

Civil Litigation

Foreign law profs warn of TWU case's international fallout

By **Cristin Schmitz**

(September 7, 2017, 3:00 PM EDT) -- Graduates from religiously affiliated universities here and abroad would face uncertainty about their credentials in Canada if the Supreme Court upholds legal regulators' refusal to accredit a proposed evangelical Christian law school that bars students and staff from same-sex sexual intimacy, abortion and extramarital sex, say foreign law professors who have rallied in support of Trinity Western University (TWU).

The International Coalition of Professors of Law, made up of 47 law teachers with links to religiously affiliated schools in 22 countries, is a newcomer among 26 interveners in landmark companion appeals the Supreme Court of Canada has tentatively scheduled for argument Nov. 30 and Dec. 1: *TWU v. Law Society of Upper Canada* and *Law Society of British Columbia v. TWU*.

The coalition and some other interveners, including the Canadian Bar Association (CBA), The Advocates' Society and the Criminal Lawyers' Association (CLA), filed their legal arguments with the top court Sept. 5, with more interveners' factums to be filed by Sept. 11.

In question is the viability of the Langley, B.C.-based nascent law school, whose religious-based code of conduct the law societies of Ontario and B.C. say erects a *de facto* discriminatory admissions barrier for prospective students who are LGBTQ, female, common law spouses and others — a position contested by TWU.

Last year TWU persuaded the British Columbia Court of Appeal to overturn the B.C. regulator's denial of accreditation, but the Ontario Court of Appeal upheld a similar decision by benchers of the Law Society of Upper Canada (LSUC) — thus prompting the respective Supreme Court appeals by the Law Society of B.C. and TWU.

Whether regulators should admit future TWU law graduates to the provincial bars has divided the Canadian legal profession like no other issue in recent years, with the potential wider fallout from the Supreme Court's upcoming decision now also attracting international attention.

The International Coalition of Professors of Law (an ad hoc group put together to support TWU's Supreme Court appeal) argues Canada would move "far outside the international mainstream" if the top court affirms what the coalition characterizes as legal regulators' "extreme positions" that the Charter and human rights law oblige law societies not to recognize otherwise-qualified law schools that demand compliance with religiously based codes of conduct or other policies that are seen by regulators as discriminatory.



Eugene Meehan

The coalition's counsel, Eugene Meehan of Ottawa's Supreme Advocacy, said the Supreme Court's acceptance of that proposition would create major career uncertainty in Canada not just for TWU graduates, but for law graduates from faith-based professional schools and universities around the world because provincial legal regulators are empowered to evaluate and determine which foreign lawyers can practise in Canada.

"Is the same fence erected around TWU graduates going to be erected for them too?" Meehan asks. "Will there be increased scrutiny for someone coming from an American faith-based school or a European faith-based school?"

Meehan also suggests that the potential impact of the TWU case extends far beyond legal regulators to all professional regulatory bodies.



Marie-France Major

"Depending on how the Supreme Court of Canada writes its judgment, do the medical colleges have the right to scrutinize [for alleged discrimination] the graduate and undergraduate degrees of a medical graduate coming to Canada" from a religiously affiliated foreign educational institution, asks Meehan, whose co-counsel is Marie-France Major.

In the coalition's written argument filed this week, Meehan and Major characterized the position of the law societies in stark terms sure to be challenged by the regulators. In the view of the coalition (and TWU), the LSUC now argues in its Supreme Court factum that the Charter and Canadian human rights law prevent the Ontario regulator from *ever* accrediting a school which holds itself out as

religious, while the Law Society of B.C. "articulates no limits on its position that accrediting a religious institution constitutes impermissible 'approval' of any 'discrimination' engaged in by the institution in maintaining its code of conduct."

"(I)f this position were to be adopted by other Canadian professional organizations, the potential grounds for rejecting qualified graduates of international institutions would be endless," argue Major and Meehan. "It is not difficult to foresee a day when one Canadian professional organization rejects medical students trained at the Université Catholique de Louvain because of the Catholic Church's opposition to abortion and assisted suicide, while another Canadian organization refuses to recognize degrees granted by Israeli universities because of the Israeli government's policies, and yet another rejects petroleum engineers trained at Al-Azhar University in Egypt because of its adherence to Muslim sexual norms."

Of the almost 30 religious, educational, LGBTQ and other advocacy groups participating in the two appeals, intervener support is split nearly equally between the opposing sides. The top court's judgment is expected to flesh out what "state neutrality" toward religion means in practice — an issue with implications, not only for private religious educational bodies like TWU, but also for religious-run institutions catering to the public, such as Catholic palliative care hospitals which refuse to allow medically assisted deaths to be provided to eligible patients on their premises.

The TWU case also offers the court the opportunity to give much needed guidance on how administrative decision-makers are to balance Charter rights using the proportionality analysis set out in the leading cases of *Doré v. Barreau du Québec* 2012 SCC 12; and *Loyola High School v. Quebec (Attorney General)* 2015 SCC 12.

Some who intervened as well in the courts below, such as the CBA, the CLA and The Advocates Society, along with the Ontario government, support (for various reasons) the law societies' decision that, as regulators in the public interest bound by the Charter, they will not accredit law schools with discriminatory entrance policies.



John Norris

"The decision not to accredit TWU's proposed law school does not in fact meaningfully promote or protect a right to equal access to legal education and the legal profession," the CLA's counsel, Toronto's John Norris, argues in the group's factum. "If, however, the decision is understood instead as an affirmation of the fundamental importance to the legal profession of the values of equality, dignity and respect for diversity, it may be justifiable under the proportionality test articulated by *Doré*."

In furtherance of their public interest mandates, "law societies must promote the fundamental values of equality and respect for human dignity in both the legal profession and in the administration of justice," writes Toronto's Susan Ursel and her co-counsel for the CBA. "The twin imperatives of inclusivity and equality require law societies to prevent barriers to access to the legal profession that

are by their nature discriminatory.”



Susan Ursel

“TWU’s approach necessarily excludes a variety of students and viewpoints,” writes Toronto’s Chris Paliare, Joanna Radbord and Vancouver’s Monique Pongracic-Speier for The Advocates’ Society. “The law societies, as public actors, must not choose to favour one religious ideology over another by accrediting a school with exclusionary criteria. They must promote the broad public interest, which includes preventing discrimination, advancing equality, maintaining public confidence in the profession and justice system and developing a representative bench and bar. Accrediting an exclusionary law school would undermine these important public interest objectives.”

Arguing for Lawyers’ Rights Watch Canada, Montreal’s Julius Grey writes “the decisions of the LSUC and LSBC to reject approval of the proposed law school in order to maintain equal, non-discriminatory merit-based access to the education necessary to be a jurist, are consistent with Canada’s international human rights law obligations to: a) guarantee rights to equality, non-discrimination and privacy; b) prohibit discriminatory and unequal access to education on the basis of sexual orientation; c) prohibit violation of privacy rights in relation to consensual sexual activity; d) guarantee absolutely the freedom to hold religious and non-religious beliefs; e) prohibit absolutely coercion that would impair the freedom to adopt or have a belief of choice and to act on such belief in private; f) allow limitations of the right to manifest religious belief, where necessary to protect the fundamental rights and freedoms of others, and, g) prevent violations by both public and private actors.”



Julius Grey

For its part, the Ontario government argues that the legal regulators' decisions should be reviewed with deference, and that "the public interest requires the LSUC to consider whether its accreditation decisions would have the effect of perpetuating arbitrary and potentially discriminatory barriers to entry to the profession."

Moreover, Ontario said TWU has not shown that compelling students (under threat of expulsion or other discipline) to comply with a code of conduct based on religious beliefs they do not share is necessary for other members of the TWU community to freely practise their religious beliefs.

The Charter's s. 2(a) guarantee of religious freedom "should not preclude the LSUC, which is bound by both the Charter and the Ontario *Human Rights Code*, from determining that a university which mandates that its students comply with religious moral norms or potentially face suspension or expulsion is unsuitable to receive a discretionary grant of the public benefit of accreditation. That is particularly the case where, as set out in the LSUC's factum, the religious norms TWU seeks to impose have an adverse impact on minority groups on the basis of gender, marital status and sexual orientation."



Chris Paliare

In support of TWU, the Association for Reformed Political Action (ARPA) Canada, represented by Ottawa's André Schutten, argues that the accreditation denials violate the Charter s. 15 equality rights of evangelical Christians at TWU in that "a qualified person, having completed an academically and professionally approved program, is nevertheless effectively barred from practising law in the province solely because she or he associated with a religious community that shares a Christian ethic on marriage and sexuality. ... Engaging in a religious communal enterprise must be vigorously protected within a pluralistic society. This type of religious association has been improperly labelled as 'unlawful discrimination.' Well-established Charter principles refute this characterization."

For the Christian Legal Fellowship (CLF), co-counsel Derek Ross and Deina Warren urge that the law societies' denial of accreditation punishes TWU students "solely because they have exercised their associational and religious rights guaranteed under the Charter. In addition to violating the Charter rights of TWU and its students, the decisions negatively impact the rights of all legal professionals, particularly those who adhere to minority beliefs. They stifle diversity of belief and independence of opinion in the legal profession. The decisions breach the law societies' duty to protect the public from the needless erosion of confidence in lawyers who share TWU's beliefs, including members of CLF. These decisions therefore undermine, rather than promote, the public interest."