TRINITY WESTERN UNIVERSITY'S LAW SCHOOL AND THE ASSOCIATIONAL DIMENSION OF RELIGIOUS FREEDOM: TOWARD COMPREHENSIVE LIBERALISM*

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Introduction

In liberal democracies freedom is often understood to be individual in character. Individuals, in this view, are free from arbitrary interference by others as they work out their various conceptions of the best life to live. This essay suggests that freedom is more complicated than this, not least because the best way to live a life usually involves membership in a larger association or community that makes claims on one's freedom. Communities of membership enforce particular standards on their members and these do, to a greater or lesser degree, constrain individuals' choices. In a liberal society no association can exercise the coercive powers of the state. Associational membership in liberal regimes requires, as Albert Hirschman argues that members enjoy the ability to belong, to voice their views about the community of which they are members, and to exit if they choose.[1]

But to what extent can the norms governing life within particular communities and associations diverge from the principles of the larger polity? Put differently, does a liberal democratic polity require the myriad associations flourishing within it to mirror, replicate, or embody the principles and norms of the polity itself? Can liberal regimes tolerate illiberal sub-state associations? Or shall liberal principles of individual freedom, equality, and due process extend all the way down from the Constitution to the institutions and associations of civil society itself? In other words, does Canadian law contain a vision of the good life which it seeks to actualize in its application to human conduct? Or does Canadian law leave room for different, even illiberal ways to live and thrive?

The relative autonomy of sub-state associations raises questions about the nature of liberalism as a political doctrine. Increasingly, Canadians are confronted with two types of liberalism. The first, liberal pluralism, operates as type of *modus vivendi*, permitting a diverse array of associational options. The second, a thicker, more comprehensive liberalism, which seeks to permeate all of civil society with liberal values, pre-eminently the idea of individual autonomy.

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[1] Albert O Hirschman, *Exit, Voice, and Loyalty: Responses, to Decline in Firms, Organizations, and States* (Cambridge, MA: Harvard University Press, 1970).

The choice is presented vividly in the contemporary controversy associated with Trinity Western University's ("TWU") proposal to establish a law school whose graduates would be accredited to practice law throughout Canada. TWU is an evangelical Christian school whose staff and students are required to sign a "Community Covenant" committing them to upholding traditional Christian standards of morality, including the sanctity marriage between a man and a woman. Several law societies have refused to accredit the school on the basis that its Covenant violates the equality rights of homosexuals.

In particular, the article will examine the proceedings of the Law Society of Upper Canada, which after receiving over 200 briefs from members and others, refused to accredit the school. It will suggest that the opposition to TWU's law school is consistent with a narrow account of religious freedom, a desire to limit associational autonomy, and ultimately a comprehensive liberalism in which liberal values apply throughout civil society. Such a development not only casts into doubt whether Trinity Western can produce lawyers who seek to practice in Canada, but comprehensive liberalism may call into question the very existence of a confessional university.

The TWU Controversy[2]

Canada currently has 18 law schools preparing students for the practice of law in common law jurisdictions (all but Quebec, which adheres to the French civil code tradition). In 2012, TWU commenced plans to open a new law school on its Langley, BC campus. To practice law in any Canadian province, law graduates must obtain a license. To obtain a license, they must pass a bar admission exam and demonstrate that they have graduated from an accredited law school. As such, each province's bar society accredits law schools. In 2012, the Federation of Law Societies of Canada ("FLSC") set a national requirement and process for approval of common law programs for the purposes of admission to the bar of any province. Importantly, the FLSC law school accreditation process does not supplant provincial accreditations processes, but was intended to make these processes a much more uniform and pro-forma affair.

TWU submitted its proposal to the approval committee of the FLSC in June 2012. The proposal met with "strong reaction." The source of this was TWU's Community Covenant and its particular reference to the sacredness of marriage between a man and a woman as a standard for conduct among all TWU students and staff. The FLSC's approval committee felt it lacked the mandate to explore the criticisms of the Covenant, so it appointed a special advisory committee to examine the "public interest" issues associated with the Covenant and report back. In its report the special advisory committee wrote that,

> [T]he Community Covenant may result in differential treatment of LGBT individuals. Faced with a requirement to commit to a code of behaviour that prohibits sexual activity outside of marriage between a man and a woman,

[2] This section incorporates material prepared for an article forthcoming in *Philosophy, Culture, and Traditions* Vol 11 (2015).

> LGBT students would legitimately feel unwelcome at a TWU law school. The SCC has made it clear, however, that the religious freedom rights of those who might wish to attend such a faith-based institution must also be considered and it is clear from the submissions received by the Federation that there are many such students.[3]

Further,

> [W]e are not aware of any evidence that TWU limits or bans the admission to the university of LGBT individuals. A number of those who made submissions to the Federation noted that there are LGBT students at TWU. It is reasonable to conclude that the requirement to adhere to the Community Covenant would make TWU an unwelcoming place for LGBT individuals and would likely discourage most from applying to a law school at the university, but it may also be that a faith-based law school would be an attractive option for some prospective law students, whatever their sexual orientation. It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students.[4]

The committee concluded that there was no public interest reason to exclude TWU graduates from the practice of law in Canada.

The FLSC's Approval Committee distinguishes between concerns and comments in its evaluations of elements of a proposal. For example,

> Where an element of the national requirement is currently met, but compliance is at a minimum level that could deteriorate to a deficiency, the Approval Committee may raise the matter as a *concern.* A school may choose to address the concern, but no action is required for approval of the program. A *comment* relates to a matter that does not affect compliance, but that the Approval Committee wishes to bring to the attention of the institution.[5]

Registering a concern, the members,

> see a tension between the proposed teaching of these required competencies and elements of the Community Covenant. In particular, the Approval Committee is concerned that some of the underlying beliefs reflected in the Community Covenant, which members of faculty are required to embrace as a condition of employment, may constrain the appropriate teaching and

[3] FLSC, Special Advisory Committee on Trinity Western's Proposed School of Law, "Final Report" (December 2013), online: < http://docs.flsc.ca/SpecialAdvisoryReportFinal.pdf > at 36.

[4] *Ibid* at 53.

[5] FLSC Canadian Common Law Program Approval Committee, Report on Trinity Western University's Proposed School of Law Program, (December 2013), para 16.

> thus the required understanding of equality rights and the ethical obligation not to discriminate against any person.[6]

The FLSC's advisory committee approved the proposal to accredit TWU's proposed law school nonetheless, noting concerns about how the public law and ethics, as well as professionalism courses will be taught

At time of writing, the law societies of Alberta, Saskatchewan, New Brunswick, Prince Edward Island, and Yukon Territory accredited the law school. Some law societies have decided against consideration until the courts have disposed of the issue. On April 25 2014 the Nova Scotia Barristers Society voted 10-9 to refuse accreditation unless TWU alters its Covenant. The Law Society of Upper Canada ("LSUC") – Ontario's professional association – also rejected accreditation. In Ontario's case the vote of Benchers on April 24, 2014 was 28-21 (with one abstention) to reject the motion to accredit. The Benchers did not issue reasons for rejection. In British Columbia, Benchers initially approved TWU's application, but received criticism from members for the decision. Members pushed for a consultative referendum asking the Benchers to rescind their approval. The Benchers threw it back to the membership. A formal, binding referendum was held in October 2014, and 74% voted to rescind approval. Benchers then followed suit, as did the British Columbia Minister of Advanced Education.

The decisions to reject accreditation and the discussions preceding them reveal much about the nature and strength of ideas of secularism, religious freedom, and liberalism in Canada. Three provincial law societies – Ontario, British Columbia, and Nova Scotia – undertook extensive public consultation processes and invited comments on the accreditation proposal. This analysis focuses on the Ontario process. Ontario is Canada's largest provincial jurisdiction and the LSUC is Canada's oldest and largest law society. Ontario is a particularly apt case study since many of the submissions made to the LSUC were also made to the other law societies.

The author surveyed each of the 212 submissions made to the LSUC regarding the TWU proposal ahead of the LSUC's April 24, 2014 decision. These submissions are available on the LSUC web page devoted to the TWU process.[7] Only 10 of the 212 were not relevant to this study. Some were concerned with the over-supply of lawyers that a new school could create. Other submissions were short letters from members of an association appending a previous statement made by an officer of that association. The latter document was counted; the former were not. Of the 202 submissions examined, 79 supported TWU's application and 123 opposed. In other words, 61% of submissions opposed TWU's accreditation in Ontario – Canada's largest provincial jurisdiction.

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[6] *Ibid* at 50.

[7] See LSUC, "Trinity Western University (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

TWU's Covenant is worth a moment's examination.[8] The first point is that the Covenant covers matters of human character and comportment extending far beyond sexual matters, and all of these have escaped criticism. The second point is that the Covenant grapples with the question of enforceability. On the one hand, we read that,

> The community covenant is a solemn pledge in which members place themselves under obligations on the part of the institution to its members, the members to the institution, and the members to one another. In making this pledge, members enter into a contractual agreement and a relational bond. […] It is vital that each person who accepts the invitation to become a member of the TWU community carefully considers and sincerely embraces this community covenant.[9]

On the other hand, the Covenant declares that,

> TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity. Students sign this covenant with the commitment to abide by the expectations contained within the Community Covenant, and by campus policies published in the Academic Calendar and Student Handbook.[10]

Furthermore, in a section of its website addressing "frequently asked questions" about the law school,[11] the Covenant notes that,

> [a]nyone is welcome to attend Trinity Western University, regardless of their sexual orientation or religious beliefs. Many gay students have attended – and graduated – from our university, as have students from many different faiths and ethnicities.

In addition,

> The Community Covenant is primarily based on the integrity of the person signing it. We don't police compliance by our students, staff, or faculty – nor has anyone ever been expelled from the University for failing to abide by this standard. But we do make it clear to prospective students, staff and faculty that membership within our community is a matter of personal integrity. As such, if a member of the University community can't or won't accept those standards, we invite them to seek one of many other living/learning situations that would be more acceptable to them.[12]

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[8] See Trinity Western University, "Community Covenant Agreement", online: <http://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>.

[9] *Ibid.*

[10] *Ibid.*

[11] Trinity Western University, "School of Law Frequently Asked Questions", online: <http://twu.ca/academics/school-of-law/faq.html>.

[12] *Ibid*.

TWU is ambiguous about the nature and enforcement of the Covenant. However, somewhat resolving the ambiguity is TWU's insistence that it operates as a voluntary association guided by confessional principles promulgated to prospective students. In answer to a frequently asked question,

> We expect any student – gay or heterosexual –to honour the traditional, Bible-based Christian standards that guide us as a community. While that may demand a high level of self-discipline for unmarried students, we believe (as do members of most other world religions) that sexual promiscuity (in any form) is unhealthy – to both the individuals involved and the community at large. Prospective students are well-aware of that and gay or straight, they have the option to go elsewhere if the prospect of honouring those standards would be too rigorous for them.

Further, TWU claims that they do not,

> "dictate" anyone's behavior. Ours is but one of many universities in Canada, and students have many other academic options available to them if they feel Trinity Western isn't right for them. As for the "strange" nature of our community standards, many world-renowned universities have religious affiliations, along with defined codes of behavior to encourage academic and personal integrity. But aside from universities, most "communities" enact standards of behavior. If you join the military, for example, you must respect the authority of your superiors and obey a chain of command. If you're a man entering a synagogue, you are required to cover your head. If you're a woman in a devout Muslim country, you must cover both your face and your body. And if you attend a spiritual retreat in India, you might be required to remain silent, or observe a strictly vegetarian diet. Our beliefs point to the larger experience of a segment of Canadian society. Trinity Western serves the Evangelical Christian community of Canada.[13]

In its proposal to the LSUC, TWU was more pointed,

> TWU acknowledges that not all people believe in the Bible or the person, works and teachings of Jesus Christ—but as a religious community TWU, its faculty and staff do. TWU (and its graduates) do not seek to impose their own beliefs upon others, but instead to enjoy the constitutionally protected freedom to exercise those beliefs within a religious educational community.[14]

In other words, TWU asserts an associational freedom undergirded by freedom of religion protected by section 2(a), and equality rights guaranteed by section 15 of the

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[13] *Ibid*.

[14] Eugene Meehan Q.C. and Marie-France Major, Trinity Western University, "Written Submission for the Consideration of Convocation in Relation to the Matter of the Accreditation of the TWU Law School". (nd), online: <http://www.lsuc.on.ca/uploadedFiles/TrinityWesternUniversitySubmissiontoLSUCwithAppendices.pdf > at 23. [*Written Submission*]

Charter of Rights and Freedoms[15] owing to the claim that, "TWU was founded on religious principles and was always intended to be a religious community."[16]

Been There, Done That: *Trinity Western University v College of Teachers* (2001)[17]

TWU underwent an accreditation controversy once before. In the late 1990s, TWU sought to offer its own Bachelor of Education degree program. Until then, TWU students had to complete a final year at the secular Simon Fraser University to qualify to teach in B.C. TWU applied to the BC College of Teachers ("BCCT") for accreditation to offer the full program under its auspices. However, accreditation was refused because of BCCT's concerns that its program discriminated against homosexuals based on the University's mission and code of conduct. The main concern was that TWU graduates would engage in homophobic conduct in the classroom. On appeal in a 8-1 decision, the Supreme Court of Canada ("SCC") sided with TWU.[18] The Court held that the BCCT, as a regulatory body, must apply *Charter* values fairly. It cannot privilege "equality" considerations above religious freedom ones. The Court ruled that BCCT's "continuing focus…on the sectarian nature of TWU is disturbing", and that the logic of its decision with respect to TWU would lead to the denial of accreditation to any individual member of a church. The Court also noted that there is a rich history in Canada and elsewhere of institutions of higher education with religious affiliations; and that "[f]or better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society."[19]

> Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions.[20]

The SCC drew an important distinction between "belief" and "conduct",

> The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.[21]

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[15] *The Constitution Act*, 1982, Schedule B to the Canada Act 1982 (UK), 1982, c 11, s 2, s 15, online: CanLii <http://canlii.ca/t/ldsx#sec2>..

[16] *Ibid* at 1.

[17] *Trinity Western University v College of Teachers*, [2001] 1 SCR 772, 2001 SCC 31 [*TWU*].

[18] *Ibid.*

[19] *Ibid* at 33.

[20] *Ibid* at 25.

[21] *Ibid* at 36.

Hearing no evidence that TWU graduates discriminated against homosexuals, the SCC dismissed BCCT's appeal of a lower court decision affirming TWU's freedom to offer the program.

For the University, *TWU* is strong support for its 2013 law school proposal. More support is garnered by the absence of any delinquency by a TWU Bachelor of Education graduate to date.. The Court affirmed the associational freedom of a confessional school to send teachers into the public school system, noting that as a private association no one is forced to attend. It understood that the very existence and integrity of an association requires space for it to define its purpose and select personnel on the basis of particular criteria that may not suit all comers. Religious freedom, in other words, has a collective, associational dimension allowing not only private religious belief but a more public, pluralistic visibility in Canadian society and positions of leadership therein.

TWU relies heavily on *TWU* in its brief to LSUC,

> In the present situation, we have a secular majority seeking to impose its ideals on a private religious community. There are calls (for a second time) to disallow a TWU program, ironically in the name of equality and diversity, from upholding sincerely held beliefs and practices. Are arguments for non-discrimination being used to discriminate against persons of faith and their religious communities?[22]

Further, they take issue with the central question posed by LSUC,

> The question to be addressed is not whether TWU discriminates against any particular group but whether it can be proven that the existence of the Community Covenant and the practice of religious belief creates a class of students that fail to meet requisite LSUC standards of education, competence and conduct. It is not for TWU to prove the negative. If there is a legitimate basis upon which to deny recognition of TWU graduates (there is not), it must be demonstrated by objective evidence, not presumptions or stereotypical assumptions about evangelical Christians.[23]

However, *TWU* may not provide the strongest support for the current proposal. Drawing a distinction for constitutional purposes between belief and conduct was sufficient to dispose of BCCT's argument in 2001, but what sort of conduct *is* permitted under the aegis of freedom of religion? The Court's distinction seems to limit the interpretation it gave section 2(a) years before when it declared that,

> [t]he essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to

[22] *Written Submission*, *supra* note 14 at para 62.

[23] *Ibid* at 79.

> manifest religious belief by worship and practice or by teaching and dissemination.[24]

The Court in *TWU* did not define the type of conduct that falls outside the freedom of religion protections. Could expressions of disapproval of homosexuality constitute conduct outside the purview of freedom of religious belief? Does the distinction do any constitutional work, given that belief, in any liberal polity, is inherently beyond the reach of law and that the key issue is always what sort of conduct is implied by conscientious belief?[25] *TWU* itself provides little guidance.

For and Against: The Arguments put to the LSUC

Unsurprisingly, supporters of TWU's application before the LSUC frequently cite *TWU* as determinative of the issue. They argue that all the same principles established in 2001 continue to apply today. This is further supported by a lack of evidence of hatred or discrimination against homosexuals by TWU graduates in the teaching profession.

Amidst all the debate, almost alone among his colleagues in faculties of law across Canada, law professor Bradley Miller came out in support of TWU. He remarked on the uniformity among the existing law schools in Canada. The "homogeneity of legal education in Canada," he wrote, "ought to be a cause for concern."[26] The same concern was expressed by John Carpay of the Justice Centre for Constitutional Freedoms. Carpay argues that "[a]uthentic diversity [fosters] a myriad of private institutions." Further:

> True tolerance does not consist of using "diversity" as a slogan to attack authentic diversity, or to censor disagreement. Rather, true tolerance means actually accepting the authentic diversity expressed by a wide range of different associations.
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> In a free society, nobody is compelled to join, or comply with the beliefs of a voluntary association, be it TWU or any other private institution. The individual's freedom to respect the beliefs, practices and standards of voluntary associations does not conflict with an association's freedom to develop, teach and practice its own beliefs.
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> Freedom of association is rendered meaningless if private institutions cannot define and live out their own mission and purpose because those in power require the institutions (as a condition of recognizing its graduates' qualifications to practice a profession) to accept as members people who disagree with that mission and purpose. Those who reject a private

[24] *R. v Big M Drug Mart Ltd*, [1985] 1 SCR 295, at 94.

[25] Mary Anne Waldron, *Free to Believe: Rethinking Freedom of Conscience and Religion in Canada.* (Toronto: University of Toronto Press), 108-109.

[26] Bradley Miller (March 19, 2014). See also Pierre-Yves Boucher (March 17, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

> association's beliefs and practices are protected by not being required to join it.
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> If, in Canada, voluntary associations cannot develop, express and live out their own beliefs, without disqualification of their members gain entry into a profession for which they are otherwise qualified, then Canada's free society will be greatly diminished.[27]

As indicated above, TWU assured the FLSC that it would offer a conventional law curriculum to its students, and that sectarian views would not pervade legal training. If that is the case, however, what is the point of a Christian perspective on the law? What is the need for a law school at TWU? TWU did not address this in its application. The Justice Centre for Constitutional Freedoms made the point that TWU perhaps felt it impolitic to make. No law society, the Centre argued, should impose an ideological standard. Every good lawyer seeks to improve the law even as he or she defends it. They state that,

> [l]aw societies understand that good lawyers can disagree with the current state of the law (whether statutory law, or the Supreme Court of Canada's interpretation of the *Charter*) and still provide competent and professional legal services to their clients.[28]

The long-standing democratic principle is that "all citizens, including lawyers and law professors," have the right "to advocate for what they see as improvements to the law."[29] The Centre's point is legally unexceptionable: lawyers and law professors of all ideological stripes both teach and urge changes to the law. But, politically, it signals to TWU's opponents that Christian lawyers may indeed wish to reform the law in a more conservative direction.

Briefs supporting TWU's application before the LSUC share a theme with the SCC's *TWU* decision. Namely, the arguments deployed against TWU's law school are also arguments against allowing any religious believer with unpopular views to practice law, even one who graduated from a public, secular law school. For example, Peter Hamm notes that,

> My concern is that if the Canadian law societies find that attendance at a law school which restricts certain behaviours and holds certain beliefs about marriage on grounds of faith is reason enough to deny admission to the Bar, where will this go next? Will lawyers who belong to Islamic, Jewish, Sikh, Christian or other faith systems that do not believe in gay marriage be considered unfit to remain members of Canadian law societies? Will those

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[27] Justice Centre for Constitutional Freedoms (March 21, 2014). The brief from the BC Civil Liberties Association (March 27, 2014) makes the same point, referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[28] Justice Centre for Constitutional Freedoms (March 21, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[29] *Ibid*.

> who belong to clubs and societies that discriminate on the basis of gender or race also be considered unfit to be lawyers? Where will this end? The LSUC should very careful in considering whether holding a belief system – even one that is generally unpopular or repugnant to most – should ever be the basis for denying membership to a Canadian law society.[30]

Some suggest that the core issue of the TWU controversy is one of clashing worldviews. Michael Minear, writes that,

> the Law Societies that do not support the TWU Law School proposal are demonstrating that secularism is not neutral. The Charter of Rights and Freedoms should not be used to force a religious institution to change its character or admissions policy to conform with [*sic*] state values.[31]

Turning to opponents of the application, the fundamental and oft-repeated criticism is that TWU's Covenant discriminates against homosexuals and others departing from traditional heterosexual identity. The Association of Chinese Canadian Lawyers of Ontario, for instance, is "opposed to discrimination of any kind."[32] Presumably, it permits non-Chinese to become members of its association, and perhaps even to take it over. The association asserts that the *Charter* value of equality does not permit TWU's "policy of discrimination against queer students."[33] Another opponent argued that lawyers who graduate from TWU Law,

> will have been taught from the outset that there is in fact no equality between individuals in spite of their sexual preference, but in fact that same-sex partners are a separate class against whom it is acceptable to discriminate. In my view, this position is completely untenable when viewing the role of the lawyer in our society.[34]

Some argue that an animus against homosexuals is evidenced by the fact that, though it is a Christian institution, TWU admits persons of different faiths. Christian confession, then, is not as important as agreement on the Covenant, a component of

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[30] Peter Hamm, (March 5, 2014). See also Jessie Legaree (March 22, 2014), both referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>. Some briefs refer to earlier jurisprudence in which persons were excluded from the legal profession due to their beliefs, referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>. In *Martin v Law Society of British Columbia* [1950] 3 DLR 173, the B.C. Court of Appeal upheld lower court decisions in which William Martin was refused admission to the bar because he was a communist. See W. Wesley Pue, "Banned from Lawyering: William John Martin, Communist" (2009) 162 BC Studies 111-136.

[31] Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[32] *Ibid*.

[33] Association of Chinese Canadian Lawyers of Ontario (March 20, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>. [*Association of Chinese Canadian Lawyers*]

[34] Brad Halls (February 28, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

which is the rule against sex outside of traditional marriage.[35] For critics, what follows from this is that TWU is against sexual diversity more than it is against religious diversity. Wrote one person:

> In my view the covenant violates the fundamental rights of persons of the gay/lesbian/bisexual/transgender orientation, and cannot be saved by appeals to freedom of religion. Recognition would also undermine all of LSUC's efforts to promote diversity in the profession. Diversity is only sustainable in an environment of tolerance. The covenant, by distinguishing and imposing a different and more restrictive code of sexual conduct on persons of same -sex orientation perpetrates intolerance of fundamental human differences. In conferring status on Trinity Western's law school for the purpose of licensing lawyers, the LSUC would legitimizing [*sic*] a type of collective, public discrimination that is contrary to Canadian values as they have evolved. While the underlying values that the covenant perpetrates are worthy of protection in a limited way, as a matter of private conscience (provided they are not expressed publicly in such a way as to promote hatred or violence), they still conflict with other the fundamental values that are based on immutable characteristics.[36]

Just as TWU's supporters cite *TWU* in defence of the law school accreditation, TWU's opponents employ the law as well. Some attempt to distinguish *TWU* from the current law school application on narrow and unpersuasive terms.[37] Others refer to what, in Canada, is known as the "living tree" interpretation of the Constitution. According to this principle, the Constitution contains general values that are shaped and developed by the courts over time in response to changing Canadian circumstances and mores.[38] However inaccurate the historical basis for this doctrine,[39] it has become shorthand for the courts' ability and obligation to alter the law. According to one brief, "thirteen years have passed since [*TWU*] was rendered and societal views on homosexuality have continued to evolve […] There has been a change in both circumstances and law in the area of gay and lesbian equality."[40] Law

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[35] Ellen Anderson (March 3, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[36] Eric Endicott (March 21, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[37] The brief by Mary Jane Mossman (March 20, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>, refers to an attempt to distinguish the law school proposal from the facts in BCCT by Diane Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" (2014) 23:1 Constitutional Forum Constitutionnel, 1-7.

[38] For a judicial statement of this position, see *Re BC Motor Vehicle Act*, [1985] 2 SCR 486. The "living tree" metaphor is all the more resonant in this controversy because the Judicial Committee of the Privy Council referred to it in reversing a SCC opinion holding that only men are "persons" for the purposes of appointment to the Senate. See *Edwards v Attorney General for Canada* [1930] AC 124, 1 DLR 98 (PC).

[39] Scott Reid, "The Persons case eight decades later: Reappraising Canada's most misunderstood court ruling" (2013), online: Constitution Day <http://constitutionday.ca/wp-content/uploads/2012/10/charter_essay_october_2012.pdf>.

[40] *Association of Chinese Canadian Lawyers*, *supra* note 33.

professor Elaine Craig is quoted as saying "Today's decision makers are expected to be much more protective of gay and lesbian equality than were the decision makers of ten, fifteen, or twenty years ago."[41]

The "living tree" argument is connected to a more basic claim about the relationship among lawyers, the law, and social mores. Opponents of TWU argue that prospective lawyers should be acquainted with more than the rule of law. Integral to a legal education are the values and mores undergirding the law. Ellen Anderson argues that it is possible,

> to establish a private law school in Canada, free of public funding, which opted to teach non-Canadian law. This could well be a matter of freedom of religion or freedom of association or otherwise. For example, Canadian traditions of tolerance certainly would encompass a law school teaching sharia law. However, we would not anticipate that graduates of such private law schools, who had not been taught Canadian law by precept *and by example*, would then be eligible to be called to the bar to practice law in Ontario"[42] [emphasis added].

What does it mean to teach the law by example? One possibility is that secular laws must be informed by secular values; those who teach the law must be animated by the values supporting them.

Another submission more pointedly asserts that the law needs to conform to emerging progressive values. Neville Austin argues,

> [t]he point [is that] a religious belief (even if sincerely held, as it is by Trinity Western) cannot alone be a justification for trampling upon the rights of others. The line must be drawn where this freedom violates Canada's legal and social norms of tolerance, respect for diversity and non-discrimination. I appreciate that this requires a case-by-case analysis. In the case at hand, it is my view that Trinity Western has crossed the line.[43]

As one critic characterized the issue, TWU "is distinctly out of step with the laws *and mores* of Canada and Canadians"[44] [emphasis added]. Without a hint of irony, another TWU opponent argues that,

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[41] Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2014) 25 Canadian Journal of Women and the Law, 168. See also Zohar Levy, (March 18, 2014), and Jennifer Mathers McHenry and others (March 28, 2014), both referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[42] Ellen Anderson (March 3, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[43] Neville Austin (March 3, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[44] Kathleen Howes (March 7, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

> [w]e should support ecumenical approaches and tolerance and acceptance of differences. The TWU rules are exclusionary and should not be supported in any legal education environment. The rule of law supersedes discriminatory expressions of religious freedom.[45]

What if the LSUC accredited TWU's law school? Where would it end? Several briefs invoked the "slippery slope" argument. Michael Rubenstein writes,

> I think allowing any religious oriented law school would create an extremely dangerous precedent," […] "What next? Should we have Jewish law schools, Muslim law Schools, Gay law schools, women only law schools, and so on? Then what next [*sic*] will we have Christian and Muslim paralegal colleges as well? How can you allow one group access to a law school and not others now that we have the Charter of Rights?"[46]

Finally, TWU's opponents of TWU asserted a clear line between public and private realms, confining religious conduct to the private realm,

> Worship, education on faith and religious canons, governance of spiritual organizations and most activities inside one's home and genuinely private clubs are within the private sphere. The rights to expression and association preclude the government from interfering with private activities. Associational rights permit all white, all black, all Aboriginal, all Asian, all Catholic, all Jewish or all agnostic private organizations to be established. The law may not dictate to anyone who his or her associates must be. Individuals can be as selective as they desire in the private sphere. While bigotry and prejudice are deplorable, it is the right of every person to close her or his home or private social life to any person solely on the basis of personal prejudices, including homophobia. The obligations of equal protection do not apply to these private activities.
>
> Things are different when the activity reaches into the public realm. Such activities go beyond social interactions and infringe on the basic right of individuals in a democracy to participate in civil society. Where facilities serve the public, such as a restaurant or a grocery store, the private owner cannot limit customers based on the owner's preference to include only certain people or to exclude others due to their minority or disfavoured status that is protected by the law.[47]

Analysis of the Submissions to the LSUC

Vagueness over terminology continues to plague the debate. Both sides claim that their arguments are grounded in the protection of "diversity." TWU and its supporters argue

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[45] James W. Dunlop (March 25, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[46] Michael Rubenstein (March 3, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

[47] Paul Schachter, (March 22, 2014), referenced in Law Society of Upper Canada, "Trinity Western (TWU) Accreditation", online: <http://www.lsuc.on.ca/twu/#submissionstolsuc>.

that diversity is respected when its associational component is protected and when associations can determine the principles animating their associational existence. In this account, a society honouring diversity is one in which secular groups co-exist with Christian, Muslim, Jewish, and other groups. Opponents claim diversity to be honoured when all of society, and its institutions, recognize a variety of family and conjugal forms beyond the traditional heterosexual model of procreative union. The latter vision requires the recognition of sexual diversity to be mandated at every level. It must be considered a civic virtue that the state and its agents (like law societies) must enforce.

It bears repeating that opposition to TWU was overwhelmingly due to its commitment to a traditional understanding of human sexuality. A great many participants in the debate took no notice of the whole theological context in which the offending passage was nested. The Covenant attempts to be a thorough evangelical Christian ethical guideline, enjoining TWU "community members" from watching pornography, drinking to excess, taking illicit drugs, stealing, lying, engaging in abusive conduct, and generally failing to love one's neighbour as one loves oneself. TWU's recognition of the sacredness of opposite-sex marriage is part of a much more complete theological worldview. Many briefs were written in apparent ignorance of this. It seems as if LSUC members imagine that people like them would want to attend TWU but for this one injunction in favour of traditional marriage. But the typical TWU law school applicant would not be like the typical LSUC member. That is TWU's point. Those who would accredit TWU but for the Covenant passage have a curious understanding of the Covenant itself. The Covenant purports to stem from a coherent account of life and faith. It is not a LEGO set whose pieces can be added and removed to fit the whim of the child.

That having been said, certain features of TWU's application are problematic. First, as mentioned above, TWU describes the Covenant as a contract, but insists that it is not really enforced. Obviously, practical difficulties attend any commitment to enforce. But TWU may be signalling to opponents that it may be willing to jettison a clause of the Covenant it has little interest in enforcing. Second, while much rides on TWU's commitment to Christian higher education, it accepts students who are not Christian believers, but who agree to abide by the Covenant. This policy can be reconciled with the school's interest in evangelizing non-believers and in serving all persons regardless of confession. From a legal perspective, however, that same open admissions policy may weaken TWU's assertion of a robust right to religious freedom. If the Covenant applies to conduct emanating from a comprehensive and coherent Christian view of the world, would not a policy allowing non-believers to attend suggest to authorities and all others that it is actually not that important that students embrace the fundamental principles by which TWU pursues its mission? Religious exemptions from prohibitions on discrimination generally depend on the institution serving a narrowly defined clientele. If its services are generally available, it loses its exemption. For TWU, and for many Christian service organizations whose object is to meet human needs regardless of the confession of the recipient, a religiously mandated ministry open to a diverse group in fact disqualifies the organization from claiming

the legal protection it needs to maintain its religious integrity. For Christian believers who take seriously the parable of the Good Samaritan, this is a Catch-22.[48]

A central point of contention in the LSUC accreditation debate is whether religious freedom includes an associational dimension that allows institutions to discriminate in their objects and admissions policies. A pre-*Charter* decision of the SCC suggests that it does.[49] Does section 2(a) of the *Charter* include an associational dimension? The SCC affirmed TWU's ability to operate a Bachelor of Education program on the basis of administrative law principles in its 2001 decision. However, the following section suggests that Canadian jurisprudence regarding religious freedom tends to fold religious freedom claims into individual privacy claims, ignoring the associational dimension of religious life. In this sense, *TWU* may have been something of a high-water mark for associational freedom. This is problematic for TWU's law school argument.

Freedom of Conscience and Religion: Individual and Associational Dimensions[50]

While the 1960 *Bill of Rights* referred to "freedom of religion", section 2(a) of the *Charter* protects "freedom of conscience and religion." "Conscience" is both broader and narrower than "religion". It is broader in the sense that it captures beliefs conscientiously held that have nothing to do with "religion" in its strict definition. Ideological, philosophical, non-religious, and anti-religious views are thus protected. But it is narrower in the sense that conscience is an inward matter of the mind, while religion has an intrinsic implication of outward performance of acts and rituals in associational settings, and in concert with other believers. Religion encompasses the institutionalized living out of norms, tenets, and understandings of an inherited way of life.

The seminal religious freedom decision is *R. v. Big M Drug Mart*,[51] in which the SCC considered the constitutionality of a federal law authorizing provinces to pass legislation regulating commercial and other activities on Sundays, the Christian Sabbath. What is most striking is perhaps the generosity with which Chief Justice Dickson expounded the meaning of religious freedom. He declares that "a truly free society […] can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct",[52] and that freedom "in a broad sense embraces both

[48] See *Waldron*, *supra* note 25 at 171-191.

[49] *Caldwell et al v Stuart et al*, [1984] 2 SCR 603.

[50] This section incorporates material in an article that will appear in David Livingstone, ed, *Liberal Education, Civic Education, and the Canadian Regime: Past Principles and Present Challenges.* (Kingston/Montreal: McGill-Queen's University Press, forthcoming) (working title).

[51] *R v Big M Drug Mart* [1985] 1 SCR 295.

[52] *Ibid* at 94.

the absence of coercion and constraint, and the right to manifest beliefs and practices."[53]

But, according to Justice Dickson, religious freedom is important because it implicates individual conscience, and this is central to democratic self-government:

> [A]n emphasis on individual conscience and individual judgment also lies at the heart of our democratic political tradition. The ability of each citizen to make free and informed decisions is the absolute prerequisite for the legitimacy, acceptability, and efficacy of our system of self-government. It is because of *the centrality of the rights associated with freedom of individual conscience both to basic beliefs about human worth and dignity and to a free and democratic political system* that American jurisprudence has emphasized the primacy or "firstness" of the First Amendment. It is this same centrality that in my view underlies their designation in the *Canadian Charter of Rights and Freedoms* as "fundamental". They are the *sine qua non* of the political tradition underlying the *Charter*. […] [T]he purpose of freedom of conscience and religion becomes clear. The values that underlie our political and philosophic traditions demand that every individual be free to hold and to manifest whatever beliefs and opinions his or her conscience dictates, provided *inter alia* only that such manifestations do not injure his or her neighbours or their parallel rights to hold and manifest beliefs and opinions of their own. Religious belief and practice are historically prototypical and, in many ways, paradigmatic of conscientiously-held beliefs and manifestations and are therefore protected by the *Charter*. *Equally protected, and for the same reasons, are expressions and manifestations of religious non-belief and refusals to participate in religious practice.*[54] [emphasis added]

Justice Wilson concurred in Justice Dickson's account of religious freedom in *Big M*. However, her interest was frequently to limit section 2(a)'s scope to religion's associational dimension. In *R. v. Jones*,[55] a pastor of a small church headed a school in a church basement and objected to having to apply to the Alberta government for permission to operate his school. He also argued that the regulations limited his section 7 right to raise his children according to his lights. A majority of the Court rejected all his arguments. In dissent on the section 7 issue, Justice Wilson offered this ode to liberty,

> I believe that the framers of the Constitution in guaranteeing 'liberty' as a fundamental value in a free and democratic society had in mind the freedom of the individual to develop and realize his potential to the full, to plan his own life to suit his own character, to make his own choices for good or ill, to be non-conformist, idiosyncratic and even eccentric – to be, in to-day's parlance, 'his own person' and accountable as such.[56]

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[53] *Ibid* at 95.

[54] *Ibid* at 122-123.

[55] *R v Jones* [1986] 2 SCR 284.

[56] *Ibid* at 76.

She commented that while Pastor Jones did not have the right to raise his children as he sees fit, he does have the right to raise his children,

> in accordance with his conscientious beliefs. The relations of affection between an individual and his family and his assumption of duties and responsibilities towards them are central to the individual's sense of self and of his place in the world. The right to educate his children is one facet of this larger concept".[57]

Notable here is the linking of the parental relationship to a matter of the "individual's sense of self."

Justice Wilson's clearest presentation of her individualism was in her concurrence in *Morgentaler v. the Queen*,[58] in which a 5-2 majority struck down Canada's abortion law as contrary to the section 7 right to security of the person. Though she wrote only on her own behalf, Justice Wilson's opinion, with its grand claims and bold rhetoric, got most of the media attention.[59] Recalling a poignant Lockean metaphor, she argued that the rights guaranteed in the *Charter* "erect around each individual, metaphorically speaking, an invisible fence over which the state will not be allowed to trespass. The role of the courts is to map out, piece by piece, the parameters of the fence."[60] Citing John Stuart Mill, she argued that the concept of human dignity undergirding the *Charter* implies thoroughgoing individual self-determination,

> Individuals are afforded the right to choose their own religion and their own philosophy of life, the right to choose with whom they will associate and how they will express themselves, the right to choose where they will live and what occupation they will pursue. These are all examples of the basic theory underlying the *Charter*, namely that the state will respect choices made by individuals and, to the greatest extent possible, will avoid subordinating these choices to any one conception of the good life.
> Thus, an aspect of the respect for human dignity on which the *Charter* is founded is the right to make fundamental personal decisions without interference from the state. This right is a critical component of the right to liberty. Liberty … is a phrase capable of a broad range of meaning. In my

[57] *Ibid* at 79. Justice Wilson ultimately dismissed Jones's *Charter* claim, holding that the law's interference with his section 2(a) right was trivial.

[58] *Morgentaler v the Queen* [1988] 1 SCR 30.

[59] Mind you, Chief Justice Dickson's reasons did not entirely escape notice. The following remark made it into the news stories: "At the most basic, physical and emotional level, every pregnant woman is told by the section that she cannot submit to a generally safe medical procedure that might be of clear benefit to her unless she meets criteria entirely unrelated to her own priorities and aspirations. Not only does the removal of decision-making power threaten women in a physical sense; the indecision of knowing whether an abortion will be granted inflicts emotional stress. Section 251 clearly interferes with a woman's bodily integrity in both a physical and emotional sense. Forcing a woman, by threat of criminal sanction, to carry a foetus to term unless she meets certain criteria unrelated to her own priorities and aspirations, is a profound interference with a woman's body and thus a violation of security of the person." *Ibid* at 56-57.

[60] *Ibid* at 164.

> view, this right, properly construed, grants the individual a degree of autonomy in making decisions of fundamental personal importance.[61]

She argues that the law limiting a woman's access to abortion offends section 2(a) because "a decision whether or not to terminate a pregnancy is essentially a moral decision, a matter of conscience […].Is the conscience of the woman to be paramount or the conscience of the state?"[62]

For her, the question answers itself. Section 2(a), she makes clear, should be broadly construed to "extend to conscientiously-held beliefs, whether grounded in religion or in a secular morality." For her, conscience is independent of religion, and any decision of the state to deny someone's freedom of conscience is a breach of section 7. Justice Wilson rarely carried the whole Court with her in these grand pronouncements on individual liberty and freedom of conscience. But as will become evident, she identified the gravitational pull of the Court's thinking.

This is apparent in cases concerning the role of religion in education and parental authority. In Ontario, Canada's most culturally diverse province, there is a growing movement to secularize its Protestant and Catholic dual system. In reality, the movement is to deny the Catholic system constitutional standing and funding since the Protestant boards have long since become a *de facto* secular system, and since the Catholic Church's resistance to several elements of the cultural program of sexual liberation is increasingly considered by opinion elites to be discriminatory and bigoted.[63] But this is a relatively recent development. In the 1980s and 1990s the concern was to achieve confessional equality not by secularizing the system but by extending public funding to other confessions on terms equivalent to those extended to the Protestant and Catholic confessions. In *Adler v. Ontario*[64], the issue was the constitutionality of the Ontario provincial government's failure to fund other Christian and Jewish schools.

Justice Iacobucci's majority decision against Adler was based on grounds that skirted the religious freedom and equality rights arguments. He argued that section 93 was a constitutional mandate to the Ontario government to fund the Catholic boards. A "child born of historical exigency,"[65] section 93 is "a comprehensive code with

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[61] *Ibid* at 166.

[62] *Ibid* at 176.

[63] Consider the debate on Ontario's *Accepting Schools Act* ("Bill 13") which requires all schools, Catholic or otherwise, to establish gay-straight alliances at the instigation of any student. It should be noted in this context that while many object to the very existence of schools that depart from the secular public model, the Toronto District School Board operates high school programs designed to cater to sexual minorities. Oasis Alternative Secondary School operates "Triangle", which "offers courses exclusively to queer students in Toronto." See Donn Short, '*Don't be so Gay!' Queers, Bullying, and Making Schools Safe*. (Vancouver: UBC Press, 2013), at 125.

[64] *Adler v Ontario* [1996] 3 SCR 609. [*Adler*]

[65] *Ibid* at para 30.

respect to denominational school rights."[66] He argued that one part of the Constitution – *Charter* religious freedom and equality rights – cannot invalidate another part of the Constitution. Ontario may decide in its wisdom to fund the other confessional schools, but the Constitution does not require it to do so. He put the ball in the legislature's court.

Writing for one other justice, Justice Sopinka's concurrence dismissed Adler's case on more direct section 2(a) terms. He noted first that the Ontario legislative framework allows for independent confessional education either at home or school. But what of the funding disparity - that Catholic parents have their costs covered by the tax system whereas other religious parents must pay their taxes and additional tuition? On this point, Justice Sopinka writes,

> While a distinction is made between these religious groups and the separate Roman Catholic schools, this distinction is constitutionally mandated and cannot be the subject of a *Charter* attack. The legislation is not the source of any distinction amongst all the groups whose exercise of religious freedom involves an economic cost […]. [T]he appellants have no complaint cognizable in law since the disadvantage they must bear is one flowing exclusively from their religious tenets.[67]

This is curious reasoning. Any law differentially affecting religionists could be dismissed on the basis that it is the complainant's religion, and not the law itself, that caused the conflict. This argument offends the idea of reasonable accommodation in Canada, according to which state action that that burdens particular persons based on their religion or conscientious belief must be interpreted or altered to accommodate such persons to the point of undue hardship to the interests the law was designed to protect.

Justice Sopinka's reasoning did not govern the Court's thinking in a 2006 decision that affirmed a reasonable accommodation whereby a Sikh student could wear his kirpan on public school grounds on which weapons were prohibited.[68] On the other hand, the Court was much more consistent with Justice Sopinka's reasoning in *Adler* when it dismissed the appeal of Alberta Hutterites who wished to retain a religiously-inspired exemption from a requirement that all driver's licenses in the province contain photo identification.[69] In that decision the majority of the Court considered it merely inconvenient that the rural, communal Hutterites contract others to drive their vehicles if their religious scruples forbade them from obtaining photo-I.D. licenses.

In the 2001 TWU case, the tension between the corporate associational identity of a Christian university and the individual rights of persons was at the

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[66] *Ibid* at para 35.

[67] *Ibid* at 702.

[68] *Multani v Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 SCR 256.

[69] *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567, 2009 SCC 37.

forefront. The Court held that administrative decisions, like accreditation of academic programs, require a balance between individual equality rights and religious freedom, even in its associational guise. However, the vindication of TWU's associational autonomy was perhaps more pyrrhic that it appears. First, TWU's policy was not found to be overly demanding. The Court was at pains to point out that the school's code of conduct fails to refer to homosexuality or sexual orientation, and that it concerns itself only with "practices that the particular student is asked to give up himself, or herself, while at TWU."[70] There is no evidence that anyone was denied admission for failing to sign the document or expelled for breaching its terms, and the prohibited sexual practices are nested in a longer list of acts including drunkenness, dishonesty, profanity, and so on.[71] In other words, the Court minimized the significance of the statement of the code of conduct, a rhetorical tack of small comfort, no doubt, to the TWU leadership.

Second, the Court ruled against BCCT's position for lack of evidence of discriminatory, hateful conduct, the implication being that if a court henceforth found TWU graduates to act in a discriminatory fashion (whatever this means) toward or with respect to homosexuals, BCCT would have a case.[72] Third, the Court indicated that BCCT in its assessment of the accreditation of TWU must consider not only section 15 equality rights considerations but also religious freedom considerations, implying that religious freedom does not trump other *Charter* considerations. Fourth, later in its reasons the Court characterized the conflict as one between individuals – the religious freedoms of some against fundamental rights of others.[73] The Court, in other words, neglected to link individual religious freedom to the associational context in which it is exercised. Finally, the evidence question was important because of the Court's distinction between belief and action pursuant to belief. "The freedom to hold beliefs is broader than the freedom to act on them."[74] Here the Court chips away at the more capacious account of religious freedom in *Big M* in which the court articulated a more robust link between belief and conduct pursuant to belief.

In *Chamberlain v. Surrey School District No. 36*,[75] the issue was the degree to which young students in public schools can, in a sense, be forced to be free – to be exposed to different family forms and lifestyles as a means to their development as tolerant individuals in a diverse society.[76] A kindergarten teacher applied to the school board to have three books approvingly depicting same-sex parented families

[70] *TWU, supra* note 17 at 22.

[71] *Ibid*.

[72] *Ibid* at 38. In addition, the Court knew of no evidence that the fifth year would indeed re-educate the students along the lines the BCCT had intended.

[73] *Ibid* at 28.

[74] *Ibid* at 36.

[75] *Chamberlain v Surrey School District No 36* [2002] 4 SCR 710, 2002 SCC 36. [*Chamberlain*]

[76] Though Chief Justice McLachlin, writing for six of the seven justices in the majority, avoided the *Charter* issue directly, she noted that "human rights considerations" were in play. Certainly, Justice Gonthier in dissent considered the *Charter* applicable to the school board.

authorized for classroom use by teachers. The board declined to approve the books, citing the age of the students to be exposed to the material, objections of parents, and the difficulties posed to children exposed to materials at odds with standards upheld at home. In short, looming large for the Board was the role of parents in raising their children.[77] The teacher cited British Columbia's legislative framework for delivering education, stressing as it does strict secularism and openness to persons of all backgrounds, interests, and needs. To refuse to present same-sex families to children, on this account, is discriminatory.

The majority of the Court gingerly avoided the concrete question, but its analysis leans to the teacher's position. According to the majority, the board wrongly acted on parents' moral objections to same-sex families by failing to consider *Charter* equality values as well as religious freedom values – in other words, the interest of same-sex parents "in receiving equal recognition and respect in the school system."[78]

In addition, the board took too seriously the argument from cognitive dissonance – that children would be confused by different teachings at home and at school. Chief Justice McLachlin states clearly that the point of exposure to diversity is not to demand that students approve of others' views and practices, but instead to learn to tolerate others and respect their right to equal respect.[79] Further:

> The number of different family models in the community means that some children will inevitably come from families of which certain parents disapprove. Giving these children an opportunity to discuss their family models may expose other children to some cognitive dissonance. But such dissonance is neither avoidable nor noxious. Children encounter it every day in the public school system as members of a diverse student body. They see their classmates, and perhaps also their teachers, eating foods at lunch that they themselves are not permitted to eat, whether because of their parents' religious strictures or because of other moral beliefs. They see their classmates wearing clothing with features or brand labels which their parents have forbidden them to wear. And they see their classmates engaging in behaviour on the playground that their parents have told them not to engage in. The cognitive dissonance that results from such encounters is simply a part of living in a diverse society. It is also a part of growing up. Through such experiences, children come to realize that not all of their values are shared by others.[80]

Dissonance is caused when two teachings of the same moral gravity and concerning the same subject cause distress. In this latter passage, the majority claims that dissonance does exist but that it is inevitable and formative. In so doing, it also, as one observer notes, equates divergent family forms with divergent modes of dress

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[77] *Ibid* at 55.

[78] *Ibid* at 58.

[79] *Ibid* at 59.

[80] *Ibid* at 65.

and cuisine.[81] The Court tries to lower the temperature of the issue, suggesting it is not that big a deal and that perhaps the parents are overreacting.

In dissent, Justice Gonthier (writing also for Justice Bastarache) insisted on parents' primary responsibility for the their children's education, that this authority is delegated to school boards, and that boards act on their behalf. This makes it entirely appropriate for boards to take parental views into account. Justice Gonthier recalled the belief-conduct distinction raised in *Trinity Western*, now flipping it in favour of the objecting parents:

> If many Canadians, as a result of deeply held religious or non-religious beliefs or opinions, draw such a line and commit to such a distinction in their daily lives, must the law obliterate it because of the allegation that acts of discrimination against persons are born from the view held by some that certain persons' conduct is immoral or inappropriate? Does a commitment to eradicating the potential for future instances of discrimination require that religious persons or others be forced to abandon their views regarding the immorality of certain conduct? Can s. 15 be used to eliminate beliefs, whether popular or unpopular? In a society committed to liberal values and robust pluralism, the answer to all of these questions must be in the negative.[82]

In the absence of evidence of harmful conduct, Justice Gonthier concluded that no link can be made between the beliefs of parents and the concern about discrimination.

But is harmful conduct or moral recognition the real issue? Justice Gonthier suspected that "it is a feeble notion of pluralism that transforms 'tolerance' into 'mandated approval or acceptance'".[83] He argued that "language espousing 'tolerance' ought not be employed as a cloak for the means of obliterating disagreement."[84]

Note that the Court in *Chamberlain* fails to distinguish causes of dissonance arising from the interactions between children from different backgrounds, on the one hand, and those authorized or mandated by the educational establishment, on the other. This was more at issue in *S.L. v. Commission scolaire des chênes.*[85] In 2008 the Quebec Government implemented an "Ethics and Religious Culture" curriculum in its public schools to teach religion "from a cultural perspective." A group of parents sought to exempt their children from the curriculum. The argument was framed as a violation of section 2(a) protection on the grounds that it would create cognitive dissonance by

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[81] See John von Heyking, "Civil Religion and Associational Life under Canada's 'Ephemeral Monster': Canada's Multi-Headed Constitution" in Ronald Weed and John von Heyking, eds., *Civil Religion in Political Thought : Its Perennial Questions and Enduring Relevance in North America*, (Washington DC : Catholic University of America Press, 2010), at 319.

[82] *Ibid* at 128.

[83] *Ibid* at 132.

[84] *Ibid* at 134.

[85] *SL v Commission scolaire des chênes* [2012] 1 SCR 235, 2012 SCC 7.

confronting children with a type of cultural relativism at school at odds with religious teaching at home. The court dismissed the challenge, finding that no violation occurred. The Court accepted the Minister's statement that the purpose of the program is simply to mandate,

> instruction in ethics […] aimed at developing an understanding of ethical questions that allows students to make judicious choices based on knowledge of the values and references present in society. The objective is not to propose or impose moral rules, nor to study philosophical doctrines and systems in an exhaustive manner.[86]

The Court held that the program does not appear to be intended to "influence young people's specific beliefs."[87]

> As for the problem of cognitive dissonance, Justice Deschamps wrote that, [t]he suggestion that exposing children to a variety of religious facts in itself infringes their religious freedom or that of their parents amounts to a rejection of the multicultural reality of Canadian society and ignores the Quebec government's obligations with regard to public education.[88]

Justice LeBel's concurrence refers to exposing children "of different origins and religions to…the diversity of opinions and cultures existing in our society, even in religious matters."[89] The wording is careful, but one notices a subtle slide from suggesting that exposing children to diversity is a fact to suggesting that it is a prescription. The Court refrains from commenting on the possibility that such exposure weakens one's attachment to one's received faith.

Religious freedom, as the *Jones* and *Chamberlain* decisions indicate, is bound up with parental obligation and authority, as well as educational choice. Bluntly put, the scope of religious freedom is determined in part by the degree of control over children's lives exercised by parents on the one hand, and the state and its agencies on the other.[90]

From Religious Freedom to Individual Autonomy

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[86] *Ibid* at 34.

[87] *Ibid* at 35.

[88] *Ibid* at 40.

[89] *Ibid* at 54.

[90] For a discussion of the relational triangle of parent, child, and state in the context of the ERC program, see Alison Braley, "Religious Rights and Quebec's Ethics and Religious Culture Course" (2011) 44:3 Canadian Journal of Political Science 613-634. She argues for a weak recognition of parental authority over children, noting that parental influence is inevitable and that the formation of values in their children is a parental obligation. But children are persons, not parents' property, and parents cannot legitimately forbid the "exposure" of their children to values that may challenge the desirability of those held by parents.

In *Chamberlain*, Justice Gonthier's dissent on behalf of parental authority is the older perspective from which the Court increasingly departs. An important trend in SCC *Charter* jurisprudence is the increasing prominence of section 7, which declares that, "Everyone has the right to life, liberty, and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice." While the Court took some time to sort out whether section 7 was primarily a procedural protection or both procedural and substantive, and whether it applied to the administration of justice alone or to public law more generally, it has emerged as perhaps the critical provision of the *Charter* and its application by the courts suggests that a key *Charter* value is individual autonomy. As noted above, this was Justice Wilson's objective from the outset. The case law supports the view that section 7 individual autonomy considerations are capacious enough to encompass many if not most religious freedom considerations.[91] In the end, this may mean that section 2(a) will atrophy as a *Charter* right and that individual conscientious belief will increasingly be understood as a matter of section 7 rights to liberty and security of the person. Religious freedom may eventually be assimilated into section 7. This is not merely a terminological matter. Religious freedom has a collective, associational dimension: it is cramped and trivialized in the absence of a right to worship in a communal context, to engage in myriad activities in continuing association with others.[92] Section 7 protects only individual rights; it captures and protects the interior, private, and individual dimension of liberty. So any movement from section 2(a) to section 7 as the bulwark of freedom of conscience and religion is significant.[93]

Support for this conclusion is found in a line of cases involving the religious freedom of Jehovah's Witnesses. The Witnesses are unwittingly among Canada's champions of civil liberties, their members having litigated important freedom of expression and religion cases since the 1940s.[94] In the *Charter* era their successes have been few. Significantly, they made more headway framing their claims in terms of individual autonomy than religious freedom.

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[91] This is a development in keeping with observations of the application of section 7 in the criminal legal context. Here the courts have discovered several rights implicit in the section 7 guarantee. One scholar, for this reason, calls section 7 "the fairest Charter right of them all." If the Canadian Constitution is a "living tree", "then s. 7 of the Charter is its tap root." See Richard C.C. Peck, *Section 7 of the Charter: The Fairest Section of Them All?* in Ryder Gilliland, ed., *The Charter at Thirty*. (Toronto: Canada Law Book, 2012), 75-104. See also Peter W. Hogg, "The Brilliant Career of Section 7 of the Charter" (2012) 58 SCLR (2d) 195.

[92] A comprehensive defense of this position is presented by Alvin J. Esau, *The Courts and the Colonies: The Litigation of Hutterite Church Disputes* (Vancouver: UBC Press, 2004), particularly chapters 3 and 12.

[93] It can only be noted in this context that the Charter's section 2(d), the guarantee of freedom of association, has been undeveloped by the courts except in relation to union rights and collective bargaining.

[94] See Gary Botting, *Fundamental Freedoms and the Jehovah's Witnesses* (Calgary: University of Calgary Press, 1993).

In *Young v. Young*,[95] the Court grappled with the consequences of an acrimonious marital breakdown rooted in religious differences between the spouses and involving the degree to which the access parent could share his Jehovah's Witness faith with his daughters over the objections of the custodial parent. An initial court order limited the father's ability to involve his daughters in his religious activities. The father appealed this condition, arguing that his *Charter* section 2(a) rights were infringed. The case turned in part on the federal *Divorce Act*'s "best interests of the child" (BIC) test, which governed custodial and access decisions and its relationship to the *Charter*.

Does BIC incorporate *Charter* values like freedom of religion or can *Charter* rights be asserted against interpretation of the BIC test? In her majority reasons Chief Justice McLachlin overturned the judge's access order because she held that the judge failed to consider the benefits to the children of knowing their father's faith.[96] She agreed that the BIC test is the ultimate criterion governing decisions about custody and access. This means that the custodial parent cannot dictate terms to the access parent. It also means, however, that the BIC test erects a lower threshold for state intervention than section 2(a) of the *Charter*:

> It is clear that conduct which poses a risk of harm to the child would not be protected. As noted earlier, religious expression and comment of a parent which is found to violate the best interests of a child will often do so because it poses a risk of harm to the child. If so, it is clear that the guarantee of religious freedom can offer no protection. But I think a case can be made that even in cases where a risk of harm may not have been established, the guarantee of freedom of religion should not be understood to extend to protecting conduct which is not in the best interests of the child […]. The vulnerable situation of the child heightens the need for protection; if one is to err, it should not be in favour of the exercise of the alleged parental right, but in favour of the interests of the child. An additional factor which may come into play in the case of older children is the "parallel right" of others referred to by Dickson J., "to hold and manifest beliefs and opinions of their own". For these reasons, I conclude that the *Charter* guarantee of freedom of religion does not extend to protect conduct which is not in the best interests of the child under the *Divorce Act*.[97]

Notice the reference to older children in this passage, no doubt born of evidence in the case transcript that the couple's older daughter expressed discomfort at being taken to Jehovah's Witness events. The implication is that as children mature they become more self-determining, more autonomous, and their desires and inclinations acquire more weight in a BIC analysis, the obvious assumption being that it is in the best interests of a person to make informed decisions affecting him - or

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[95] *Young v Young* [1993] 4 SCR 3. [*Young*]

[96] In the companion case of *P(D) v S(C)* [1993] 4 SCR 141, the majority similarly reversed a lower court order restricting the religious activities of an access parent, holding that the order was based more on presumption than evidence of harm to the children.

[97] *Young*, *supra* note 86 at 122.

herself. Regardless of the age of the child his or her interests are to be weighed independently of the parents' interests and obligations.

The principle of individual autonomy becomes paramount in *B.(R.) v. Children's Aid Society of Metropolitan Toronto.*[98] An infant born prematurely was in need of life-saving blood transfusion, a practice contrary to the religious beliefs of the baby's Jehovah's Witness parents. The baby was taken into custody by the Children's Aid Society and transfused. Though moot, legal proceedings continued on the constitutional questions. The parents made not only a religious freedom argument but also a liberty-privacy-autonomy argument under section 7, claiming that this provision guarantees a substantive parental liberty to make decisions affecting their children. This is an important conceptual tack because it shifts the terms of argument away from freedom of religion to legal ground more squarely fixed to the morality of individual autonomy.

The outcome in *B.(R.)* was never in doubt; it is hard to imagine a court in a liberal democracy sanctioning faith-based decisions made on behalf of an incompetent person leading inexorably to that person's death. Such limits on the parents' religious freedom would always be considered reasonable. The question is how the Court accounted for its decision to rule against the parents. Writing for two others, Justice LaForest held that the *Charter* protects individuals, not families. But individuals as parents have interests in the welfare of their children. And their right to liberty protected by section 7 recognizes this. These interests should be protected by the *Charter* not so much because the liberty of parents is sacred but so that they will be bound by *Charter* values:

> The state is now actively involved in a number of areas traditionally conceived of as properly belonging to the private sphere. Nonetheless, our society is far from having repudiated the privileged role parents exercise in the upbringing of their children. This role translates into a protected sphere of parental decision-making which is rooted in the presumption that parents should make important decisions affecting their children both because parents are more likely to appreciate the best interests of their children and because the state is ill-equipped to make such decisions itself. Moreover, individuals have a deep personal interest as parents in fostering the growth of their own children. This is not to say that the state cannot intervene when it considers it necessary to safeguard the child's autonomy or health. But such intervention must be justified. In other words, *parental decision-making must receive the protection of the Charter in order for state interference to be properly monitored by the courts, and be permitted only when it conforms to the values underlying the Charter.*[99] [emphasis added]

On the section 2(a) question, Justice LaForest elaborated a theme hinted at in *Young*, that a child's increasing intellectual competence enables him or her more legal power to articulate and determine his or her interests. He notes that,

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[98] *B(R) v Children's Aid Society of Metropolitan Toronto* [1995] 1 SCR 315.

[99] *Ibid* at 372.

> it is the freedom of religion of the appellants - Sheena's parents - that is at stake in this appeal, not that of the child herself. While it may be conceivable to ground a claim on a child's own freedom of religion, the child must be old enough to entertain some religious beliefs in order to do so. Sheena was only a few weeks old at the time of the transfusion.[100]

In their concurrence, Justices Iacobucci and Major (joined by Justice Cory) take Justice LaForest's remark in a different direction, suggesting not that the child is helplessly dependent and that its interests are backstopped by the state, but that the four month-old possessed rights against her parents. On the one hand, they argue that the baby's parents,

> are constitutionally entitled to manifest their beliefs and practice their religion, as is their daughter. That constitutional freedom includes the right to educate and rear their child in the tenets of their faith. In effect, until the child reaches an age where she can make an independent decision regarding her own religious beliefs, her parents may decide on her religion for her and raise her in accordance with that religion.[101]

On the other, they describe the baby as a possessor of rights that can be asserted against her parents,

> The appellants proceed on the assumption that Sheena is of the same religion as they, and hence cannot submit to a blood transfusion. Yet, Sheena has never expressed any agreement with the Jehovah's Witness faith, nor, for the matter, with any religion, assuming any such agreement would be effective. There is thus an impingement upon Sheena's freedom of conscience which arguably includes the right to live long enough to make one's own reasoned choice about the religion one wishes to follow as well as the right not to hold a religious belief. In fact, denying an infant necessary medical care could preclude that child from exercising any of her constitutional rights, as the child, due to parental beliefs, may not live long enough to make choices about the ideas she should like to express, the religion she should like to profess, or the associations she should like to join.[102]

This means that not only are religious freedoms and the right to liberty on the part of the parents limited, but the child has a *Charter* right to freedom of conscience the justices assert against the parents' religious scruples. Does this argument not render any parental role in the inculcation of religious faith in their children constitutionally suspect? While parents may consider that they have not only an interest but also an obligation to impart their faith to their children, the justices suggest the opposite; namely, their obligation is *not* to interfere with the individual autonomy of their children. The primacy of individual conscience finds its apotheosis in a denial of the

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[100] *Ibid* at 381.

[101] *Ibid* at 434-5.

[102] *Ibid* at 437.

legitimate authority of parents to raise their children according to their own religious faith. Ultimately, the logic suggests child rearing according to *Charter* values, not religious ones. The SCC seems to nod in this direction.

A recent decision concerning Jehovah's Witnesses' *Charter* rights represents something of a resolution of years of religious freedom-related defeats before the courts. In *A.C. v. Manitoba (Director of Child and Family Services)*,[103] a 14 year-old Witness suffering from Crohn's disease was considered to be in need of a blood transfusion. A.C. had prepared an advance directive refusing such medical treatment but this was ignored. She was taken into state care and given the transfusion. She claimed that, though only a minor, she was competent to refuse medical treatment. Manitoba legislation stipulates that minors *over* 16 years of age are considered competent to refuse medical treatment unless unable to appreciate the consequences of their decisions, but no provision is made for persons under 16. For children under 16, medical decisions are made using the BIC test.

A.C. unsuccessfully challenged the constitutionality of the law based on sections 2, 7, and 15, but it is clear that the section 7 protection of individual autonomy was A.C.'s argument of choice. She cited a battery of section 7 case law indicating that section 7 contains a substantive right to liberty and autonomy, which includes the individual freedom to make decisions of personal importance.[104] She argued that she was a "mature minor", a category incorporated into Canadian law from Britain and applied in 1986 in the case of a 16 year old seeking a therapeutic abortion over the wishes of her parents,[105] and that mature minors are entitled to liberty to make fundamental decisions concerning their own lives, as a full, substantive interpretation of section 7 guarantees.

In her reasons concurring in the decision upholding a law depriving A.C. the right to refuse medical treatment, Chief Justice McLachlin folded the religious freedom claim into the autonomy argument,

> In this case, the s. 7 and s. 2(*a*) claims merge, upon close analysis. Either the *Charter* requires that an ostensibly 'mature' child under 16 have an unfettered right to make all medical treatment decisions, or it does not, regardless of the individual child's motivation for refusing treatment. *The fact that A.C.'s aversion to receiving a blood transfusion springs from religious conviction does not change the essential nature of the claim as one for absolute personal autonomy in medical decision making*[106] [emphasis added].

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[103] *AC v Manitoba (Director of Child and Family Services)* [2009] 2 SCR 181, 2009 SCC 30.[*Manitoba*].

[104] See, for example, Wilson's reasons in *R v Morgentaler*, at 166; *Godbout v Longueuil (City)*, [1997] 3 SCR 844, *R v Malmo-Levine*, 2003 SCC 74, [2003] 3 SCR 571, at 85; *Blencoe v British Columbia (Human Rights Commission)*, 2000 SCC 44, [2000] 2 SCR 307, at 54; *Chaoulli v Quebec (Attorney General)*, 2005 SCC 35, [2005] 1 SCR 791, and *B(R).*

[105] *Manitoba*, *supra* note 103 at 58.

[106] *Ibid* at 155.

Dissenting, Justice Binnie also reduced the religious freedom claim to a constitutional right to liberty to make "life choices" and decisions of "fundamental personal importance": "To a Jehovah's Witness, nothing is of more 'fundamental personal importance' than observance of the teachings of the church".[107]

The reduction of religious freedom to individual autonomy is now relatively well-known. Benjamin Berger, in a trenchant 2007 essay, argues that "the thickly cultural character of Canadian constitutionalism" tilts to individual autonomy, equality, and a set of norms of procedural justice. This vision clashes with religious worldviews of some groups in Canada that operate on different accounts of human good. It clashes also with the very notion that religion is not merely a sense of the divine but also a culture ordering the lives of adherents. Berger describes a Canadian legal regime that amounts to a comprehensive liberalism, reflexively averse to robust claims to cultural pluralism. Law "digests" religion in terms it as a liberal construct understands: religion is about private, subjective individual belief whose consequences for conduct and communal existence are subject to larger concerns about the common good as law understands it.[108] In Berger's understanding of the operation of Canadian law,

> Religion is valuable and deserving of legal protection because it is one possible expression of personal autonomy; that is, to protect religion is to protect the right of the individual to make choices about his or her spiritual life.[109]

In his analysis of *Syndicat Northcrest v. Amselem*,[110] in which the SCC granted the section 2(a) claim of a condominium resident who wished to erect a succah on his balcony contrary to the terms of his residency agreement, Berger suggests that the individualistic interpretation of religious freedom means that "putting up a succah is a choice to be analysed against other choices like hanging a garden trellis or opting for satellite television over cable."[111]

As religious freedom is being conflated with personal autonomy or privacy, then the associational religious freedom on which TWU must rely in defence of its law school program may indeed rest on thin ice. If all this results in TWU's being unable to accredit its graduates in Canadian provinces, a decisive shift in the nature of Canadian liberalism will have taken place.

Liberal Pluralism and Comprehensive Liberalism

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[107] The Court by a 6-1 margin upheld the Manitoba law and found the BIC test at the heart of the province's law governing persons under 16 years of age to be constitutional, able as it is to take account of the circumstances of a mature minor.

[108] Benjamin L Berger, "Law's Religion: Rendering Culture" (2007) 45:2 Osgood Hall L.J 277-314. [*Berger*]

[109] *Ibid* at 309.

[110] *Syndicat Northcrest v Amselem* [2004] 2 SCR 551, 2004 SCC 37.

[111] *Berger*, *supra* note 108 at 294.

There are different kinds of liberals and different kinds of liberalism. There is Hayekian free-market liberalism and Galbraithian planning liberalism. There is the Hegelian liberalism of T.H. Green versus the pragmatist liberalism of Richard Rorty. All are committed in some basic measure to the protection of individual security and liberty. But they differ on the grounds for this, and on the means by which these principles are protected and advanced.

I suggest that liberals also disagree on the degree to which civil society must reflect the principles and values that define the liberal regime. Liberalism is at its core about liberty of individuals, and there is an associational dimension to this, since free individuals will decide to combine in different groups, associations, and institutions. Some will be loose affiliations and others much deeper and engrossing. Associations differ according to the degree to which they dominate the lives of their adherents. A membership in a local gym demands little of the person joining. Membership in the Jehovah's Witnesses is much more demanding. The very objects and terms of membership in different associations may exclude certain persons or classes of persons. The Catholic Church prohibits women from becoming priests. A women's health resource and counselling centre may bar employment of men.

Many liberals find the rich, thick associations objectionable because they may impinge too much on human freedom, making it difficult for people, once in, to leave later. One view of the matter is that all associations should be tempered in their ability to make illiberal demands on their members; a person's ability to think critically of his or her place in an association should never be compromised and a decision to leave should never be difficult. Thus any associational belonging can never be so different from life in the wider community that exit from an associational membership to another or to none at all is at all difficult or taxing.

Other liberals look at liberty differently, taking societies as they find them and seeking to infuse political life with principles of individual liberty, equality, and the rule of law while leaving civil society – the realm of individual and association freedom – to its own devices, within broad limits. All liberals refuse to accept the coercive power of civil society associations that approaches that of the state itself. As Albert Hirschman argued, group membership involves three principles: loyalty, voice, and exit. In a liberal society, group members should always have these three options available to them. But as a practical matter, the question becomes how stringent will be the application of these principles, given that liberalism's *raison d'être* is the protection of a wide berth for associational diversity.

A metaphor may illuminate the issues. On one view, liberal democracy is a dense, unkempt wood – a riot of colour and leaf, some weeds and brambles, but also tall, majestic trees and extraordinary ferns. One may not like the prickly rose bush or the poison ivy, but one can step around them. There is beauty and vitality in this wood but it is a bit disordered and contains flora we might find objectionable. Another view is that liberal democracies are fragile gardens that need constant attention. All flowers in the garden must be tended. There can be no weeds. All the flowers must contribute to the ordered beauty of the whole. Left unattended, weeds in the corner will grow uncontrollably and crowd out the beautiful flowers. The garden will in time be ugly,

unruly, and dangerous. No one will want to visit it. Like the flowers in the garden, associations must be monitored and steered. The first image is that of a liberal pluralism. The second image conveys a more comprehensive liberalism in which liberal values must infuse not just the institutions of government but the associations embedded in civil society as well.

William Galston is an able representative of liberal pluralism. His *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice*[112] sets out an understanding of liberal principles that are conducive to the accommodation of diversity. To be a liberal, according to Galston, is to hold a presumption in favour of individuals and groups leading their lives as they see fit. Galston writes that,

> From the liberal pluralist point of view, public institutions must be cautious and restrained in their dealing with voluntary associations, and there is no presumption that a state may intervene in such associations just because they conduct their internal affairs in ways that diverge from general liberal principles.[113]

Galston is a liberal but as his book title indicates, he is first a pluralist whose pluralism is modified or conditioned by his liberalism. He denies that the state is plenipotentiary. The state is one human association possessing a share of sovereign authority. Other human associations like the family and church also have independent sovereign integrity, as do individuals themselves. Sovereignty is plural and coordinate. Human sub-state associations do not exist at the state's sufferance. Where the lines are drawn in particular cases in particular contexts is no easy task, but the matter of principle is that there are lines to draw.[114]

Galston supports a presumption in favour of diversity. He counsels a cautious and restrained treatment of civil associations. The burden of proof should always be on the proponent of intervention. He offers the principle of, "*maximum feasible accommodation* of diverse legitimate ways of life, limited only by the minimum requirements civic unity. This principle of expresses (and requires) the practice of tolerance – the conscientious reluctance to act in ways that impede others from living in accordance with their various conceptions of what gives life meaning and worth."[115]

In Canada, the liberal pluralist position is perhaps best and most robustly represented by Alvin J. Esau, whose work is a trenchant defense of legal pluralism, the notion that a political order contains not one but several systems of law and that no one system has a necessarily dominant, overweening status relative to the others. Key to his approach is the distinction between inside and outside law. Inside law refers

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[112] William Galston, *Liberal Pluralism: The Implications of Value Pluralism for Political Theory and Practice* (New York: Cambridge University Press, 2002). [*Liberal Pluralism*]

[113] *Ibid* at 9. For a similar account of liberalism, see David McCabe, *Modus Vivendi Liberalism* (New York: Cambridge University Press, 2010).

[114] *Ibid* at 114. See also Galston, "On the re-emergence of political pluralism" Daedalus (2006), 118-122.

[115] *Liberal Pluralism*, *supra* note 103 at 119.

to the legal norms and principles that govern life in thick communities of culture and faith. Esau's paradigmatic cases are Canada's Hutterite communities, agrarian communities across Western Canada holding property in common and adhering to strict religious rules associated with Anabaptist Christianity.[116] Outside law refers to the general public and private law of Canada, including its constitutional law. He asks,

> Can a liberal society accommodate illiberal groups by upholding a conception of collective rights has having a priority over individualistic notions of rights, or must these groups be forced by the power of outside law to conform to the dominant legal culture based on a homogenizing ideology of individual equality, dignity, and autonomy as defined by the larger society?[117]

His view is that yes, illiberal inside law can exist, and should. Legal pluralism, a type of non-territorial legal federalism, requires a recognition of the sovereignty of cultural subgroups limited by a clear, well-defined notion of harm, and such recognition in turn requires courts to abstain from interfering in the internal legal life of such communities.

While Esau only obliquely considers aboriginal peoples in his book on the Hutterites, First Nations in Canada also argue for "inside law" to operate alongside and often independently of Canadian "outside law." Indeed their longstanding complaint is that inside law lacks the independence of outside law that is First Nations' due. In a detailed study of the relationship between the Canadian *Charter* and aboriginal peoples, for example, David Milward covers the many ways in which aboriginal notions of justice conflict with Canadian *Charter* standards. He prefers the operation of robust traditional inside law – many features of which are illiberal – but understands that in their contemporary, broken, debilitated, and dispirited state, many First Nations communities require Canadian *Charter* standards to protect vulnerable individuals from the application of poorly understood traditional inside law.[118]

Esau is suspicious of a legal centralism seeking to carry liberal understandings of the human into the internal workings and understandings of religious and cultural communities. The rhetoric is that of human rights and dignity, but these are watchwords of liberalism that "becomes a comprehensive system transcending the public sphere, and freedom *of* religion somehow becomes freedom *within* religion."[119] While his work does not comment explicitly on the Trinity Western controversy, it is reasonable to assume that his account of legal pluralism supports the

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[116] Alvin J. Esau, *The Courts and the Colonies: The Litigation of Huttterite Church Disputes* (Vancouver: UNB Press, 2004).

[117] *Ibid* at 301.

[118] David Milward, *Aboriginal Justice and the Charter: Realizing a Culturally Sensitive Interpretation of Legal Rights* (Vancouver: UBC Press, 2012).

[119] Alvin J. Esau, "Living by Different Law: Legal Pluralism, Freedom of Religion, and Illiberal Religious Groups" in Richard Moon, ed, *Law and Religious Pluralism in Canada*. (Vancouver: UBC Press, 2008), 110-139, at 128.

University's ability to maintain its code of conduct while graduating lawyers able to practice law in Canada.

While the particulars of cases sometimes befog the issue, Justice Gonthier is the SCC jurist whose comments most incline to the legal pluralist position. In *Chamberlain*, as indicated above, he defended a robust conception of toleration that permits the existence of association whose views will not appeal to those of the majority. Certain supporters of TWU's application for accreditation before the LSUC, such as Bradley Miller, and John Carpay of the Justice Centre for Constitutional Freedoms, also claim room for 'illiberal' associations within a liberal democratic political and legal order.

American scholar Stephen Macedo typifies a rather more comprehensive account of liberal values and the degree to which they should animate liberal society. Liberal democracies have an interest in ensuring that their citizens develop in ways comporting with these principles. The polity requires a more complete citizen allegiance than what Galston defends. Liberal democracy is not about institutions alone; it is also about mores and manners, sensibilities and norms. Macedo believes that liberal societies must enjoy a high degree of consensus on liberal principles in order to function properly. Constitutionalism,

> cannot endure without citizens who are willing to support its fundamental principles and to take part in defining them. We are citizens of a liberal *society*, after all, not subjects of a state[120] [emphasis added].

Liberal citizenship for him requires a degree of citizen virtue that would make must pluralists uncomfortable. Liberal citizens are tolerant citizens, Macedo argues, but toleration requires more than a commitment to "put up with" diverse others. Tolerance requires the adoption of a critical standard of reason allowing one to engage in public discussion on terms outside of one's worldview. Tolerance requires the capacities – and probably the desire – to engage others in the public square in terms all can understand and appreciate.

For Macedo, liberalism reaches the soul as well as the body; its aim is to "mold" people in ways that make the private life congruent with "the ways of a liberal republic."[121] He sees liberalism as properly concerned not just with legal and constitutional forms but with the wider civic lives of citizens, the lives they lead, and the development of a "publicly reasonable liberal community."[122] Macedo's liberalism is transformative; it has "spine" and is a "tough-minded" program for making the individual "freedom to choose" central to the liberal project. Such a concern for

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[120] Stephen Macedo, "Multiculturalism for the Religious Right? Defending Liberal Civic Education" (1995) 29:2 Journal of Philosophy of Education 225. It is significant that Macedo distinguishes society and state in this passage.

[121] Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000), 13-15. [*Diversity and Distrust*]

[122] *Ibid* at 169.

individual liberty in the civic sphere naturally draws Macedo's tough-minded liberalism into private life. Liberalism's aims "are deep and pervasive."[123]

In a liberal regime as Macedo understands it, religious neutrality is a mirage. The basic political value of "equal freedom for all applies within the religious sphere and all other spheres"[124] In this account, liberal democracy itself is a way of life into which citizens must be inducted. Liberal democracies, then, are not principally about maintaining civil order coupled with limits on state power, but about the formation of citizens' moral character.

Such a standard is not equally amenable to all religious believers. When such tensions arise, they, not transformative liberalism, must give way.[125] For example "[p]olitics cannot […] leave religion to one side: it cannot leave the soul alone and care only for the body, for our deepest moral and spiritual commitments need to be shaped in accordance with political imperatives."[126] "The private needs to be "congruent" with the ways of a liberal republic."[127] Transformative liberalism charges the state with the transformation of society.

In these senses, liberalism has to penetrate all the way down into civic and private life. Macedo's sense is that this happens as a matter of course because liberalism is a regime and regimes operate to produce and sustain a shared conception of justice,

> Citizens remain free to practice their religion and to condemn alternative belief systems. The lives of liberal citizens are in a sense properly divided: we have a public and a private side, and the public (or political) side is guided by imperatives designed to make our shared life together civilized and respectful. This division of spheres is only part of the story of the relation between liberalism and various systems of normative diversity, including religion. Liberalism does not simply divide our lives, and from certain angles at least, it really only divides our lives in a superficial sense. In a deeper sense…liberal institutions and practices shape all of our deepest moral commitments in such a way as to make them supportive of liberalism. That work is both legitimate and at odds with the notion that our basic commitment is to difference, diversity, or versions of multiculturalism designed without keeping civic aims in view.[128]

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[123] *Ibid* at 14.

[124] *Ibid* at 85. The remaking of private life and association in the image of liberal values, Macedo, asserts, "is both legitimate and at odds with the notion that our basic commitment is to difference, diversity, or versions of multiculturalism designed without keeping civic aims in view." *Ibid* at 164.

[125] *Ibid* at 227.

[126] *Ibid* at 30.

[127] *Ibid* at 43.

[128] *Ibid* at164.

Macedo's liberalism requires a separation of public and private realms and lives. But, to be clear, says he: "We should avoid the common tendency to underdescribe the pattern of life which is liable to be promoted by even a circumscribed political liberalism."[129]

We need, he argues, "a more judgmental liberalism"[130] but one that prudentially favours the gentler mechanisms of education and intercultural contact rather than the more draconian coercive tools of the state. Macedo is willing to consider requests for reasonable accommodation, that is, exemptions from the otherwise universal or general application of laws designed to advance public objectives. Such concessions are a matter of prudence, not rights. Furthermore, exemptions have a transformative purpose,

> the transformative ambitions of civic liberalism themselves suggest certain principles of accommodation […] Because liberal public morality is always (more or less) in a stare of coming-into-being, we should accommodate dissenters when doing so helps draw them into the public moral order; that is, when it helps transform a modus vivendi into a deeper set of shared commitments.[131]

So the more liberally-minded, reformable dissenters can be accommodated; the very diverse, illiberal, unreformables are to be required to adhere to the letter of general laws and policies.

Macedo's view has clear and obvious implications for Trinity Western University. Its illiberal code of conduct operates against the cultivation of the liberal virtues of tolerance and individual autonomy at the core of liberal commitments. TWU's illiberalism is fundamentally incompatible with Macedo's comprehensive liberalism and so must by prudent means be discouraged and ultimately eradicated. It is reasonable to think that making the accreditation of TWU's law school conditional upon its withdrawal of its internal policies on marriage and sexual conduct is quite consistent with Macedo's more judgmental liberalism.

Most opponents of TWU's accreditation in some fashion or other ground their arguments in this comprehensive liberalism, a liberalism that seeks to instantiate liberal values all the way down into civil society associations. Among jurists, perhaps Justice Wilson is the clearest exponent of comprehensive liberalism. But others like Justices Iacobucci and Sopinka reveal tendencies in this direction. Chief Justice McLachlin is careful in her judgments, but some of her off-bench remarks, as indicated above, suggest a concern about legal pluralism.

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[129] Stephen Macedo, "Liberal Civic Education and Religious Fundamentalism: The Case of God v. John Rawls?" (1995) 105:3 Ethics 479.

[130] *Diversity and Distrust*, *supra* note 112 at 278.

[131] *Ibid* at 205.

This brief sketch of two prominent liberal thinkers suggests what is behind the debate about TWU's law school and broader trends in *Charter* s. 2(a) jurisprudence. Two distinct visions of liberal democracy in Canada are in contest, one a liberal pluralism favouring space for robust expressions of associational diversity; and the other a more comprehensive liberalism seeking to reshape Canadians' values by impressing them onto the education system and other forms of associational life. The evidence canvassed in this article suggests the turn from liberal pluralism to comprehensive liberalism is well under way. The paradox in this development is that Canada's official self-understanding is that of a polity committed to diversity and multiculturalism. Comprehensive liberalism undermines the substance of this self-image.

Conclusion

Already, a court has pronounced on the matter. A Nova Scotia court decided an appeal of the Nova Scotia Barristers Society`s denial of TWU Law`s application for accreditation in Trinity Western`s favour.[132] The SCC will almost certainly decide the TWU controversy. There, TWU will rely heavily on the Court's 2001 decision in *TWU*, discussed above. In that decision the Court judged that the College of Teachers failed to weigh "*Charter* values" properly when it denied TWU's application for accreditation of a school of education.

The argument of this paper is that the *Charter* is indeed of consequence for the fate of TWU's law school accreditation applications, and that the individualistic interpretation of freedom of religion provision bodes ill for those applications. Alvin Esau, whose work is consulted in this article, argues that the real threat to the inside law of religious groups is posed not by the *Charter* but by private law – property law, tort law, and to an extent employment law. Common law courts will take jurisdiction in internal disputes, and apply outside legal concepts to the inside law of those groups, thus homogenizing them in the process. Since section 32 of the *Charter*, Esau argues, confines the application of *Charter* only to the state and not to private actors, the *Charter*'s individualism is not a central worry for sub-state religious communities.

Esau may now have cause for concern. The SCC's recent decision in *Doré v. Barreau du Québec*[133] alters the legal landscape. It suggests that administrative bodies have the responsibility to incorporate "*Charter* values" into decisions they make in applying the provisions of their statutes, and that these are subject to review by courts on a standard of reasonableness rather than correctness. Angela Cameron and Paul Daly argue in an analysis of that decision that this will be a boon to bodies charged with making decisions with respect to public education, because, in their view, the pre-eminent *Charter* value is equality, and this *Charter* value especially favours the rights and ambitions of the LGBT community.[134] Equality considerations, in their view,

[132] *Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25.

[133] *Doré v Barreau du Québec*, [2012] 1 SCR 395, 2012 SCC 12.

[134] Angela Cameron and Paul Daly, "Furthering Substantive Equality Through Administrative Law: Charter Values in Education" *Supreme Court Law Review* (2013) 63 (2d) 169-204.

should predominate in administrative decisions about curricular reforms intended to normalize same-sex families and non-traditional forms of sexual preference. Would such decisions limit religious freedom? They suggest not, because religionists have access to parochial, religious schools where religious values can be taught more freely.

They imagine *Charter* values not to advance section 2(a) religious freedom values sufficiently to temper the assertion of sexual preference equality consideration in public school settings. This is close to saying that *Charter* values are secular values. After all, if religious freedom values were as robust as equality values, parental religious scruples in public schools would need to be given greater consideration by administrators. They do indeed exploit a fundamental ambiguity in the concept of "*Charter* values," a notion the courts have frequently invoked but never precisely defined. In this sense, *Charter* values are something of an empty vessel to be filled with whatever meaning seems fitting to a jurist or administrative agency in a particular circumstance. *Charter* values are an abstraction from the already abstract, general wording of black letter *Charter* provisions. Ultimately, the language of values is the language of preference.

For all that, Cameron and Daly do seem to acknowledge religious freedom values. Their argument for LGBT normalization in public schools depends on the existence of religious, parochial schools to which religious parents can send their children and where traditional values protected by religious freedom can be taught. So public schools can implement gay-friendly equality policies because religious schools can implement traditional family-friendly policies. But do Cameron and Daly advocate the existence of such parochial schools? Would they support TWU's law school accreditation application and TWU's existence more generally?

The recent SCC decision in *Loyola High School v. Quebec (Attorney General)*[135] is suggestive in this regard. Unanimously granting a Quebec private religious school the right to teach Catholic history, theology, and ethics from a confessional, doctrinal perspective, rather than an "objective," "neutral," "phenomenological", or "cultural" perspective as mandated by Quebec law, the Court articulates a surprisingly generous interpretation of the collective, associational dimension of religious freedom in Canada.[136] This ought to cheer TWU supporters. But a wrinkle in the decision is that the Court – and particularly the reasons written by Justice Abella on behalf of three others on the panel of seven hearing the appeal – grants the school a degree of confessional autonomy insofar as Quebec law permits private religious schools to exist. The Court's reasoning seems to be that so long as the province allows private religious schools to exist, then the ministerial discretion to grant schools exemptions from the curricular guidelines to teach "equivalent" curricula must permit "equivalent" curricula to depart from strict neutrality.[137] "Equivalent" cannot mean veritably identical. But does the *Charter* itself – or the "*Charter* values"

[135] *Loyola High School v Quebec (Attorney General),* 2015 SCC 12.

[136] *Ibid* at 61-64, 91-97.

[137] *Ibid* at 54, 69.

framework more generally – require such schools to exist? Can the Quebec government prohibit such schools if it wishes? The Court does not say.

If TWU ultimately loses its bid, one important implication is that independent religious educational institutions may in the end not be able to implement faith-based policies. Maybe, if Canada comes to embody more deeply an ideology of comprehensive liberalism, independent religious institutions may not be allowed to exist. Indeed, the larger question in the TWU controversy is not simply whether its law school graduates can practice law in Canada. It is whether the school – hewing as it does to traditional moral ideas its critics consider illiberal – should exist at all.