A CLASH OF POSITIVE AND NEGATIVE LIBERTY: DENYING ACCREDITATION TO TRINITY WESTERN LAW SCHOOL

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This paper describes the current state of affairs regarding the accreditation of Trinity Western's Law School, relating its challenges with the Law Society of British Columbia, The Law Society of Upper Canada, and the Nova Scotia Barristers' Society that eventually reached the Supreme Court of Canada. The paper provides an analysis of the conflict of rights and freedoms using a Berlinian (2002) analytic approach of positive and negative liberty.

I Introduction

> What is good, true, and just in religion will not always comport with the law's view of the matter, not will society at large always properly respect conscientious adherence to alternate authorities and divergent normative, or ethical commitments. Where this is so, two comprehensive worldviews collide.[1]

There is no doubt that Canadian society has advanced in the last 30 years in the creation of a healthier, fairer, and more just society. Canadian society has done so through the recognition and protection of those who have for many years been oppressed, marginalized, or lacked a voice in the Canadian justice system.

Yet, in addressing past and present injustices and inequities, can the law overstep, albeit with the best of intentions, in preferring what Isaiah Berlin calls negative liberty over positive liberty?[2] If the law does so, then might Kymlicka be correct when he suggests that protections 'become illegitimate if, rather than reducing a minority's vulnerability to the power of the larger society, they instead enable a minority to exercise economic or political dominance over some other group?'[3] Has this, in effect, happened with the majority of the members of the Nova Scotia Barristers' Society (NSBS), the Law Society of Upper Canada (LSUC), and the Law Society of British Columbia (LSBC) being unwilling to accredit the law school at Trinity Western University (TWU) in Langley, British Columbia (BC)?[4]

The effect of non-accreditation of TWU would disqualify graduates from taking the provincial bar course without having first to undergo a hurdle — as yet unknown — not required of graduates from any other Canadian law school. This is so notwithstanding the fact that the Federation of Law Schools of Canada found that TWU's law school met the standard of law schools across Canada, and further, that TWU's controversial *Community Covenant* is not a bar to that finding.[5] What could be the basis for the opposition to this law school, and by consequence,

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to its graduates, by a majority of the members of various law societies? Certainly the law societies were not alone in their concerns; the Council of Canadian Law Deans wrote to the President of the Federation of Law Societies of Canada, stating:

We would urge the Federation to investigate whether TWU's Covenant is inconsistent with federal or provincial law. We would also urge the Federation to consider this covenant and its intentionally discriminatory impact on gay, lesbian and bi-sexual students when evaluating TWU's application to establish an approved common law program.[6]

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

TWU challenged the positions of the LSBC, the LSUC, and the NSBS towards Canadian citizens of religious belief. As such, this paper is in two parts. Part I presents the facts of the dispute while surveying the litigation that led to this matter to the Supreme Court of Canada. Part II analyses the conflict of rights involved in this case using the Berlinian analytic approach of positive and negative liberty.

II Part I: The Challenges

A Background: Trinity Western University

In 1962, Trinity Junior College was established in Langley, BC, pursuant to the Trinity Junior College Act, according to which its 'underlying philosophy and viewpoint … is Christian.'[7] Its founding denominations were the Evangelical Free Churches of Canada and America. Today, TWU has 42 undergraduate majors and 16 graduate programs. TWU, which is funded through private donations, tuition, and supporting services, has extension campuses in Ottawa, Ontario; Richmond, BC and Bellingham, Washington. TWU's total annual enrolment is approximately 4,000 and its alumni number approximately 24,000.[8]

> TWU's mission statement reads:
> [A]s an arm of the Church, to develop godly Christian leaders: positive, goal-oriented university graduates with thoroughly Christian minds; growing disciples of Jesus Christ who glorify God through fulfilling the Great Commission, serving God and people in the various marketplaces of life.[9]

TWU is committed to its core values, among which are 'Obeying the Authority of Scripture' and 'Pursuing Faith-Based and Faith-Affirming Learning.'[10] TWU's student handbook, the *Community Covenant Agreement*, states in part: '[i]n keeping with biblical and TWU ideals, community members voluntarily abstain from … sexual intimacy that violates the sacredness of marriage between a man and a woman',[11] citing Romans 1:26–27 in the New International version of the Bible:

> Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones. In the same way the men also abandoned

> natural relations with women and were inflamed with lust for one another. Men committed shameful acts with other men, and received in themselves the due penalty for their error.[12]

B The Federation of Law Societies of Canada

On 15 June 2012, TWU applied to the Canadian Common Law Program Approval Committee of the Federation of Law Societies of Canada ('Federation')[13] and to the BC Minister of Advanced Education under the BC *Degree Authorization Act* for approval of its proposed law school. TWU's *Community Covenant Agreement* included the following statement: '[i]n keeping with biblical and TWU ideals, community members voluntarily abstain from … sexual intimacy that violates the sacredness of marriage between a man and a woman.'[14]

A special Federation advisory committee considered the import of the *Community Covenant Agreement*, deciding that there 'was no public interest reason for preventing graduates of the JD [juris doctor] program at TWU from practicing law' and that if the Federation Approval Committee 'concluded that the TWU proposed law school met the national requirement there was no public interest bar to the approval of the school.'[15] The Approval Committee approved the law degree, accepting that Trinity was committed to ethical professionalism, and 'to teach equality and to promulgate non-discriminatory practices, and that it would ensure that students understood the full scope of protections from discrimination based on sexual orientation.'[16]

> On 16 December 2013, a Federation report stated:
> After a thorough review of the proposal submitted by Trinity Western University (TWU), the Common Law Program Approval Committee of the Federation of Law Societies of Canada has granted TWU preliminary approval of its proposed law school program … The Approval Committee had a limited mandate: to determine whether the proposed law school program would produce graduates competent for admission to law society bar admission programs.[17]

This decision was a major hurdle for TWU, in particular because Canadian law societies relied on the Federation's approval of a law school in determining who was qualified to article in their provinces. The ultimate responses from the various legal societies and the BC government have not been favourable.

III The Juridical History

A The Nova Scotia Barristers' Society

On April 25, 2014, the NSBS Council voted against accrediting TWU's law school, declaring:

> [T]he *Community Covenant* is discriminatory and therefore Council does not approve the proposed law school at Trinity Western unless TWU either; exempts law students from signing the *Community Covenant*; or amends the *Community Covenant* for law students in a way that ceases to discriminate.[18]

The Council's rationale was that TWU had not appropriately balanced freedom of religion and equality; the Covenant was discriminatory under the Nova Scotia *Human Rights Act*,[19] and TWU exceeded the limits of freedom of religion by requiring that students sign the Covenant and by threatening discipline if the Covenant were broken. It distinguished the TWU and BCCT cases in that, among other things, the current dispute was not about 'condemn[ing] graduates as being unqualified to practice law but … to address and reject the systemic discrimination of the institution.'[20] TWU objected and appealed the decision to the Nova Scotia Supreme Court.

On 28 January 28 2015, Justice Campbell heard the case, and after an extensive judgement, ruled that NSBS did not have authority under the *Legal Professions Act* to refuse accreditation to TWU's law school nor to demand institutional changes just because the NSBS members were outraged or suffered stress because of TWU's *Community Covenant*.[21] He said

> [E]ven if it did have that authority it did not exercise it in a way that reasonably considered the concern for religious freedom and liberty of conscience … The legal authority of the NSBS cannot extend to a university because it is offended by those policies or considers those policies to contravene Nova Scotia law that in no way applies to it. The extent to which NSBS members or members of the community are outraged or suffer minority stress because of the law school's policies does not amount to a grant of jurisdiction over the university.[22]

The NSBS appealed and on 26 August 2016 a unanimous Court of Appeal[23] (Justices Fichaud, Beveridge, Farrar, Bryson and Bourgeois) decided in favour of Trinity and against the attempt by the NSBS to amend its regulations so as to justify its decision against Trinity. The Court held that the NSBS had exceeded its authority under the *Legal Profession Act* as no authority existed under that Act to issue rulings regarding another province's human rights act (in this case the BC *Human Rights Act*) or the *Canadian Charter of Rights and Freeedoms*. In particular the Court wrote, among other things, '[n]othing in the *Legal Professions Act* authorises the Society to issue an independent ruling that someone has violated Nova Scotia's *Human Rights Act*. Nor does the *Human Rights Act* … contemplate the Society's intervention (para 63).' Moreover, the court descalred that Trinity, as a private university, was not subject to the *Charter.*

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

In BC, the Federation's approval of 16 December 2013[24] resulted in TWU's law school becoming a fully 'approved faculty of law for the purposes of enrollment in the Law Society's admission program … subject to any further resolution adopted by the Benchers.'[25]

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

> BE IT RESOLVED THAT the Law Society of British Columbia requires all legal education programs recognized by it for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education — including faculty, administrators, and employees (in hiring continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs.[27]

On 31 October 2014, the BC Benchers 'adopted the position that the proposed TWU law school was not an approved faculty of law for the purposes of admission to the BC Bar. The resolution was adopted by 25 votes for, one vote against and four abstentions'.[28] On 11 December

2014, the Minister of Advanced Education, Amrik Virk, revoked his earlier approval of the proposed TWU law school.[29]

TWU sought judicial review of the Law Society's decision in a petition dated 18 December 2014, alleging that the Resolution was invalid as it was ultra vires of the Law Society, unconstitutional, involved an improper sub-delegation or fettering of authority, and represented an unreasonable application of the Law Society's discretion.[30]

On 26 August 2015, Chief Justice Hinkson of the BC Supreme Court heard the case and rendered his opinion on 10 December 2015.[31] He reasoned that the correct administrative standard to be applied by the Court was correctness, meaning that it was either right or wrong, not reasonableness, meaning that it was in the range of possible acceptable decisions, (paras 90 & 96). He added:

> the LSBC correctly found that it has the jurisdiction to use its discretion to disapprove the academic qualifications of a common law faculty of law in a Canadian university, so long as it follows the appropriate procedures and employs the correct analytical framework in doing so (para 108).

Notwithstanding the above, Justice Hinkson noted that:

> the Benchers permitted a non-binding vote of the LSBC membership to supplant their judgment. In so doing, the Benchers disabled their discretion under the LPA [*Legal Profession Act*] by binding themselves to a fixed blanket policy set by LSBC members. The Benchers thereby wrongfully fettered their discretion (para 120).

In sum, Chief Justice Hinkson wrote:

> I find that the Benchers improperly fettered their discretion and acted outside their authority in delegating to the LSBC's members the question of whether TWU's proposed faculty of law should be approved for the purposes of the admissions program. Even if I am wrong, and the Benchers had the authority to delegate the Decision to the members, I find that the Decision was made without proper consideration and balancing of the *Charter* rights at issue, and therefore cannot stand (para 153). … Given my decision with respect to the invalidity of the Decision, it is unnecessary for me to resolve the issue of the collision of the relevant *Charter* rights (para 154). …I find that given inappropriate fettering of its discretion by the LSBC and its failure to attempt to resolve the collision of the competing *Charter* interests in the October Referendum or the Decision, the appropriate remedy is to quash the Decision and restore the results of the April 11, 2014 vote, and I so order (para 156).

On 1 November 2016, the BC Court of Appeal ruled in favour of TWU.[32] The Court determined that the Benchers did not meet their duty to the legislature because they could not delegate their decision to the majority of the Society. Further, the effect of having 60 law school seats at Trinity would have a minimal impact on access to law school for the legal profession. Moreover, denying access to lesbian, gay, bisexual, transgender, queer/questioning, and other (LGBTQ+) students would not enhance access to law school. The Court also considered that the denial of accreditation would have had a severe impact on TWU's rights and those of its graduates to practice law in BC. Practically, to deny accreditation would have denied TWU's right to fundamental and associative rights guaranteed under section 2 of the *Charter*. The Court declared:

> The Law Society's decision not to approve TWU's law school is unreasonable because it limits the right to freedom of religion in a disproportionate way — significantly more than is reasonably necessary to meet the Law Society's public interest objective. (Headnote)

C The Law Society of Upper Canada

In early 2014, the LSUC considered approving TWU's law school. On 24 April 2014, the Benchers denied accreditation by a vote of 28 to 21. 'The effect of the LSUC's decision is to refuse to accept applications for admission to the Ontario Bar from graduates of TWU's proposed law school.'[33] The LAUS did not provide a rationale for it action but advised that the 'reasons of Convocation will be provided through the transcript of both sessions, as well as the written record and, ultimately, the vote.'[34]

TWU sought judicial review. On 2 July 2015, Justices Marrocco and Nordheimer of the Ontario Superior Court of Justice (Divisional Court) entered an order in favour of the LSUC, interpreting the empowering statute as providing jurisdiction to do so and that the Benchers' decision was reasonable.[35] TWU appealed and on 29 June 2016 the Ontario Court of Appeal rendered its unanimous decision.[36]

The Court noted that 'The challenge in this appeal is considering the balance between freedom of religion on the one hand and equality in the context of sexual orientation on the other hand. Who strikes the balance and what is it?' (para 14). After observing that the appropriate standard of review was reasonableness (para 71) and that there was 'no general question of law of central importance and outside the LSU's specialised area of expertise [which] arises in this case' (para 69), the Court applied the *Syndicat Northcrest v Amselem* case[37] in determining if there was a breach of freedom of religion under section 2(a) of the *Charter* (para 88).

The Court held that both TWU and Mr. Volkenant, whose right to freedom of religion were properly engaged in the case, were sincere in their beliefs and thus the first part of the Amselem test was met (paras 90 & 91). The Court also indicated that 'while the degree to which religious organisations can independently claim the protection afforded by s. 2(a) [freedom of conscience and religion] has not been established conclusively in the jurisprudence, it is clear that freedom or religion under the *Charter* has a collective aspect … (para 93)' and thus 'TWU's own s.2(a) right is also engaged' (para 93).

> Perhaps surprisingly, the Court pointed out that:
>
> it is premature to attempt to assess … whether and to what extent there may be an interference with Mr. Volkenant's s. 2(a) *Charter* rights or indeed of any other student who eventually graduates from TWU's law school, should they face some alternative process to be admitted to the Bar of Ontario (para 96).

The Court explained that 'the LSUC's decision would interfere with TWU's religious freedom in a manner that is more than trivial or insubstantial' (para 99) but that 'the jurisprudence establishes that freedom of religion is not absolute and that in any *Charter* analysis the competing rights of other individuals must always be taken into account' (para 100). This noted, the Court found a breach of both parties right to freedom of religion under section 2(a) of the *Charter* (para 101). The Court then maintained that the LSUC had authority to consider values found in the *Charter* and in human rights legislation as under its empowerinbg stature section 4.2 (3) which states, 'The Society has the duty to protect the public interest', which required a broad reading (para 104) in deciding whether to accredit TWU.

Deciding that 'TWU's admission policy, when viewed in conjunction with the *Community Covenant*, discriminates against the LGBTQ+ community on the basis of sexual oroientation contrary to s. 15 of the *Charter* and s. 6 of the HRC [Ontario *Human Rights Code*] (para 115)', and further that the Ontario Benchers had properly balanced the empowering statute's objectives, 'promoting a legal profession based on merit and excluding discriminatory classifications with the limit that denying accreditation would place on … [TWU's] religious freedom' (para 112), the Court concluded:

> the decision to not accredit TWU represents a reasonable balance between TWU's 2(a) right under the *Charter* and the LSUC's statutory objectives. While TWU may find it more difficult to operate its law school absent accreditation by the LSUC, the LSUC's decision does not prevent it from doing so. Instead, the decision denies a public benefit, which the LSUC has been entrusted with bestowing, based on concerns that are entirely in line with the LSUC's pursuit of its statutory objectives (para 143). …I am satisfied that the LSUC's decision not to accredit TWU was indeed a reasonable conclusion. I would therefore uphold the Divisional Court's decision (para 145). Accordingly, I would dismiss the appeal …(para 146).

D Other Law Societies

Other law societies have considered the certification of TWU's law school. In June 2014, the Law Society of New Brunswick Council initially accredited the new school but its membership subsequently directed it to withdraw its approval; however, the motion to rescind approval was neither defeated nor approved.[38] The 'bar associations in Alberta and Saskatchewan have approved accreditation — although Saskatchewan has put its decision on hold, as has Manitoba'.[39] The Law Society of Newfoundland and Labrador put its decision on hold pending litigation in other provinces and a further review of the proposed school by the Federation.[40]

On 16 October 2014, the Law Society of the Northwest Territories Executive defeated a motion to accredit TWU by a 4 to 3 vote.[41] The Law Society of Nunavut has yet to address the accreditation issue.[42] The SCC has been asked to determine the legal issues surrounding the certification of TWU's law school. And, on Thursday, 23 February 2017, the SCC agreed to hear appeals from the Ontario Court of Appeal and the British Columbia Court of Appeal.[43]

E Supreme Court of Canada

On Friday, June 18th, 2018, the Supreme Court of Canada (SCC), handed down its 7 to 2 decision against TWU. In a complex judgment, with four opinions, the Court held that both the Ontario and British Columbia law societies could refuse to accredit the proposed law school, hence preventing its graduates from being accepted for legal articles in those provinces. This has stopped Trinity from opening its Law School because it must have the approval of the Province of British Columbia to do so, and it cannot receive that approval if the Law Society of British Columbia will not accredit Trinity's Law School.

The Court based its judgment on the finding that the law societies had properly balanced the right of their societies to promote equal access to the legal profession, to pursue diversity in the legal profession, to maintain a positive image for the profession in society, and to prevent the risk of significant harm to those who, being in a protected class of persons, breached Trinity's Community Covenant, against the Trinity University community's right to religious freedom.

The opposing law societies' objection to approval of Trinity's proposed law school was based on its Community Convention which all students and professors must sign, prohibiting engagement in sexual acts except within heterosexual marriages. A breach of the Covenant could result in penalties including suspension or expulsion from Trinity. The Court agreed with the law societies that such a restriction was unnecessary for a legal education and that it in effect resulted in raising a discriminatory barrier restricting non-heterosexuals and others from being considered for any of Trinity's sixty law school seats.

Justices Cote and Brown disagreed with the majority. These justices thought that the law societies should only determine the fitness, technically and ethically, of law school graduates to practice law and, as these points were never in question, Trinity should have received accreditation.

In essence, the Court's position was that a private, religiously-based institution offering a university education may impose attendance conditions. However, the Court specified that it could not reasonably expect a statutory body acting in the public good necessarily to accept the credentials granted by the institution where its institutional admittance policy discriminated against a protected class of persons.

IV Part II: The Conflict Between Positive and Negative Liberty

> For many people in a secular society religious freedom is worse than inconsequential. It actually gets in the way. It's the dead hand of the superstitious past reaching out to restrain more important secular values like equality from becoming real equality.[44]

There is a sense of justice delayed to be sure in seeing the injustices perpetrated against the LGBTQ+ members of society finally ameliorated by case law,[45] section 15 of the *Canadian Charter of Rights and Freedoms*,[46] and the many provincial human rights codes. No one can justify denying members of the LGBTQ+ community from having access to restaurants, apartments, or jobs, or in any way being restricted from entry to a post-secondary education on the basis of their sexual orientation. This would indeed be unjust and unacceptable in a free and democratic society. It is also true that requiring applicants to a university to sign a document such as the *Community Covenant*, with all that it implies, might be considered an insult to the personhood to some members of the LGBTQ+ community. Therefore, the requirement is discriminatory as it improperly conflates fairness with injustice.

This noted, if freedom of conscience and freedom of religion are to have meaning, individuals must be allowed to interact in community.[47] Community is the fertile ground within which brothers and sisters of like thought can freely express themselves in a safe space and thereby flourish. As the ancients knew so well, we are human in part because we live within the walls of the city, in community. Consonant with that idea, and true to a liberal democracy where individuals determine the good for themselves, Canadians give people of faith the sanctity of their synagogues, temples, mosques, and churches to meet in fellowship in their communities to freely express themselves according to their beliefs and conscience. Indeed, those holy places assist in the formation of their children's beliefs and provide succor to members of their community in times of trouble and a gathering place in times of celebration.

No one could reasonably say that LGBTQ+ communities should not be protected even though we may vehemently disagree with the beliefs and ideas they express. Rather, we recognise the right of all citizens to freedom of conscience, freedom of religion, and freedom of association as being necessary to a truly free and democratic society. These rights have meaning only when we protect the rights of communities despite strongly disagreeing with them, being offended

by them, and indeed questioning whether anyone, anywhere, should express what we consider odious ideas in public.

It is difficult to say that those with whom we disagree, those who we believe mock us, malign us, attempt to humiliate us, and identify us as inherently disordered human beings, and teach their children that this is so, should still be allowed to express their opinions even in their own communities, or require anyone who wishes to join their communities to agree with those beliefs and to sign a document which implies such things, and lastly, demand that we must provide them the legal means to do so. Yet, this is consonant with the creation of Canada as a 'community of communities'.[48] Freedom has meaning only when we acknowledge that others with whom we fundamentally disagree have the same rights as we do.

In his view of positive and negative liberty, Berlin surely intended to underscore the importance of a pluralistic society where many communities with differing views can function with the approval of the wider society.[49] He suggested that the norm in a free society is a state of tension due to conflicting values. He wrote that:

> the history of political thought has, to a large degree, consisted in a duel between … two great rival conceptions of society. On one side stand the advocates of pluralism and variety and an open market of ideas, an order of things that clashes and the constant need for conciliation, adjustment, balance, an order that is always in a condition of imperfect equilibrium, which is required to be maintained by conscious effort. On the other side are to be found those who believe that this precarious condition is a form of chronic social and personal disease, since health consists in unity, peace … [and] the recognition of only one end or set of non- conflicting ends as being alone rational.[50]

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

> Whatever the principle in terms of which the area of non-interference is to be drawn, whether it is that of natural law or natural rights, or of utility, or the pronouncements of a categorical imperative, or the sanctity of the social contract, or any other concept with which men have sought to clarify and justify their convictions, liberty in this sense means liberty from; absence of interference beyond the shifting, but always recognizable, frontier.[51]

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

> Worthwhile negative liberty, Berlin recognizes, depends not merely upon the existence of options but their number, accessibility, whether and to what extent deliberate human acts have blocked options, and the value of the accessible options, to both the agent and other members of society.[52]

In *Trinity Western University v The Law Society of Upper Canada*, this paper suggests that the Ontario Court found that Canadian society should prefer negative to positive liberty. The apparent rationale may be that having freedoms without being able to exercise them is useless. This is, of

course, true. Even so, Canadians allow difference in society to ensure freedom of conscience and freedom of choice among a plurality of values for all citizens.

This paper argues that the fountainhead of all positive and negative rights is freedom of conscience, which requires community to flourish, just as negative liberty is necessary for positive liberty to have meaning. But what if these rights collide? Which side should prevail? This is the conundrum. Or is it? Humans seek solutions to states of tension, but as above, Berlin said it is precisely living in that state of tension that makes a free society. We do not value monism, as do dictatorships where everyone has to go to the rallies and appear to be unthinkingly supportive or be ostracised — or worse. In a free society, citizens are allowed to be foolish and naïve, as thought so by some, and thus such freedom fosters pluralism.

As citizens, Canadians are engaged in what Chief Justice McLachlin, as she was then, called a 'dialectic of normative commitments' where societal tension is or ought to be the norm.[53] Communities whose values differ from mainstream Canadian society ought to be allowed to act according to their collective conscience, at least insofar as entry into their community should be controlled by the community and not by others. Arguably, this is so even when it in effect shuts out others from the community's benefits. The alternative is to give the state the right to in effect disallow certain communities due to their beliefs; excluding egregious cases such as those whose activities are contrary to the *Criminal Code*.

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

> Religious freedom under the *Charter* must therefore account for the socially embedded nature of religious belief, and the deep linkages between this belief and its manifestation through communal institutions and traditions … To fail to recognize this dimension of religious belief would be to "effectively denigrate those religions in which more emphasis is placed on communal worship or other communal religious activities" … These collective aspects of religious freedom — in this case, the collective manifestation and transmission of Catholic beliefs through a private denominational school [are crucial to]… the collective practice of Catholicism and the transmission of the Catholic faith.[54]

It is true that TWU's law school is not a church per se, but because it is clearly an organ of a church, it qualifies as part of the 'socially embedded nature' of a specific religious belief.[55] The argument that TWU can have its beliefs but that it should not be able to require adherence to them for all those who attend is not reasonable; the commonality of beliefs makes the community. People wishing to enter a faith or communitarian community, which TWU clearly is by its mission statement, do not get to choose their own horizon of beliefs for the community.[56]

On the practical side, one can argue that TWU's discrimination against LGBTQ+ citizens reduces their accessibility to a law school education. Further, no statutorily created public body could or should, directly or indirectly, countenance such discrimination. Indeed, this seems to be a clear case when negative liberty should trump positive liberty. Still, this paper suggests that as the BC legislature approved the statutory creation of the university, sheltered it from claims under the *Human Rights Code*,[57] and acknowledged it as a private university with express values and a particular world view, it is sui generis — unlike a public institution created by the wider society — and its existence rests on its specific mission to a community in Canada.

This paper suggests that section 15 of the *Charter* and the arguments associated with it do not apply to TWU's law school, as the purpose of section 15 cannot be to force religiously based institutions to change their principles in anticipation of future applications. The Ontario

Court could, in effect, close TWU's law school before it opened. Moreover, if it opened, it is disingenuous to say that non-accreditation is directed to the school, not the graduates. Courts often look to the effect of a decision, and in this case the effect of not accrediting TWU's law school would be absurd. It would require TWU law school graduates to pass some type of test, perhaps a values test, to practice in jurisdictions not because of their academic standing or evident ability to article in law, but because of the values of the institution from which they graduated. The alleged sins of the institution would be visited on its graduates.

Surely, this result is neither fair nor just to graduates of TWU's law school: it is a slap in the face of their religious freedom.[58] To hold otherwise is to say that as TWU discriminated against members of the LGTBQ+ community, law societies may punish its graduates and in effect discriminate against them for attending TWU. It seems that such graduates may then have a section 15 *Charter* argument against those law societies. This would be an interesting case of negative liberty versus negative liberty.

It is possible to allow both apparently incommensurate views to coexist within the law, where society recognises and allows for a small community to exist and function with statutory approval notwithstanding its evident challenge to the values of the wider community. In *Loyola High School v Quebec*, the SCC was clear that unlike in *SL v Commission scolaire des Chênes*,[59] which found that the Quebec minister was correct in denying a group of parents the right to withdraw their children from the provincial ethics and religious culture (ERC) program, because it did not breach their religious freedom insofar as Loyola High School had been established for a specific religious (Catholic) purpose. Therefore, it could not teach the ERC program in accord with ministerial direction or a neutral point of view when speaking of Catholicism. To do so would have demonstrably interfered 'with the manner in which the members of an institution formed for the very purpose of transmitting Catholicism, can teach and learn about the Catholic faith. This engages religious freedom protected under s. 2(*a*) of the *Charter*'.[60]

This paper suggests that the same argument applies to TWU's law school because it rests within a university established for a singular purpose, one approved by the BC legislature, a purpose not in conflict with the BC *Human Rights Code*,[61] and thus a purpose in concert with living in a free and democratic society. This is part of what Chief Justice McLachlin called the ongoing 'dialectic of normative commitments' in Canadian society, writing:

> For society to function it has to be able to depend on a general consensus with respect to certain norms. On the other hand, in society there is a value placed on multiculturalism and diversity, which includes a commitment to freedom of religion.[62]

V Conclusion

This paper has argued, in effect, that it is an error to frame the TWU law school case as a zero-sum problem. Given the just claims for equality demanded by those in the LGBTQ+ community; the legal, political, and societal support for that community; and the principle of negative liberty expressed in section 15 of the *Charter* as well as consideration of provincial human rights codes, there are strong arguments against accrediting TWU's law school. Even so, the paper suggests that the resolution of past injustices, including the possible limiting of law school positions in Canada, ought not to ground a claim for provincial statutory bodies to act against TWU.

The authors adopted this position because to do otherwise is contrary to what a free Canadian society should be: a community of communities. Further, not to accredit TWU's law school would be to discriminate against its graduates. It is true that no provincial law society can stop

the opening of the law school, but it is disingenuous to argue that therefore law societies that refuse to accredit its graduates are not harming them. Unintended harm is still harm — not for what graduates have done or for what they may believe, but rather because of a statement of the institution they attended.

Earlier in this paper, we asked if Kymlicka was correct when he suggested that protections 'become illegitimate if, rather than reducing a minority's vulnerability to the power of the larger society, they instead enable a minority to exercise economic or political dominance over some other group'.[63] We do not believe that it is the intention of individuals or law societies who disagree with accrediting TWU's law school to discriminate against those who make up the TWU community or its graduates, but nevertheless it is the effect. Discrimination against that community and its graduates should be anathema to those who have long suffered persecution, marginalization, and discrimination under the law, particularly prior to 1968 and thereafter in the wider society.

Keywords: Trinity Western University, Freedom of Religion, Community Covenant, Negative Freedom, LGBTQ+

Endnotes

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2 Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed), *Liberty* (Oxford University Press, 2002) 166.

3 Will Kymlicka 'Western Political Theory and Ethnic Relations in Eastern Europe' in Will Kymlicka and Magda Opalski (eds), *Can Liberal Pluralism be Exported? Western Political Theory and Ethnic Relations in Eastern Europe* (Oxford University Press, 2001) 13 [28].

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

5 TWU, *University Policies: Community Covenant Agreement — Our Pledge to One Another* (2014) <www.twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>.

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9 Trinity Western University, *Our Mission* (2014) <www.twu.ca/academics/about/mission.html>.

10 Trinity Western University, *Core Values* (2015) <www.twu.ca/about/values/>.

11 *Community Covenant Agreement*, above n 5, art 3.

12 *The Holy Bible, New International Version* (Biblica Inc, 2011).

13 The Federation is the national coordinating body of the 14 law societies that govern lawyers and notaries across the country. One of its functions is to develop national standards of regulation. Each law society in the common law provinces and territories requires applicants for bar admission to hold a Canadian common law degree or its equivalent. The Federation adopted a uniform national requirement for Canadian common law programs in 2010. The Approval Committee is the body responsible for making the determination as to whether a degree complied with those national standards. (*Trinity Western University v Nova Scotia Barristers' Society*, 2015 NSSC 25 [45]).

14 *Community Covenant Agreement*, above n5, art 3.

15 *Trinity Western University v Nova Scotia Barristers' Society,* 2015 NSSC [48].

16 Ibid [49].

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18 *Trinity Western University v Nova Scotia Society,* above n 15, [57].
19 *Human Rights Act*, RSNS 1991, c 12.
20 *Trinity Western U niversity v Nova Scotia Society,* above n 15, [58].
21 Ibid [3, 8].
22 Ibid.
23 *The Nova Scotia Barristers' Society v Trinity Western University,* 2016 NSCA 59.
24 On 27 September 2013, the Benchers of the BCLS unanimously approved an amendment to the Law Society Rules, including the new subrule 4.1, which states that a common law program would be approved for the purposes of establishing adequate academic qualifications if approval was granted by the FLSC under the national requirement, 'unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.' Factum of the Respondent, *Trinity Western University v The Law Society of British Columbia*, [128] <http://www.lawsociety.bc.ca/docs/newsroom/TWU-argument-LSBC.pdf>.
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28 Ibid [173].
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34 Ibid [64].
35 *Trinity Western University v The Law Society of Upper Canada*, 2015 ONSC 4250 [96, 124].
36 *Trinity Western University v The Law Society of Upper Canada*, 2016 ONCA 518.
37 *Syndicat Northcrest v Amselem,* [2004] SCC 47; The Court also noted that *Movement Laique Quebecois v Saguenay (City)*, [2015] SCC 16 reinterated the Court's position.
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44 *Trinity Western University v Nova Scotia Society*, above n 15 [271].

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

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

Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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

48 Dwight Newman, *Community and Collective Rights: A Theoretical Framework for Rights Held by Groups* (Hart Publishing, 2011) 229.

49 See Berlin, above n 2.

50 Isaiah Berlin, *The Sense Of Reality: Studies in Ideas and their History* (Random House, 1997) 155–56.

51 Berlin, above n 2, 173–74.

52 Amy Gutmann, 'Liberty and Pluralism in Pursuit of the Non-Ideal' (1999) 66(4) *Social Research* 1039, 1042.

53 McLachlin, above n 1, 21.

54 *Loyola High v Quebec,* above n 48, [60–61].

55 Ibid [60].

56 Trinity Western University, above n 9.

57 *Human Rights Code*, RSBC 1996, c 210.

58 This is precisely the point made by the SCC in *Trinity Western University v College of Teachers*, 2001 SCC 31 [2001] 1 SCR 772 where the court said:

While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations (p. 811). (See: https://scc-csc.lexum.com/scc-csc/scc-csc/en/1867/1/document.do)

59 *S.L. v Commission scolaire des Chenes*, [2012] SCC 1 SCR 235.

60 *Loyola High v Quebec*, above n 48 [61].

61 *Human Rights Code*, above n 58.

62 McLachlin, above n 1, 21–22.; See also the ethical perspective in a democracy: Gutmann, A. (2004). Identity in Democracy. New Jersey: Princeton University Press, p. 154 where she says,

The ultimate ethical commitments of individuals are special in a way that democratic government should respect when it can do so without undermining its own legitimate authority to make laws. Democracies should treat the consciences of individuals – whether they are religious or secular – as deserving of respect when such respect is compatible with protecting the basic rights of individuals.

63 Kymlicka, above n 3, 28.