All eyes turn to the Supreme Court's TWU hearing

Monday, November 27, 2017 @ 4:15 PM | By Cristin Schmitz

Lawyers are turning their attention this week to the Supreme Court battle between Trinity Western University (TWU) and two law societies in companion appeals that ask important questions about freedom of religion and equality rights, judicial review, the autonomy of legal regulators and what the legal profession stands for.

After a rare two-day hearing Nov. 30 and Dec. 1 (TWU and the law societies are up first, followed by some 30 interveners), the top court will have to decide whether to maintain or overturn separate decisions by the Law Society of Upper Canada (LSUC) and the Law Society of British Columbia (LSBC) that refused accreditation to the evangelical Christian university's nascent law school: *Law Society of B.C. v. TWU.; TWU v. LSUC.*

The issues raised by the litigants are varied, novel and far-reaching (although there is no guarantee that the judges will find it necessary to pronounce on all of them), including:

- What is the scope and what are the internal limitations of the right to freedom of religion?
- What is the scope of law societies' powers to operate without external interference in exercising their public interest mandate?
- Are corporations or organizations, such as religious education bodies and churches, covered by the Charter's s. 2(a) guarantee of freedom of religion (or is such protection enjoyed only by individual members)
- Is correctness (i.e. no deference), rather than "reasonableness," the standard of review that should apply to administrative decision-makers balancing 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;

- What is "academic freedom" and who enjoys it — individual professors and teachers, or do institutions have it too?


Eugene Meehan, Supreme Advocacy

The appeals present an unusually rich menu of legal and constitutional issues to the court, said Eugene Meehan of Ottawa's Supreme Advocacy, who represents some interveners.

"If you read all the factums — about 30 — you get the feeling there are more issues being raised than Baskin Robbins has ice cream flavours," the court's former executive legal officer remarked. "The Supreme Court is normally a two- or three-flavour customer."

He explained that as cases progress through the legal system, the issues generally narrow, but the opposite is true in TWU. "Administrative and judicial decisions in multiple jurisdictions have taken different approaches and added new layers of analysis," Meehan pointed out. "And even the jurisdiction from which no appeal was taken, Nova Scotia, there's still a Court of Appeal decision there to be looked at and considered. Rather than a boulder wearing down as it rolls along, this case is like a snowball growing in size as it gets pushed uphill. This two-day appeal will feel like an analytical avalanche to some."

The denial of accreditation to the law school TWU first proposed in June 2012 was based on what the appellant B.C. regulator and respondent Ontario regulator contend is a discriminatory admissions barrier TWU has erected against LGBTQ and some other would-be students via a compulsory faith-based code of conduct ("community covenant") that reserves sexual intimacy to marriage between one man and one woman — with transgressors facing possible suspension or expulsion from the university.

The appellate courts below painted the case as a clash or competition between TWU's Charter religious

freedom rights and LGBTQ equality rights, but some of the parties and interveners at the Supreme Court frame the legal issues and stakes quite differently in their written arguments — sometimes starkly so.

Therefore how the salient issues should be framed is expected to be a sharp focus of questioning by the judges.

For TWU and many of its supporting interveners, its fight to produce lawyers trained in an evangelical Christian tradition is about state incursions on the Charter-protected religious freedom and equality rights of the university and members of its community — not about the Charter s. 15 equality or s. 2(a) religious freedom rights of would-be students who object to the beliefs and obligations entailed in the covenant.

As the intervener Criminal Lawyers' Association puts it, "as a private institution TWU is under no legal obligation to respect [Charter] rights or to act in a nondiscriminatory manner. Though TWU's conduct is discriminatory, the school is under no legal obligation to act otherwise. On the contrary, it has a constitutional right to conduct itself as it does. There being no legal remedy against TWU, it is unhelpful to characterize its conduct as rights infringing."

Asserts TWU, "TWU's private nature permits its community to maintain the covenant, whereas the law societies' public nature means the Charter prohibits them from rejecting TWU graduates on grounds related to religion. … The violation of the equality rights of members of TWU's community demonstrates the hollowness of the assertion that the [law societies'] decisions protect equal access to the legal profession. If that were so, TWU graduates would have equal access to the Ontario and B.C. bar without regard to the religious foundations of the Christian law school they chose to attend. Cutting down the equality rights of some groups in the public sphere to prefer the equality claims of others in the private sphere does not enhance equality" as understood in s. 15 jurisprudence.

TWU's position is endorsed, to a greater or lesser degree, by such interveners as the Association for Reformed Political Action Canada, the International Coalition of Professors of Law, the National Coalition of Catholic Trustees Association, the Christian Legal Fellowship, the Canadian Conference of Catholic Bishops, the Evangelical Fellowship of Canada, and a coalition of the Roman Catholic Archdiocese of

Vancouver, the Catholic Civil Rights League and the Faith and Freedom Alliance.

By contrast, the law societies and some of their supporting interveners argue that TWU's s. 2(a) rights are not infringed at all since the university is trying to compel would-be students who do not share its beliefs to abide by the faith-based code of conduct.


Tim Dickson, JFK Law Corporation

"The courts below have not directly grappled with the question of whether freedom of religion is really engaged by the law societies' denials of accreditation and our hope is that the Supreme Court will seriously examine this point," said Tim Dickson of Vancouver's JFK Law Corporation, counsel for the Canadian Secular Alliance.

"The essence of freedom of religion is the right to hold and to manifest one's own religious beliefs or non-belief, free from coercion," Dickson said. "Admission to TWU is expressly not limited to students who hold evangelical Christian beliefs, and yet all students are required to sign the community covenant and obey its religiously based norms."

Requiring every student to obey religious norms in which they do not believe amounts to "religious coercion," he added. "That requirement is not protected by s. 2(a) as it is antithetical to its animating purpose."

In other words, a religious freedom right that was designed to shield individuals from religious coercion cannot be used as a sword to coerce religious practice, the coalition maintains.

The court is asked as well to elaborate on the communal aspect of religious freedom — a subject about which it has not said very much.

"The communal aspects of freedom of religion do not,

and should not, extend s. 2(a)'s protection beyond the freedom to have beliefs and the freedom to manifest them," Dickson contends. Given previous Supreme Court dicta, "even if the court were to find that freedom of religion can be asserted by a corporate institution, I expect the court would conclude that such a corporate right could not be used to curtail the freedom of religion of the institution's members," he remarked.

Meehan noted "it will be interesting to see if — and how — the court wades into the area of group rights, and how it addresses the interplay of group associative rights with individual equality rights."

The appeal also pits the United Church against TWU and some supporting interveners who are urging the court to recognize for the first time that organizations and corporations (not just their members) are protected by s. 2(a).

"Unlike natural persons, corporations and institutions are unable to hold beliefs and do not have consciences," argues the United Church in its brief filed with the court. "The United Church is concerned about efforts to expand s. 2(a) in a manner that would give such organizations licence to discriminate against those who disagree with the precepts of the organization's principals [who run the organization]. The fundamental purpose of s. 2(a) of the Charter is to protect individuals' rights to entertain and manifest their religious beliefs without fear of reprisal. Broadening its scope to protect organizations would enable those organizations to defend their own opaque and discriminatory decisions in the name of faith. This would create considerable mischief in the interests of protecting the collective dimension of religious belief, a dimension that is already protected by individuals' freedom of association."