Trinity Western Law School: "To Be or Not to Be — That Is the Question"

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> *What is good, true, and just in religion will not always comport with the law's view of the matter, nor will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide.*[1]

There is no doubt that Canadian society has advanced in the last 30 years in the creation of a healthier, fairer, and more just society through the recognition and protection of those who have for many years been oppressed, marginalized, or lacked a voice in the Canadian justice system. First Nations, Métis, and Inuit peoples now rightfully demand an equal place in Canadian society and in some cases reparations for their horrendous treatment in the past.

Women demand equal opportunity and an equal voice in the Canadian patriarchal society. Those dealing with mental, emotional, and physical challenges are recognized as being more than able and willing to contribute to Canadian society and rightfully demand an opportunity to do so. In sum, discrimination based upon one's faith, colour of skin, sexual orientation, gender, and other protected categories has been correctly labeled as bigoted, hurtful, and simply wrong. For the marginalized, legal rights and remedies have been articulated in provincial and territorial human rights codes, in the *Canadian Human Rights Act*,[2] and in the *Canadian Charter of Rights and Freedoms*.[3] These protections have been essential for giving voice to and support for the rights of the oppressed, marginalized, and minorities.

Yet in addressing past and present injustices and inequities, can the law overstep, albeit with the best of intentions, in preferring what Berlin called negative liberty over positive liberty?[4] If the law does so, then might Kymlicka be correct when he suggests that protections "become illegitimate if, rather than reducing a minority's vulnerability to the power of the larger society, they instead enable a minority to exercise economic or political dominance over some other group"?[5] Has this in effect happened with the majority of the members of the Nova Scotia Barristers' Society, the Law Society of Upper Canada, and the Law Society of British Columbia being unwilling to accredit the law school at Trinity Western University (TWU) in Langley, British Columbia (BC)?[6]

The effect of non-accreditation of the law school would disqualify graduates from taking the provincial bar course without having first to undergo a hurdle — as yet unknown — not required of graduates from any other Canadian law school. This is so notwithstanding that the Federation of Law Schools of Canada has found that TWU law school meets the standard of law schools across Canada and further that TWU's controversial Community Covenant is not a bar to that finding.[7] What could be the basis for the opposition to this law school, and by con-

sequence to its graduates, by a majority of the members of several law societies? Certainly they are not alone in their concerns; the Council of Canadian Law Deans wrote to the president of the Federation of Law Societies of Canada, stating

> We would urge the Federation to investigate whether TWU's covenant is inconsistent with federal or provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an approved common law program[8]

These are perplexing questions. The case of TWU's law school is fraught with legal, political, philosophical, and ethical issues that go to the root of what it means to live in a free, democratic society, where fundamental freedoms are protected and where the right not to be discriminated against, if one is in a protected category, is upheld. The incommensurate clash between positive and negative rights emerges in the TWU law school case as sides choose between two positions, one based upon the world view of citizens who claim a moral and legal obligation to redress the inequities of the past and ensure fairness in the present, and a group of citizens bound by conscience and religious beliefs seeking the right to express themselves in the community without the state imposing its secular view upon them.

Ostensibly, the TWU case deals with three questions:

1. Does the law society have the statutory jurisdiction to refuse accreditation to TWU's law school?
2. If the answer is yes, what is the applicable standard on judicial review, correctness or reasonableness?
3. Has the applicable standard been met?

However, I suggest that the deeper question at the heart of this case is, "What should be the nature of Canadian society?" In part, that question may be answered when we respond to the following questions: "How can a private corporate entity, albeit established by provincial statute, expect to receive the imprimatur of a statutorily created body bound by law to abide by a provincial human rights code and the *Charter*? On what basis could that statutory decision maker give its approval to an entity that prima facie discriminates against a historically marginalized and oppressed segment of Canadian society?" Those questions are at the heart of this paper, which I have called "Trinity Western Law School: "'To Be or Not to Be — That Is the Question.'"

This paper consists of three parts. Part 1 provides the facts, which have brought the Trinity law school issue into the public arena. Part 2 presents in brief the legal issues involved, focusing on how the Nova Scotia and Ontario courts have attempted to adjudicate the conflict. Part 3 looks at the ostensible incommensurability of the conflict between positive and negative liberty in this case and ends with the suggestion that, on balance, the argument weighs in favour of Canadian law societies approving the accreditation of Trinity's law school.

Part 1: The Facts

Background: Trinity Western University

In 1962 Trinity Junior College was established in Langley, BC, pursuant to the *Trinity Junior College Act*, which stated that its "underlying philosophy and viewpoint . . . is Christian."[9] Its founding denominations were the Evangelical Free Churches of Canada and America. Today, TWU has 42 undergraduate majors and 16 graduate programs. It is funded through private donations, tuition, and supporting services. Extension campuses are found in Ottawa, Ontario; Richmond, BC; and Bellingham, Washington. Its total annual enrollment is approximately 4,000 and its alumni number approximately 24,000.[10]

Its mission statement reads:

> [A]s an arm of the Church, to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Jesus Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.[11]

TWU is committed to its core values, among which are "Obeying the Authority of Scripture" and "Pursuing Faith-Based and Faith-Affirming Learning."[12] Its student handbook, the *Community Covenant Agreement* states, in part, "In keeping with biblical and TWU ideals, community members voluntarily abstain from . . . sexual intimacy that violates the sacredness of marriage between a man and a woman"[13] and cites Romans 1:26-27 in the New International version of the Bible:

> Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones. In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed shameful acts with other men, and received in themselves the due penalty for their error.[14]

Throughout its history TWU has had its conflicts with regulatory bodies. In 1985 it established a five-year teacher-training program, the last year of which was taken at Simon Fraser University. In 1995 TWU applied to the British Columbia College of Teachers (BCCT) for approval of its own complete B.Ed. program, which would no longer require a year away. Its application was denied as "approval would not be in the public interest because of discriminatory practices of the institution."[15] The discriminatory practice was that students[16] were required to sign a statement that they would

> REFRAIN FROM PRACTICES THAT ARE BIBLICALLY CONDEMNED.
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> These include but are not limited to drunkenness … swearing or use of profane language … , harassment … , all forms of dishonesty including cheating and stealing … , abortion … , involvement in the occult … , and sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography …. Furthermore married members of the community agree to maintain the sanctity of marriage and to take every positive step possible to avoid divorce.[17]

On application for judicial review, the BC Supreme Court found that BCCT lacked jurisdiction under the *Teaching Profession Act*, and there was no foundation to support the allegation of discrimination by TWU graduates. The BC Court of Appeal found that BCCT had jurisdiction to consider discrimination but affirmed the trial judge's finding that there was no foundation to find discrimination in this case. After much argument, the Supreme Court of Canada (SCC) held in TWU's favour, by an 8 to 1 decision, as there was no evidence that any graduate of the program had ever discriminated against a gay student and further that there was a difference between belief and conduct.[18] Today, TWU offers its own complete B.Ed. program.[19] Perhaps encouraged by the SCC ruling, Trinity has chosen to pursue establishing a law school, the process of and opposition to which is the subject of this paper.

The Federation of Law Societies of Canada

On June 15, 2012, TWU applied to the Canadian Common Law Program Approval Committee of the Federation of Law Societies of Canada ("Federation")[20] and to the BC Minister of Advanced Education under the BC *Degree Authorization Act* for approval of its proposed law school. Its *Community Covenant Agreement* included the following statement: "In keeping with biblical and TWU ideals, community members voluntarily abstain from . . . sexual intimacy that violates the sacredness of marriage between a man and a woman."[21]

A special Federation advisory committee considered the import of the *Community Covenant Agreement* and found that there "was no public interest reason for preventing graduates of the JD [juris doctor] program at TWU from practicing law" and that if the Federation approval committee "concluded that the TWU proposed law school met the national requirement there was no public interest bar to the approval of the school."[22] The approval committee approved the law degree accepting that Trinity was committed to ethical professionalism, and "to teach equality and to promulgate non-discriminatory practices, and that it would ensure that students understood the full scope of

protections from discrimination based on sexual orientation."[23]

On December 16, 2013, the Federation stated:

> After a thorough review of the proposal submitted by Trinity Western University (TWU), the Common Law Program Approval Committee of the Federation of Law Societies of Canada has granted TWU preliminary approval of its proposed law school program. . . . The Approval Committee had a limited mandate: to determine whether the proposed law school program would produce graduates competent for admission to law society bar admission programs.[24]

This decision was a major hurdle for TWU, in particular because Canadian law societies relied upon the Federation's approval of a law school in determining who was qualified to article in their provinces. The current executive director of TWU's School of Law stated,

> When we started this process, we understood we needed two approvals: accreditation through the FLSC [the Federation] and degree approval from the Ministry [of Advanced Education for BC]. TWU was the first to go through the new FLSC accreditation process. Some law societies had specifically delegated the accreditation issue to the FLSC; some had not considered the issue and arguably still retained their own rights to decide on accreditation. BC enacted a rule that accepted the FLSC decision unless there was a motion to not accredit. So once TWU had the FLSC's favorable decision, it wasn't actually seeking approvals of individual law societies. Rather, what happened is that the opposition to TWU prompted some law societies to look at the issue specifically.[25]

The ultimate responses from the various legal societies, and the BC government, were not favorable.

The Nova Scotia Barristers' Society (NSBS)

On April 25, 2014, the NSBS council voted against accrediting TWU's law school, saying,

> [T]he Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western unless TWU either;
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> exempts law students from signing the Community Covenant; or
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> amends the Community Covenant for law students in a way that ceases to discriminate.[26]

The council's reasoning was that TWU had not appropriately balanced freedom of religion and equality; the covenant was discriminatory under the Nova Scotia *Human Rights Act*,[27] and TWU had exceeded the limits of freedom of religion by requiring that students sign the covenant and by threatening discipline if the covenant were broken. It distinguished the TWU and BCCT case in that, among other things, the current case was not about "condemn[ing] graduates as being unqualified to practice law but . . . to address and reject the systemic discrimination of the institution."[28] TWU objected to the ruling and appealed the decision to the Nova Scotia Supreme Court.

On January 28, 2015, Justice Campbell heard the case, and after an extensive judgment found that NSBS did not have authority under the *Legal Professions Act* to refuse accreditation to TWU's law school nor to demand institutional changes just because the NSBS members were outraged or suffered stress because of TWU's community covenant.[29] He said,

> [E]ven if it did have that authority it did not exercise it in a way that reasonably considered the concerned for religious freedom and liberty of conscience. … The legal authority of the NSBS cannot extend to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it. The extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university.[30]

The NSBS has appealed the decision.[31]

The Law Society of British Columbia and the Minister of Advanced Education

In BC, the Federation's approval of December 16, 2013,[32] resulted in TWU's law school becoming

a fully "approved faculty of law for the purposes of enrollment in the Law Society's admission program … subject to any further resolution adopted by the Benchers."[33]

On December 17, 2013, the BC Minister of Advanced Education, Amrik Virk, gave consent to TWU to issue law degrees under the *Degree Authorization Act*. On April 14, 2014, Trevor Loke launched a lawsuit against the minister to challenge his consent.[34] From January 2014 to April 2014, the BC Benchers considered the TWU application and on April 11, 2014, they voted on a motion to deny approval. That motion was defeated 20 to 7. A motion to deny accreditation, and thus overturn the presumptive approval due to the Federation's findings, was passed in a mail ballot referendum of the members of the BC Law Society. The following resolution to deny was passed with 5,951 (74%) in favor of denial and 2,008 (26%) against. The motion said, among other things,

> BE IT RESOLVED THAT the Law Society of British Columbia require all legal education programs recognized by it for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education — including faculty, administrators and employees (in hiring continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs.[35]

On October 31, 2014, the BC Benchers "adopted the position that the proposed TWU law school was not an approved faculty of law for the purposes of admission to the BC Bar. The resolution was adopted by 25 votes for, one vote against, and four abstentions."[36]

On December 11, 2014, the Minister of Advanced Education Amrik Virk revoked his earlier approval of the proposed TWU law school.[37]

> TWU sought judicial review of the Law Society's decision in a petition dated December 18, 2014, alleging that the Resolution was invalid as it was *ultra vires* of the Law Society, unconstitutional, involved an improper sub-delegation or fettering of authority, and represented an unreasonable application of the Law Society's discretion.[38]

On August 26, 2015, Chief Justice Hinkson of the BC Supreme Court heard the case and has reserved his decision.[39]

The Law Society of Upper Canada (LSUC)

In early 2014 the LSUC considered approving TWU's law school. On April 24, 2014, the Benchers denied accreditation by a vote of 28 to 21. "The effect of the LSUC's decision is to refuse to accept applications for admission to the Ontario Bar from graduates of TWU's proposed law school."[40] No reasons were provided, although LSUC advised that the "reasons of Convocation will be provided through the transcript of both sessions, as well as the written record and, ultimately, the vote."[41]

TWU sought judicial review of the LSUC decision. On July 2, 2015, Justices Marrocco and Nordheimer of the Ontario Superior Court of Justice (Divisional Court) found in favour of the LSUC, stating that the empowering statute provided jurisdiction to do so and that the Benchers' decision was reasonable.[42] TWU is appealing this decision.[43]

Other Law Societies

Other law societies have considered the certification of TWU's law school. In June 2014, the Law Society of New Brunswick council initially accredited the new school but subsequently was directed by its membership to withdraw that approval; however, the motion to rescind approval was neither defeated nor approved.[44] The "bar associations in Alberta and Saskatchewan have approved accreditation — although Saskatchewan has put its decision on hold, as has Manitoba."[45] The Law Society of Newfoundland and Labrador has put its decision on hold pending litigation in other provinces and a further review of the proposed school by the Federation.[46] On October 16, 2014, the Law Society of the Northwest Territories Executive defeated

a motion to accredit TWU by a 4 to 3 vote.[47] The Law Society of Nunavut has yet to decide on the accreditation issue.[48] It seems clear that eventually the SCC will be asked to determine the legal issues surrounding the certification of TWU's law school. With that in mind, I now move to the issues that the SCC will face in that matter.

Part 2: The Legal Issues

"The law faces the seemingly paradoxical task of asserting its own ultimate authority while carving out a space within itself in which individuals and communities can manifest alternate, and often competing, sets of ultimate commitments."[49] As noted earlier, the TWU conflict in Ontario and Nova Scotia focused on three broad questions: Does the law society have the statutory jurisdiction to refuse accreditation to TWU's law school? If the answer is yes, what is the applicable test on judicial review, correctness or reasonableness? Has the applicable standard been met? In this section I look at these three questions as adjudged in both the New Brunswick and Ontario cases to better understand the legal issues involved in this matter.

Law societies and statutory jurisdiction

Every Canadian law society is a creature of statute. In Nova Scotia, the NSBS regulation section 3.3.1 required that to be an articling student, a person had to "have a law degree" and under section 3.1(b) "law degree" is defined as "a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for granting of such a degree, or an equivalent qualification."[50]

The NSBS decided to deny accreditation on the basis of several factors, among which were the lack of balance of freedom of religion and equality in the Community Covenant, and the incompatibility between the Nova Scotia *Human Rights Act* and the requirement for students to sign the Community Covenant. Perhaps realizing the lack of statutory authority to reject the TWU request, the NSBS revised its regulations to redefine "law degree" as

> **3.1(b) (ii)**
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> a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee unless Council, acting in the public interest, determines that the university granting the degree unlawfully discriminates in its law student admissions or enrolment policies or requirements on grounds prohibited by either or both the *Charter of Rights and Freedoms* and the *Nova Scotia Human Rights Act.*[51]

Justice Campbell confirmed the NSBS's right in "upholding and protecting the public interest in the practice of law in Nova Scotia,"[52] but rejected its attempt to regulate a BC law school as beyond its jurisdiction under the *Legal Profession Act.*[53] He then considered what standard of judicial review the court should apply.[54] Because there was no privative clause preventing review by the court or statutory direction on the standard of judicial review, or on appeal, he had to decide if the standard of review would be correctness or reasonableness.[55]

The correctness standard would apply if what was being considered was a matter of general law or an issue which would affect the "very fabric of Canadian society".[56] Applying correctness, a judge could substitute his or her own determination of right or wrong regarding the decision. However, if the standard were reasonableness, then the court would give deference to the expert bodies and not overturn their decisions, whether the justice agrees with the decision or not, as long as the decision was "reasonable." As stated by Justice Fichaud,

> Reasonableness is neither the mechanical acclamation of the tribunal's conclusion nor a euphemism for the reviewing court to impose its own view. The court respects the Legislature's choice of the decision maker by analysing that tribunal's reasons to determine whether the result, factually and legally, occupies the range of reasonable outcomes. The question for the court isn't — What does the judge think is correct or preferable? The question is — Was the tribunal's conclusion reasonable? If there are several reasonably

> permissible outcomes, the tribunal, not the court, chooses among them. If there is only one and the tribunal's conclusion isn't it, the decision is set aside. The use of reasonableness, instead of correctness, generally has bite when the governing statute is ambiguous, authorizes the tribunal to exercise discretion, or invites the tribunal to weigh policy.[57]

In this case Justice Campbell, citing *Dore v Barreau de Quebec* (2012),[58] appreciated that *Charter* values could be specifically at issue in a case or alternatively merely implicated. The former required the correctness test but the latter required the lesser test of reasonableness.[59] Campbell expounded on that test, saying that:

> The question on judicial review is whether in assessing the impact of the *Charter* protection, and given the "nature of the decision and the statutory and factual contexts", the decision "reflects a proportionate balancing of the *Charter* protections at play." The issue is one of proportionality. The question is whether in the relevant context, the decision maker "properly balanced" the relevant *Charter* values with the statutory objectives within a "margin of appreciation." If the decision maker has properly balanced the *Charter* values and statutory objectives, the decision is reasonable. It may be assumed, conversely, that if the decision-maker has not properly balanced the *Charter* values, within that scope of deference or margin of appreciation, the decision is unreasonable.[60]

Justice Campbell found that the purpose of the *Legal Profession Act* was "to regulate lawyers and the practice of law"[61] and that the Society was "using the law degree to get at something else"[62] — regulating TWU and its policies — actions outside of its statutory mandate.[63] He held that "the Community Covenant, a non-academic policy at a university that is subject to the regulatory regime in British Columbia, is unrelated to, irrelevant to, and extraneous to the practice of law in Nova Scotia"[64] and that the NSBS "had no authority to pass the resolution or the regulation."[65] Citing the *Anselem*[66] and the *Multani*[67] cases, he suggested that freedom of religion was to be interpreted broadly and expansively and that one should not prefer one right over another.[68] This would be consistent with the court in *R v NS*,[69] where the court held that religious rights should not be limited in situations where there is no good reason for the limitation. Religious rights have not been marginalized or in any way required to give way to a presumption that equality rights will always prevail.

Indeed, Justice Campbell said, "Equality rights have not jumped the queue to now trump religious freedom … . Religious freedom has not been relegated to a judicial nod to the toleration of cultural eccentricities that don't offend the dominant social consensus."[71] Moreover, he cited both Justice Deschamps in *SL v Commission scolaire des Chenes,* saying that governments should remain neutral on religion,[72] and Justice Rothstein's judgment in *Saskatchewan (Human Rights Commission) v Whatcott*, saying that

> there are large sections of society that have different views. Those views for some are based on interpretations of sacred texts and religious traditions. The freedom to hold those views is protected. How those views are expressed and made part of public debate and how those views are put into practice must be considered as part of the delineation and balancing process. But a person has a constitutional right to express religiously based views that ridicule, belittle, or affront the dignity of other people, including sexual or other minorities.[73]

In sum, the court found, after distinguishing the 2001 TWU decision, that the purpose of the governing statute did not give jurisdiction to the NSBS to make its determination to deny approval, and in any event, if that finding was in error, the standard of reasonableness applied and the decision was not reasonable. Although the court recognized that there was both a regulation and an administrative action at issue, with ordinarily a different standard of review applicable to each, it considered them the same for its analysis.[74]

In its analysis the court found that the actions of the NSBS infringed the right to freedom of religion in a non-trivial and substantial way, a requirement for an infringement to be sufficient in law. Moreover, section 1 of the *Canadian Charter of Rights and Freedoms* did not justify the NSBS action, nor were the rights

of LGBT people in conflict with TWU.[75] Justice Campbell said "The passing of the resolution and the regulation by the NSBS were not in themselves the exercise of equality rights. They were aimed at supporting equality rights but not in and of themselves manifestations of the exercise of those rights."[76]

While there was a pressing purpose in confronting discrimination, promoting diversity, and removing barriers for those entering the legal profession, the court found that "[i]t is not rationally connected to the objective or purpose that is pressing and substantial[,] which is redressing systemic discrimination in the profession."[77] In seeking minimal impairment of the right to freedom of religion, the court found hypocrisy in the NSBS position:

> [The NSLS] did not require the removal of the Community Covenant, only its amendment so that discriminatory effects did not apply to law students . . . [which] would only forbid discrimination against law students but would have no issue with their being taught by professors, surrounded by other students, and subject to administrators, who would be subject to what it considers to be unlawfully discriminatory treatment.[78]

Proportionally, the court found that the NSBS action would "do nothing whatsoever to improve the status of LGBT people in . . . [the] province"[79] and would directly and significantly diminish the impact of the value of religious expression in this case.[80] "The NSBS resolution and regulation infringe on the freedom of religion of TWU and its students in a way that cannot be justified. The rights, *Charter* values and regulatory objectives were reasonably balanced within a margin of appreciation."[81]

The Ontario Superior Court of Justice

The legal issues before the Ontario court were the same as before the Nova Scotia Supreme Court. However, the Ontario court found in favour of the LSUC against TWU. It held that the Ontario statute had broader authority than the Nova Scotia statute because the former had "an express mandate 'to maintain and advance the cause of justice and the rule of law'", and it had more control over the requirements of legal education than did the NSBS.[82] Further, whereas the NSBS had attempted to control TWU, the LSUC was not attempting to do so. Indeed, unlike in the NSBS case, LSUC was directly attempting to "prevent and combat discrimination, and its ultimate effect on the composition of the legal profession in Ontario."[83] Finally, although the NSBS justice used the argument that an insignificant 2.4% of available law school seats would be in TWU's new school, it was in fact a very significant consideration as it was a question of a minority potentially applying for those seats and "discrimination is evaluated on a numbers basis."[84]

The court also said that people in TWU could express their beliefs, associate without constraint at the university, and establish a law school if desired. The court said,

> [T]here is no prohibition, in the decision of the respondent, against TWU establishing a law school. There is no state-enforced isolation of evangelical Christians. Assuming that economic opportunities may differ for TWU graduates does not interfere with their rights to associate. Nor can the applicants use the right to freedom of association to argue in favour of state action that will permit them to be equal to, but operate separate from, all other law schools.[85]

TWU is appealing this decision.

On the first issue of whether a statute grants jurisdiction to an administrative decision maker to consider matters such as in the TWU case, it seems to me that the court will find that law societies must act in the public interest and in doing so the court will ultimately find within the language in a statute the means by which a law society can make a determination of the issue at hand. On the second issue, applying the appropriate test of judicial review where Charter values are involved, the reasonableness test applies. However, in some cases the administrative decision may be multifaceted, involving both a statutory empowerment and a regulation passed pursuant to that statute, which may cause the court to apply the reasonableness test to part of the decision and the correctness test to other parts.

Beyond the legal analysis, one could argue that what is at stake is really a decision regarding what is to be the nature of Canadian society. One point is certain: The cases from Ontario and Nova Scotia indicate the stark contrast of those apparently determined to champion the supremacy of section 15 over section 2 of the *Charter* with those who would argue against this supremacy. The issue is whether this would be the best outcome for a free, democratic, and pluralistic society.

Part 3: The Conflict Between Positive and Negative Liberty

> *For many people in a secular society religious freedom is worse than inconsequential. It actually gets in the way. It's the dead hand of the superstitious past reaching out to restrain more important secular values like equality from becoming real equality.*[86]

There is a sense of justice — delayed to be sure — in seeing the injustices perpetrated against the LGBTQ members of society finally ameliorated by case law,[87] section 15 of the *Canadian Charter of Rights and Freedoms*,[88] and the many provincial human rights codes. No one can justify members of that community being prohibited from having access to a restaurant, or an apartment, or a job, or in any way being restricted from access to a post- secondary education on the basis of their sexual orientation. That would indeed be unjust and unacceptable in a free and democratic society. It is also true that requiring applicants to a university to sign a document such as the Community Covenant, with all that it implies, is clearly an insult to the personhood of a member of the LGBTQ community. Therefore, the requirement is discriminatory, as it improperly conflates fairness with injustice.

That being said, if freedom of conscience and freedom of religion are to have meaning, individuals must be allowed to interact in community.[89] Community is the fertile ground within which brothers and sisters of like thought can feely express themselves in a safe space and thereby flourish. As the ancients knew so well, we are human in part because we live within the walls of the city — in community. Consonant with that idea and true to a liberal democracy where individuals determine the good for themselves, Canadians give people of faith the sanctity of their synagogues, temples, mosques, and churches to meet in fellowship in their communities to freely express themselves according to their beliefs and conscience. Indeed, those holy places assist in the formation of their children's beliefs and provide succor to members of their community in times of trouble and a gathering place in times of celebration.

No one could reasonably say that these communities should not be protected even though we may vehemently disagree with the beliefs and ideas they express. Rather, we recognize the right of all citizens to freedom of conscience, freedom of religion, and freedom of association as being necessary to a truly free and democratic society. These rights have meaning only when we protect the rights of communities despite strongly disagreeing with them, being offended by them, and indeed questioning whether anyone anywhere should express what we consider odious ideas in public. It is difficult to say that those with whom we disagree, those who we believe mock us, malign us, attempt to humiliate us, and identify us as inherently disordered human beings, and teach their children that this is so, should still be allowed to express their opinion even in their own community, or require anyone who wishes to join their community to agree with those beliefs and to sign a document which implies such things, and lastly, demand that we must provide them the legal means to do so. Yet this is consonant with the creation of Canada as a "community of communities".[90] Freedom has meaning only when we acknowledge that others with whom we fundamentally disagree have the same rights as we do.

In his view of positive and negative liberty, Berlin surely intended to underscore the importance of a pluralistic society where many communities with differing views can function with the approval of the wider society.[91] He suggested that the norm in a free society is a state of tension due to conflicting values. He wrote that

> The history of political thought has, to a large degree, consisted in a duel between . . . two great rival conceptions of society. On one side stand the advocates of pluralism and variety and an open market of ideas, an order of things that clashes and the constant need for conciliation, adjustment, balance, an order that is always in a condition of imperfect equilibrium, which is required to be maintained by conscious effort. On the other side are to be found those who believe that this precarious condition is a form of chronic social and personal disease, since health consists in unity, peace . . . [and] the recognition of only one end or set of non-conflicting ends as being alone rational.[92]

To accept pluralism as the norm in society is to accept the inevitable collision of values amongst its citizens. Berlin believed that this was the price to be paid if one believed in the ability of individuals to transform their lives through free choice, in an existential sense but not a nihilistic sense of rejecting all communal values. Positive liberty (hereinafter referred to as positive freedom) seems relatively easy to comprehend as an assertion of specific rights such as freedom of religion. However, negative freedom requires an explanation. It refers to the restricted use of others' positive freedom in that when exercising one's rights one must not interfere with others' rights. Berlin stated,

> Whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility, or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty from; absence of interference beyond the shifting, but always recognizable, frontier.[93]

Gutmann (1999) interpreted Berlin's concept as follows:

> Worthwhile negative liberty, Berlin recognizes, depends not merely upon the existence of options but their number, accessibility, whether and to what extent deliberate human acts have blocked options, and the value of the accessible options, to both the agent and other members of society.[94]

In *Trinity Western University v The Law Society of Upper Canada*, I suggest that the Ontario court found that Canadian society should prefer negative to positive liberty. The apparent rationale may be that having freedoms without being able to exercise them is useless. This is, of course, true. However, Canadians allow difference in society to ensure freedom of conscience and freedom of choice amongst a plurality of values for all citizens. I would argue that the fountainhead of all positive and negative rights is freedom of conscience, which requires community to flourish, just as negative liberty is necessary for positive liberty to have meaning. But what if these rights collide? Which side should prevail? That is the conundrum. Or is it? Humans seek solutions to states of tension, but as above, Berlin said it is precisely living in that state of tension that makes a free society. We do not value monism, as do dictatorships where everyone has to go to the rallies and appear to be unthinkingly supportive or be ostracized — or worse. In a free society, citizens are allowed to be foolish and naïve, as thought so by some, and thus such freedom fosters pluralism.

As citizens Canadians are engaged in what Chief Justice McLachlin calls a "dialectic of normative commitments" where societal tension is or ought to be the norm.[95] Communities whose values differ from mainstream Canadian society ought to be allowed to act according to their collective conscience, at least insofar as entry into their community should be controlled by the community and not by others. Arguably, this is so even when it in effect shuts out others from the community's benefits. The alternative is to give the state the right to in effect disallow certain communities due to their beliefs: excluding egregious cases such as those whose activities are contrary to the *Criminal Code*.

The SCC has recently recognized the necessary collective nature of the right to religion. As Justice Abella stated in *Loyola High School v Quebec,*

> Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation

> through communal institutions and traditions … To fail to recognize this dimension of religious belief would be to "effectively denigrate those religions in which more emphasis is placed on communal worship or other communal religious activities" … . These collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school [are crucial to] … the collective practice of Catholicism and the transmission of the Catholic faith.[96]

It is true that TWU's law school is not a church per se, but it is clearly an organ of a church and as such qualifies as part of the "socially embedded nature" of a specific religious belief.[97] The argument that TWU can have its beliefs but that it should not be able to require adherence to them for all those who attend is not reasonable; the commonality of beliefs makes the community. Persons wishing to enter a faith or communitarian community, which TWU clearly is by its mission statement, do not get to choose their own horizon of beliefs for the community.[98]

On the practical side, one can argue that TWU's discrimination against LGBTQ citizens reduces their accessibility to a law school education. Further, no statutorily created public body could or should, directly or indirectly, countenance such discrimination. Indeed, this seems to be a clear case when negative liberty should trump positive liberty. However, I suggest that as the BC legislature approved the statutory creation of the university, sheltered it from claims under the *Human Rights Code*,[99] and acknowledged it as a private university with express values and a particular world view, it is *sui generis* — unlike a public institution created by the wider society — and its existence rests upon its specific mission to a community in Canada.

I suggest that section 15 of the *Charter* and the arguments associated with it do not apply to TWU's law school, as the purpose of section 15 cannot be to force religiously based institutions to change their principles in anticipation of future applications. The Ontario court could, in effect, close TWU's law school before it opened. Moreover, if it opened it is disingenuous to say that non-accreditation is directed to the school, not the graduates. Courts often look to the effect of a decision, and in this case the effect of not accrediting TWU's law school would be absurd. It would require TWU law school graduates to pass some type of test, perhaps a values test, to practice in jurisdictions not because of their academic standing or evident ability to article in law, but because of the values of the institution from which they graduated. The alleged sins of the institution would be visited upon its graduates.

Surely this result is neither fair nor just to graduates of TWU's law school: it is a slap in the face of their religious freedom.[100] To hold otherwise is to say that as TWU discriminated against members of the LGTBQ community, law societies may punish its graduates and in effect discriminate against them for attending that institution. It seems that such graduates may then have a section 15 *Charter* argument against those law societies. This would be an interesting case of negative liberty versus negative liberty.

It is possible to allow both apparently incommensurate views to coexist within the law, where society recognizes and allows for a small community to exist and function with statutory approval notwithstanding its evident challenge to the values of the wider community. In *Loyola High School v Quebec*, the SCC was clear that unlike in *SL v Commission scolaire des Chênes*, which found that the Quebec minister was correct in denying a group of parents the right to withdraw their children from the provincial ethics and religious culture (ERC) program as it did not breach their religious freedom, Loyola High School had been established for a specific religious (Catholic) purpose. Therefore, it could not teach the ERC program in accord with ministerial direction; that is, from a neutral point of view when speaking of Catholicism. To do so would demonstrably interfere "with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2 (*a*) of the *Charter*."[101]

I suggest that the same argument applies to TWU's law school, as it rests within a university

established for a singular purpose, a purpose approved by the BC legislature, a purpose not in conflict with the BC *Human Rights Code*,[102] and thus a purpose in concert with living in a free and democratic society. This is part of what Chief Justice McLachlin called the ongoing "dialectic of normative commitments" in Canadian society, saying,

> For society to function it has to be able to depend on a general consensus with respect to certain norms. On the other hand, in society there is a value placed on multiculturalism and diversity, which includes a commitment to freedom of religion.[103]

Conclusion

I have argued, in effect, that it is an error to frame the TWU law school case as a zero-sum problem. Given the just claims for equality demanded by those in the LGBTQ community; the legal, political, and societal support for that community; and the principle of negative liberty expressed in section 15 of the *Charter* and provincial human rights codes, there are strong arguments against accrediting TWU's law school. However, I have suggested that the resolution of past injustices, including the possible limiting of law school positions in Canada, ought not to ground a claim for provincial statutory bodies to act against TWU. I have taken this position because to do otherwise is contrary to what a free Canadian society should be: a community of communities. Further, not to accredit TWU's law school would be to discriminate against its graduates. It is true that no provincial law society can stop the opening of the law school, but it is disingenuous to argue that therefore law societies that refuse to accredit its graduates are not harming them. Unintended harm is still harm — not for what graduates have done or for what they may believe, but rather because of a statement of the institution they attended.

Earlier in this paper, I asked if Kymlicka was correct when he suggested that protections "become illegitimate if, rather than reducing a minority's vulnerability to the power of the larger society, they instead enable a minority to exercise economic or political dominance over some other group."[104] I do not believe that it is the intention of individuals or law societies who disagree with accrediting TWU's law school to discriminate against those who make up the TWU community or its graduates, but nevertheless it is the effect. Discrimination against that community and its graduates should be anathema to those who have long suffered persecution, marginalization, and discrimination under the law, particularly prior to 1968 and thereafter in the wider society.

This paper is entitled "Trinity Western Law School: 'To Be or Not to Be — That Is the Question.'" I suggest that the right response to this issue is that Canada is and should be a community of communities. The parties involved should consider that the Beatles had it right when they sang, "Let it Be."

Endnotes

* Dr JK Donlevy, has been a member of the Saskatchewan Law Society since 1985 and is an Associate Professor at the Werklund School of Education, University of Calgary. Note that this paper was written prior to the Court of Appeal decisions from the courts in British Columbia, Ontario and Nova Scotia.

1 Beverly McLachlin, "Freedom of religion and the rule of law: A Canadian perspective" in Douglas Farrow, ed, *Recognizing religion in a secular society: Essays in pluralism, religion, and public policy* (Montreal: McGill-Queen's University Press, 2004) 12 at 21 [McLachlin, "Freedom of religion"].

2 *Canadian Human Rights Act*, RSC 1985, c H-6.

3 *Canadian Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

4 Isaiah Berlin, "Two concepts of liberty" in Henry Hardy, ed, *Liberty* (Oxford: Oxford University Press, 2002) 166 [Berlin, "Two concepts"].

5 Will Kymlicka "Western political theory and ethnic relations in Eastern Europe" in Will Kymlicka & Magda Opalski, eds, *Can liberal pluralism be exported? Western political theory and ethnic relations in Eastern Europe* (Oxford,

England: Oxford University Press, 2001) 13 at 28 [Kymlicka, "Western political theory"].

6 At this time the law school is not open pending litigation in various provinces.

7 Trinity Western University, "University policies: Community covenant agreement — Our Pledge to One Another" (2014), online: <www.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf> [Community Covenant Agreement].

8 Council of Canadian Law Deans, Letter, "Re: Trinity Western University School of Law Proposal" (20 November 2012), online at 2: <www.ccld-cdfdc.ca/images/reports/CCLDnov20-2012lettertoFederation- reTWU.pdf>.

9 *An Act Respecting Trinity Western University*, SBC 1969, c 44, s 3(2).

10 Trinity Western University, "About TWU: Fact Sheet", online: <http://twu.ca/about/fact-sheet.html>.

11 Trinity Western University, "Our mission" (2014), online: <www.twu.ca/academics/about/mission.html> [TWU, "Our Mission"].

12 Trinity Western University, "Core Values" (2015), online: <www.twu.ca/about/values/>.

13 Community Covenant Agreement, *supra* note 7, art 3.

14 The Holy Bible, New International Version (Colorado Springs, CO: Biblica Inc, 2011).

15 *Trinity Western University v College of Teachers*, 2001 SCC 31 at para 5, [2001] 1 SCR 772 [*TWU v Teachers*].

16 Staff and faculty were made to sign a document with a similar clause.

17 *TWU v Teachers, supra* note 15 at para 10.

18 See Kent J. Donlevy, "Value pluralism and negative freedom: The Trinity and Surrey cases" (2005) 39:3 McGill Journal of Education 305.

19 Trinity Western University, "School of Education: Program overview" (2014), online: <www.twu.ca/undergraduate/academics/majors-and-programs/school-of-education/default.html>.

20 The Federation is the national coordinating body of the 14 law societies that govern lawyers and notaries across the country. One of its functions is to develop national standards of regulation. Each law society in the common law provinces and territories requires applicants for bar admission to hold a Canadian common law degree or its equivalent. The Federation adopted a uniform national requirement for Canadian common law programs in 2010. The Approval Committee is the body responsible for making the determination as to whether a degree complied with those national standards. (*Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 at para 45 [*TWU v Nova Scotia Society*]. The case was appealed to the Nova Scotia Court of Appeal after this paper was written. The decision in that case can be found at: *Nova Scotia Barristers' Society v Trinity Western University*, 2016 NSCA 59.

21 Community Covenant Agreement, *supra* note 7, art 3.

22 *TWU v Nova Scotia Society, supra* note 20 at para 48.

23 *Ibid* at para 49.

24 Federation of Law Societies of Canada, "December 16, 2013 Archives" (16 December 2013), online: <http://flsc.ca/2013/>.

25 E. Philips, Executive Director — TWU Law, Trinity Western University, Personal communication (20 October 2015).

26 *TWU v Nova Scotia Society, supra* note 20 at para 57.

27 *Human Rights Act*, RSNS 1991, c 12.

28 *TWU v Nova Scotia Society, supra* note 20 at para 58.

29 *Ibid* at paras 3, 8.

30 *Ibid.*

31 After this paper was presented, on July 26, 2016, the Nova Scotia Court of Appeal found in favour of Trinity Western. *The Nova Scotia Barristers' Society v Trinity Western University,* 2016 NSCA 59.

32 On 27 September 2013, the Benchers of the BC Law Society unanimously approved an amendment to the Law Society Rules, including the new Subrule 4.1, which states that a common law program would be approved for the purposes of establishing adequate academic qualifications if approval was granted by the FLSC under the national requirement, "unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.": Factum of the Respondent, *Trinity Western University v The Law Society of British Columbia*, online at para 128: <http://www.lawsociety.bc.ca/docs/newsroom/TWU-argument-LSBC.pdf> [Factum of the Respondent *TWU v BC Society*].

33 *Ibid* at para 130.

34 James Bradshaw, "B.C. government sued over approval of Trinity Western law school" *The Globe and Mail* (14 April 2014), online: <www.theglobeandmail.com/report-on-business/industry-news/the-law-page/lawyers- challenge-bc-approval-of-trinity-western-law-school/article17957304/>.

35 Factum of the Respondent *TWU v BC Society*, *supra* note 31 at para 169.

36 *Ibid* at para 173.

37 CBC News Desk, "Trinity Western law school: B.C. advanced education minister revokes approval" *CBC News* (11 December 2014), online: <www.cbc.ca/news/canada/british-columbia/trinity-western-law-school-b-c-advanced-education-minister-revokes-approval-1.2870640>.

38 Factum of the Respondent *TWU v BC Society*, *supra* note 31 at para 176.

39 Law Society of British Columbia, News Release, "Hearing in TWU v. Law Society of BC concludes" (27 August 2015), online: <https://www.lawsociety.bc.ca/page.cfm?cid=4127&t=Hearing-in-TWU-v-Law-Society-of-BC-concludes>. Note the decision in this case was issued after the paper was written: *TWU v Law Society of British Columbia*, 2015 BCSC 2326.

40 Factum of the Applicants *Trinity Western University v Law Society of Upper Canada*, online at para 2: <https://www.outonbayst.org/wp-content/uploads/2016/03/Applicants_-Factum-March-2-2015.pdf>.

41 *Ibid* at para 64.

42 *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 at paras 96, 124 [*TWU v Society of Upper Canada*]. The case was appealed to the Ontario Court of Appeal after this paper was written. Decision of that Court can be found at: *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518.

43 After this paper was presented, on June 29, 2016 the Ontario Court of Appeal found in favour of the LSUC. *Trinity Western v The Law Society of Upper Canada,* 2016 ONCA 518.

44 Law Society of New Brunswick, "2014/2015 President's Annual Report" (August 2015), online at 2-3: <www.lawsociety-barreau.nb.ca/files/LawNews/LawNews_August2015.pdf>.

45 CBC News Desk, "Law society council upholds Trinity Western accreditation" *CBC News* (9 January 2015), online: <www.cbc.ca/news/canada/new-brunswick/law-society-council-upholds-trinity-western-accreditation- 1.2895025>.

46 See Law Society of Newfoundland and Labrador, News Release, "Law Society Response — Trinity Western University's Proposed Law School" (11 June 2014), online: <www.lawsociety.nf.ca/law-society-response-trinity-western-universitys-proposed-law-school/>.

47 See Law Society of the Northwest Territories, News Release, "Trinity Western University - President's Statement regarding vote on TWU Law School" (August 2014), online: <http://www.lawsociety.nt.ca/society/twu/>.

48 See Law Society of Nunavut, Notice to the Profession, "Trinity Western University Law School Accreditation" (14 May 2014), online: <www.lawsociety.nu.ca/wp-content/uploads/2013/07/Notice-to-the-Profession-TWU-May-15-2014.pdf>.

49 McLachlin, "Freedom of religion" *supra* note 1 at 16.

50 *Legal Profession Act* SNS 2004, c 28; Regulations made pursuant to the Legal Profession Act, SNS 2004, c 28, s 3.1(b)(i).

51 *Ibid* at s 3.1(b)(ii)

52 *TWU v Nova Scotia Society, supra* note 20 at para 128.

53 *Ibid* at paras 166, 181.

54 *Ibid* at para 217; The Oakes test, as explained in *Dagenais* v *Canadian Broadcasting Corp.,* [1994] 3 SCR 835, 1994 CanLII 39 (SCC), indicates that the breach of a Charter right can be justified only if:

> 1. The legislation's objectives are pressing and substantial;
> 2. The measures adopted in the legislation are rationally connected to the objective;
> 3. The legislation impairs as little as possible the right or freedom in question; and
> 4. There is proportionality between the deleterious and salutary effects of the measures which are responsible for limiting the *Charter* right and the legislative objective.

In the case of a decision of an administrative tribunal or actor, emphasis must be placed on the issues of proportionality, minimal impairment, and balancing as between legislative objectives and *Charter* rights (*Daegenais* at paras 37-40, 88, 114, 146-48).

55 *TWU v Nova Scotia Society, supra* note 20 at para 139.

56 *Ibid* at paras 157-58.

57 (*Egg Films Inc. v Nova Scotia (Labour Board),* 2014 NSCA 33 at para 26, [2014] NSJ No 150 (QL); Justice Abella in *Mouvement laïque québécois v City of Saguenay*, 2015 SCC 16, [2015] 2 SCR 3 [*Mouvement laïque*] although agreeing with the decision of the majority, expressed concern in that it had used correctness for one part of the judgment and reasonableness for another. Her position was that to do so would "undermin[e] the framework for how decisions of specialized tribunals are generally reviewed" (*ibid* at para 165). In *Dunsmuir v New Brunswick* the SCC had decided that reasonableness applied when a specialized tribunal was interpreting its own

"home statute" (*Mouvement laïque* at para 166). The majority of the court accepted the principle that "it should be presumed that the standard of review is reasonableness" (*ibid* at para 46) but that "it can be rebutted … where a contextual analysis reveals that the legislature clearly intended not to protect the tribunal's jurisdiction in relation to certain matters." (*ibid* at para 46).

58 *Dore v Barreau de Quebec,* 2012 SCC 12, [2012] 1 SCR 395 dealt with the standard of review, correctness or reasonableness, that a court should use when considering a decision by a bar's disciplinary council. In this case a lawyer responded to the critical comments made about him by a judge in the judge's trial judgment by sending the judge a letter calling him "loathsome, arrogant and fundamentally unjust," and accusing him of "hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks" (*ibid* at para 10). Where a *Charter* value has been breached, the Court held that it was proper to apply the justification provisions of section 1 of the *Charter* utilizing the tests enunciated in *R v Oakes* (*Mouvement laïque,* supra note 55 at paras 3, 35-41, 113, 114, 146-51).

59 *TWU v Nova Scotia Society*, *supra* note 20 at para 161.

60 *Ibid* at para 164.

61 *Ibid* at para 166.

62 *Ibid* at para 170.

63 *Ibid* at paras 175-76.

64 *Ibid* at para 178.

65 *Ibid* at para 181.

66 In *Syndicat Northcrest v Anselem,* 2004 SCC 47, [2004] 2 SCR 551, dealing with the right of Orthodox Jewish condominium owners to establish religious structures (succahs) on their condominium balconies notwithstanding condominium regulations to the contrary regarding structures on the property, SCC said with reference to the Quebec *Charter of Human Rights and Freedoms* — which interpretation was identical to the *Canadian Charter of Rights and Freedoms* — that freedom of religion was to be interpreted to be "broad and expansive" and should not be prematurely narrowly construed (*ibid* at para 62).

67 In *Multani v Commission scolaire Marguerite-Bourgeoy,* 2006 SCC 6, [2006] 1 SCR 256, dealing with the right of a Sikh student to wear a ceremonial religious object similar to a dagger in school, the SCC confirmed that there had been no conflict of fundamental rights and thus no need to prefer one over the other (*ibid* at para 28).

68 In *Saskatchewan (Human Rights Commission) v Whatcott* [2013] the SCC again rejected the hierarchical approach to rights. The case involved the balancing of freedom of conscience, religion, and expression with equality rights.

69 In *R v NS,* 2012 SCC 72, [2012] 3 SCR 726 the court dealt with the issue of whether a witness should be permitted to wear a niqab that covered her face while testifying in court. The issue of trial fairness is of course of fundamental importance, but the "need to accommodate and balance sincerely held religious beliefs against other interests is deeply entrenched in Canadian law" (*ibid* at para 54).

70 *Ibid.*

71 *TWU v Nova Scotia Society*, *supra* note 20 at para 196.

72 *Ibid* at para 198.

73 *Ibid* at para 206.

74 The judge differentiated between a regulation and an administrative action. The resolution was administrative but the regulation was different. The test to determine how *Charter* rights should be considered is different (*ibid* at para 215). Here the regulation was passed to implement the resolution, so a different test was not appropriate (*ibid* at para 216). The balancing and delineation of rights is as set out in *Dagenais* and applied in *R v NS*.

75 *Ibid* at para 239.

76 *Ibid*.

77 *Ibid* at para 243.

78 *Ibid* at paras 266-67.

79 *Ibid* at para 269.

80 *Ibid* at para 270.

81 *Ibid.*

82 *TWU v Society of Upper Canada, supra* note 41 at para 129.

83 *Ibid* at para 132.

84 *Ibid* at paras 133-34.

85 *Ibid* at para 142.

86 *TWU v Nova Scotia Society*, *supra* note 20 at para 271.

87 See e.g. *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609.

88 *Charter*, *supra* note 3, s 15(1):

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin,

colour, religion, sex, age or mental or physical disability.

89 In *Loyola High School v Quebec (Attorney General),* 2015 SCC 12, [2015] 1 SCR 613 [*Loyola High v Quebec*] the Court relied upon the *R v Big M Drug Mart* decision, and quoted from *Alberta v Hutterian Brethren of Wilson Colony*, reaffirming that there were collective religious rights and that freedom of religion "has both an individual and a collective dimension" (*ibid* at 92). "[R]eligions are necessarily collective endeavors . . . . It follows that any genuine freedom of religion must protect, not only individual belief, but the institutions and practices that permit the collective development and expression of that belief" (*ibid,* citing Timothy Macklem, "Faith as a Secular Value" (2000) 45 McGill LJ 1 at 25). Relying upon the decision in *R v Big M Drug Mart*, the Court held that religious freedom "includes both the individual and collective aspects of religious belief" *(Loyola* at para 59).

90 Dwight Newman, *Community and collective rights: A theoretical framework for rights held by groups* (Oxford: Hart Publishing, 2011) at 229.

91 See Berlin, "Two concepts", *supra* note 4.

92 Isaiah Berlin, *The Sense Of Reality: Studies in Ideas and their History* (New York: Random House, 1997) at 155-56.

93 Berlin, "Two concepts", *supra* note 4 at 173-74.

94 Amy Gutmann, "Liberty and pluralism in pursuit of the non-ideal" (1999) 66:4 Social Research 1039 at 1042.

95 McLachlin, "Freedom of religion" *supra* note 1 at 21.

96 *Loyola High v Quebec, supra* note 87 at paras 60-61.

97 *Ibid* at para 60.

98 TWU, "Our Mission" *supra* note 11.

99 *Human Rights Code*, RSBC 1996, c 210 [*Human Rights Code*, RSBC].

100 This is precisely the point made by the SCC in *TWU v Teachers, supra* note 15, where the court said,

> While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations (*ibid* at para 32).

101 *Loyola High v Quebec*, *supra* note 87 at para 61.

102 *Human Rights Code*, RSBC, *supra* note 97.

103 McLachlin, "Freedom of religion" *supra* note 1 at 21-22.

104 Kymlicka, "Western political theory" *supra* note 5 at 28.