests has had the effect of excluding students from less well-off backgrounds.⁷⁷

I am doubtful that this claim (that law school admission is no longer a significant barrier to the profession) is credible in the current context of legal education in Canada. Nevertheless, it does highlight the difficulty in determining when the actions of a “private” religious institution impact the public interest or the interests of individuals outside the community to a degree that precludes the institution from claiming autonomy under section 2(a).

If, as the dissenting judges assumed, TWU is a private religious institution, then it would be free to discriminate in its admissions not just against gays and lesbians but also against women and racial minorities. A private religious university could exclude women (or married women, or women with children) from its law program if it believed that a woman’s role is to care for her children and to provide support in the home for her husband. Such a school could also expel individuals who engaged in interracial dating, if it was opposed for religious reasons to

⁷⁶ For example, the law schools at Thompson Rivers University and Lakehead University. Ryerson University is intending to open a law school in 2020 — but will do so without government funding. See D. Newman, “On the Trinity Western University Controversy: An argument for a Christian Law School in Canada”, 22 *Constitutional Forum* (2015), at 6, which argues that there are lots of law school places now.

⁷⁷ A. Jerome, “Report on law school tuition highlights impact of high costs on access, diversity”, *The Lawyer’s Daily* (February 5, 2019), online: <<http://www.thelawyersdaily.ca/articles/10102/report-on-law-school-tuition-highlights-impact-of-high-costs-on-access-diversity>>.

“race-mixing”. Perhaps TWU’s assertion of autonomy in this case has resonance only because as a community we remain ambivalent about sexual orientation equality or we still cannot quite let go of the idea that a ban on same-sex intimacy is a restriction on behaviour (that an individual can refrain from engaging in) rather than an act of discrimination against gays and lesbians.

VI. THE REMOVAL OF THE COVENANT

Not long after the Supreme Court of Canada’s decision, TWU announced that it would no longer require students to sign the Covenant.⁷⁸ This presumably was done in response to the clear signal given by the law societies and by the Court that the Covenant was the only thing preventing accreditation of the TWU program.⁷⁹

But even with the removal of the Covenant, there remain two significant concerns about the program’s accessibility. The first is that TWU, as a conservative evangelical Christian institution, will remain a hostile place for gay and lesbian students. Even if students are no longer asked to sign an undertaking that they will refrain from same-sex intimacy, the spiritual community will continue to view homosexuality as sinful, morally corrupt, or unnatural.⁸⁰ This is hardly a welcoming environment for gays and lesbians, even if they are not formally excluded from the program.

⁷⁸ W. Stueck & S. Dhillon, “B.C.’s Trinity Western University drops mandatory covenant forbidding sex outside heterosexual marriage”, *The Globe and Mail*, online: <<https://www.theglobeandmail.com/canada/british-columbia/article-bcs-trinity-western-university-drops-mandatory-covenant-forbidding/>>.

⁷⁹ See, for example, McLachlin C.J.C. in *Law Society of British Columbia v. Trinity Western University*, [2018] S.C.J. No. 32, [2018] 2 S.C.R. 293, at para. 145 (S.C.C.): “... If the community wishes to operate a law school, it must relinquish the mandatory Covenant it says is core to its religious beliefs, with the attendant ramifications on religious practices.”

⁸⁰ V.M. Muñiz-Fraticelli, “The (Im)possibility of Christian Education” (2016), 75 S.C.L.R. (2d) 209-221, at 219 recognizes that this commitment by TWU does not disappear simply with the removal of the covenant:

...Given how fundamental the biblical conception of marriage is to TWU’s identity, the alternative to TWU Law School *with* the discriminatory CCA [covenant] is not TWU Law School *without* the CCA. The alternative is no TWU Law School at all, and thus no additional places for straight or LGBTQ, religious or secular students. The university is founded on a religious mission — however objectionable some part of it may be to the mainstream of Canadian society. It is a branch of the church. From TWU’s perspective, it would be incoherent to claim a Christian identity but not enforce norms that ensure that TWU remains a Christian space, and not merely as a school substantively identical to all others that is merely administered by Evangelicals.

Second, TWU, if it is to be the kind of Christian institution it wants to be, must favour conservative Christian applicants in its admission process. How this will occur is not clear — but it will occur. The TWU program is hypothetical, and so we know little about its admission criteria. TWU wants to create an evangelical Christian law school for Christian students who will then practise as Christian lawyers. Yet, if TWU intends to be such a school, then its admission process will have to take into account more than just LSAT (Law School Admittance Test) scores and GPA (grade point average).

Perhaps TWU assumes that only Christians will apply to its program. But, as long as law school places are limited in number, it is likely that non-Christians will apply to TWU. If that is the case then TWU will either choose the strongest students (academically) and its mission will be defeated, or it will give preference to Christian applicants and in doing so will exclude some students from its program on grounds that might be viewed as discriminatory. Either directly or indirectly it appears that Christian students will be favoured in admission to TWU's program. If it is objectionable to exclude gay and lesbian students, is it not also objectionable to exclude non-Christian students? There is a difference though between discrimination against gays and lesbians and discrimination against non-Christians. While gays and lesbians represent a historically marginalized group, the same cannot be said about the general and diverse group that includes everyone who is not an evangelical Christian, even if this general group encompasses the members of various religious minorities.

VII. THE FUTURE OF RELIGIOUS FREEDOM

There has been lots of handwringing in academic circles about what the TWU decision means for religious freedom in Canada, and more particularly for the freedom or autonomy of religious associations. I suspect, though, that it means very little, other than that the application of freedom of religion in future cases remains unpredictable. This will be so until the Court recognizes that the key issue in accommodation cases is not the just or appropriate balance between competing religious and public interests, but is instead the boundary between the civic and spiritual spheres of life.

As long as the Court seeks to resolve religious freedom issues within the standard model of Charter adjudication that focuses on balancing or

proportionality it will go through the motions of balancing and engage in a superficial trading-off of competing interests — giving weight to that which has no weight, or arbitrarily discounting one side or the other of the balance, in order to reach a result that seems intuitively correct. In other words, the balancing/proportionality process allows the Court to avoid providing any real justification or explanation for its conclusion in a particular case.

For many religious adherents, their spiritual life is not simply an expression of personal belief, but is instead lived and sustained in community. Indeed, from a civic-secular perspective, it is difficult to account for the constitutional protection of religious practice or spiritual life without understanding its communal character – the deep tie between the individual and the religious community or tradition with which she/he associates.