Implications for the evangelical community of the Supreme Court decision in the Trinity Western University law school case

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The Supreme Court of Canada's twin judgments in the British Columbia and Ontario appeals in the TWU law school litigation have important implications for many issues of constitutional law which will be commented upon at length by many lawyers. This article, however, is focused on what is on the mind of Canadian Evangelicals themselves: What do these twin court decisions mean for our religious freedom in the years ahead, and how should we live in light of this?

In the interest of brevity and readability, the focus here shall be on the decision of the bare (5/9 Judge) majority judgment.[1]

There is, of course, no precise answer to "what will happen now as a result of this judgment?" Court judgments are focused on their specific facts, and do not speak directly to other situations. All we can do is exegete principles from the judgment which we predict other courts would find applicable in other situations. A great deal depends on the political philosophies of the government actors and judges who will be making those decisions in the years ahead and how they interpret (and where they put the emphasis) on the Supreme Court decision. What I offer below is a range of possible outcomes – informed speculations – starting with a narrow reading of the Supreme Court decision which treats it as exceptional given the unusual facts and statute at issue and of restrictive precedential value, to then looking at the truly worrying consequences of a broader interpretation. What actually happens next depends in part (but only in part) on how the Christian community responds.

I will close with some reflections on our current cultural and legal moment as crystalized by the majority's judgment, and then offer some initial thoughts as to "How then shall we live?" - a topic upon which I, like you, will be looking to our pastoral leaders to give us further guidance in the years ahead.

Numbers in parentheses in what follows are paragraph references to the Supreme Court of Canada decision in the BC Appeal unless otherwise indicated. All emphasis in quotations (bold, etc.) is my own, unless otherwise indicated.

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[1] For those looking for assurance that other Judges of our highest court understood Evangelicals' serious concerns as argued by EFC (click here for EFC's factum) and other interveners, I commend the reasons for judgment of the two dissenting Judges (as well as the portion of the judgment authored by (former) Chief Justice McLachlin where she, unlike the majority, finds that the breach of TWU's religious freedom to be profound (BC decision paras. 129-134), although she ultimately joins the majority in finding that breach to be justified on the particular facts of the case). However, since it is the majority reasons which is 'the law' which will guide lower courts until the Supreme Court's next religious freedom ruling, it is on the majority judgment that this article focuses.

The narrow (and more benign) interpretation

On one level, the result in this case was driven by its particular facts.

Although ultimately coming down against TWU, the majority judgment does use strong general language at paras. 60-75 to describe the *Charter of Rights and Freedoms* protections for freedom of religion in Canada. Paragraph 64 affirms "deep linkages between [religious] belief and its manifestation through communal institutions and traditions" and that "The ability of religious adherents to come together and create cohesive communities of belief and practice is an important aspect of religious freedom under s. 2 (a)." Paragraph 67 affirms the comprehensiveness of religious worldview, stating "Evangelical Christians carry their religious beliefs and values beyond their private lives and into their work, education, and politics." The court acknowledges that TWU has valid religious purposes (paras. 68-69) and that the community covenant is connected to those valid purposes (71-73). The court affirms the statements in the *Same-Sex Marriage Reference* that religious officials could not be compelled to perform a same-sex wedding contrary to their religious beliefs (90).

In light of that, how could the majority find the law societies' refusal to accredit TWU to be justified? The particular facts which the court found to justify the infringement of these religious freedom rights were the combination of two particularities about the case.

The first particularity is that the court considered there to be a disconnect in that **all** TWU students were required to abide by the community covenant (which controls **behaviour**), even though **not** all TWU students were required to be practising Christians (TWU students are not required to sign the statement of faith). Thus, while affirming that "The TWU community has the right to determine the rules of conduct which govern **its members**…. The effect of the mandatory covenant is to restrict the conduct of **others**" (para. 99). A few paragraphs later, "Being required by someone **else's** religious beliefs to behave contrary to one's sexual identity is degrading and disrespectful." (101) "It requires **non-evangelical** LGBTQ students, whom TWU welcomes to its school, to comply with conduct requirements" (96). And again, "The refusal to approve the proposed law school means that members of the TWU religious community are not free to **impose** those religious beliefs on **fellow law students**" (103).

Thus, if TWU admitted only students who affirmed its Statement of Faith and were therefore part of the "religious community" described at para. 103, there would be no "imposition" of Christian conduct on non-Christians, and the concerns of the majority would not arise. One response which Christian organizations may consider taking in response to the Supreme Court decision is therefore to align the group of people which must subscribe to the organization's religious beliefs, with the group which must conduct themselves by its conduct requirements, rather than having the second group be broader than the first. Examples would be to require not only all teachers, but also all students at a religious school, to subscribe to its statement of faith as well as to its conduct code. Ironically, to the extent that religious groups follow this approach, the result of the Supreme Court decision will be to make religious groups more

insular and withdrawn from the wider community (e.g., no non-believers in a religious school), thus decreasing diversity and authentic pluralism in Canada's public life, rather than increasing it.

The second particularity is that the court was dealing with law societies and lawyers. All Judges were previously lawyers, and both the bar and the bench consider themselves to play a special role in society. That was a focus of argument in the case (particularly in the law societies' attempts to distinguish this case from the similar case about TWU's teaching program which it won at the Supreme Court 8:1 in 2001). The majority judgment repeatedly emphasizes the "societal trust enjoyed **by the legal profession**" (Ontario decision para. 21) and the particular statutory mandate of law societies to "uphold and protect the public interest **in the administration of justice**" and "preserving and protecting the rights and freedoms of all persons" (BC decision para. 33). The majority stated that the covenant "effectively imposes inequitable barriers on entry to the school" which would "would negatively impact equitable access to and diversity **within the legal profession** and would harm LGBTQ individuals, and would therefore undermine the public interest **in the administration of justice**" (para. 39; to similar effect: para. 95, final sentence).

The court upheld as "reasonable" the law societies' conclusion, pursuant to their public interest jurisdiction, that the special status of lawyers elevated the importance of mandating equal access to law schools and thus the bar; the court described this as "upholding and maintaining the public interest **in the administration of justice**, which necessarily includes upholding a positive public perception **of the legal profession**" (para. 40). The concurring judgment of Chief Justice McLachlin similarly stressed that "The LSBC operates under a unique statutory mandate – a mandate that imposes a heightened duty to maintain equality and avoid condoning discrimination" (150).

Viewed thus, the majority's judgment does not speak to situations outside of professional regulation in the "public interest," and arguably not even to any professions other than the practice of law, where concerns with access to justice and public confidence in the impartiality and equal application of law loom large.

The combination of these two particularities – the disconnect between belief requirements and conduct requirements at TWU, and the special position of lawyers – together with the majority's view that restricting the covenant was of "minor significance" to religious freedom (essentially finding that it was peripheral to religious belief and essentially optional), led the majority to conclude that "In other circumstances, a more serious limitation may be entitled to a greater weight in the balance and change the outcome. But that is not this case" (para. 104). In other words: Don't assume that the balance will come out the same way in another case. Each case is decided on its particular facts. These were unusual facts in at least two respects which led to an unusual outcome. Other cases which pose a more severe infringement of religious freedom, and/or a state objective of lesser importance, will be unjustified.

The broad (and more dangerous) interpretation

But it has been said that hard facts make bad law. Any lawyer will tell you that legal decisions can and do have precedential impact beyond themselves. That is the nature of the common law. Decisions of the Supreme Court of Canada have a wide shadow. Following are some of the aspects of the reasoning of the majority which pose significant concern for the future of religious freedom in Canada. In the interest of brevity, I will not give the counterpoint to each of these concepts in this article, but pretty much all of them are forcefully rejected in the cogent dissent (paras. 260-342).

Harm: The first concept of significant concern in the majority judgment is its holding that facing "inequitable barriers on entry to the school … would **harm LGBTQ individuals**" (BC para. 39) and that "those who do attend will be at the **risk of significant harm**" (Ontario para. 39; to similar effect see BC para. 96). In a similar vein the majority implies that the covenant is a "**violation of essential human dignity** and freedom" of LGBTQ+ students and **treats them as " 'less worthy'** than others" (BC 95; see also 97).

The risk to religious freedom from these comments is simple: Section 1 of the *Charter of Rights and Freedoms* permits all rights, including religious freedom rights, to be infringed by state action where "demonstrably justified in a free and democratic society." Consistent jurisprudence holds that the prevention of proven, concrete harm can be a valid justification for rights infringements. If a person is harmed by the "inequitable barrier" created by a religiously informed code of conduct to which they cannot or do not wish to subscribe, and if such a "barrier" is a "violation of [their] essential human dignity," then the state can claim a justification to reach in and remove such barriers wherever it finds them: religious grade schools, para-church organizations, even churches, would not (necessarily) be exempt from the reach of the state in its mission to protect people from harm.

Some will go further, and argue that the majority's reason should be read as finding "harm," and "violation of essential human dignity" as inherent in a commitment to traditional sexual ethics, wherever they may be found, not only in institutions, but also within families. We have seen movements in this direction in recent years, such as provincial educational and school board policies empowering (or even mandating) school officials (even in religious schools, in some cases) to facilitate the involvement of students in gay straight alliances without informing their own parents (even if their children come out as LGBTQ+ or profess a different gender identity).

Those committed to parental rights will need to remain vigilant. Earlier this year the *Justice Centre for Constitutional Freedoms* won a constitutional challenge to a decision of the Children's Aid Society of Hamilton to close their foster home due to their refusal to teach their foster children about the Easter Bunny (contrary to their religious beliefs), in which the government representative tried to make an issue of the Baars' (presumed) traditional Christian beliefs about sexual matters, arguing that it made them unsuitable foster parents (see

paras. 172-178). There could be additional pressure on Christian foster and adoptive parents in the years ahead to conform to state ideology as a condition of receiving a placement.

Condonation: The majority stated that the law societies' "overarching statutory duty [was] upholding and maintaining the public interest in the administration of justice, which necessarily includes upholding a **positive public perception** of the legal profession" (40) and that "The public confidence in the administration of justice may be undermined if the LSBC is **seen to** approve a law school that effectively bars many LGBTQ people from attending" (95). Chief Justice McLachlin in her judgment concurring with the majority went so far as to state that for the law society to accredit TWU would be to "**condone** a practice that discriminates [against] … LGBTQ people" (146) and that its mandate includes "seeking to avoid condoning or even **appearing to condone** discrimination" (149).

If the state can justify withholding regulatory approval from an otherwise-qualified applicant on the basis that it could be "seen to approve" of all of the beliefs or conduct of that applicant (be it an individual or an organization), then the state can justify refusing approval to any person or organization which holds minority views which the political majority finds sufficiently repugnant, such as regarding abortion and human sexuality.

Churches and other Christian organizations require numerous types of governmental approvals to legally operate: health inspector approvals for a soup kitchen, government approvals to run a Christian daycare, ministry of education approvals to run a Christian school, CRA approval for charitable status, government approval for various types of government grants (as contested in the current Canada Student Jobs controversy). By the majority's reasoning, a government bureaucrat can refuse such approvals for fear of being "seen to approve" the applicant's "harmful" views and/or practices which are "violation of essential human dignity." Evangelical churches which rent public schools for their services on Sunday mornings might also be at risk.

Taken to its logical conclusion, only those religious institutions which agree with the political majority would be able to obtain required government approvals and permits to operate. Those which refused would need to operate underground and possibly illegally. As in China, there would be two types of churches: legal, state-approved churches, and the underground church.

Charter Values: I will not repeat here the important point made in Bruce Clemenger's summary of the Supreme Court decision regarding the danger of the majority judgment justifying the infringement of the TWU community's rights by reference to the majority Judges' conception of "Charter values." Giving "Charter values" sufficient legal force to justify overriding the fundamental freedoms of a minority reinforces majoritarian control of constitutional interpretation to the detriment of the minorities for whose protection the *Charter* exists.

The imposition of cultural hegemony through the regulatory/welfare state

The kind of pressure exerted on a minority from this misuse of the ever-expanding regulatory apparatus of the state cannot be understated. The more services which government provides,

the more it taxes to fund those services, and the more it regulates every aspect of life, the less space remains for religious communities and institutions to create alternatives.

When government taxes all people, but then redistributes that money only to services delivered in conformity with government ideology in order to prevent 'harm' or 'condonation' of views it finds objectionable (e.g., schools which teach the government position on gender and sexuality, or care homes which offer Medical Aid in Dying), it makes it financially burdensome for religious persons to create their own (for example) schools or care homes, because they need to pay twice for those services: once through their taxes (to support the government's schools to which they cannot in good conscience send their children because of what is taught, or public care homes where they do not feel safe), and again through their tuition/fees to the religious schools or care homes to which they are able to send their children and parents (and those tuition fees will also be higher if government excludes those religious equivalents from eligibility for government grants – again redistributing mandatory taxes only to those service providers which tow the government line). This type of pressure is arguably worse in our generation of dual-income families, high taxation, and high social services, than in previous eras. For single parents, or those of modest means, the 'alternative' of a religious school in keeping with their beliefs may be literally financially impossible, leaving them in fact with no alternative at all.

Even more coercive is outright regulatory prohibition, where government regulates an area (e.g., medical services) and then outright prohibits the provision of services in that section other than in accordance with government fiat. This is what we are seeing with the forced medical referral regime in Ontario. In previous eras where government did not have a monopoly on various sectors, both public and private approaches could co-exist. The ever-expanding reach of the regulatory/welfare state amplifies the danger of government actors using 'condonation' reasoning as a basis for implicitly outlawing religiously-informed alternatives.

Know the signs of the times

Over the last decade in particular, there has been a rising tide of public ridicule and scapegoating of, and discrimination against, orthodox Christians (including Evangelicals) in Canada. It has become, in effect, politically correct in Canada to be anti-Christian (at least with respect to those Christians who are pro-life and hold to the orthodox biblical understanding of the purpose for and morality of sexuality and gender, both of which views have been labelled by political and other leaders as 'harmful' and 'hateful' to women and LGBTQ+ Canadians, respectively). Unfortunately, our highest court has deferred to the political views of the elected representatives of lawyers' self-governing societies that they cannot be seen to approve a "harmful" code of conduct. Hard facts (in the eyes of the court) make bad law. All Judges were previously lawyers, and in this case lawyers were appealing to Judges that there is something so special about their mutual endeavour in the law which permits the state greater latitude in breaching the rights of a minority.

In so doing, the court has permitted the law societies to repeat the very errors of the past which they decry: the imposition of majoritarian morality upon dissenters. TWU, the first non-secular law school in Canada, is prevented from opening in the name of protecting diversity, thereby preserving the status quo which is a monoculture in Canadian legal education which is available only at public universities whose monopolies is thereby preserved.

How, then, shall we live?

There is nothing new under the sun. Those who have proclaimed their allegiance to a God who has greater authority than Caesar have faced ridicule, discrimination, and outright persecution throughout history, from the Old Testament to the present day. Human governments of every era have held some of their beliefs to be more or less non-negotiable and essentially sacred, and have forced them upon dissenters. It appears that some measure of this is now coming our way.

Orthodox Christians in Canada, including Evangelicals, have enjoyed an extended period of religious freedom both because the political majority's views on matters of substance was often closely aligned with our own (our national culture being, more or less, the product of cross-denominational Christian consensus), and also because one of those national values was the Christian virtue of tolerance, which flows out of the Christian belief that all are made in the image of God and therefore possess inherent dignity – a dignity which persists even in the case of deep disagreement.

So while it is indeed deeply disappointing to see our highest court fail to protect our freedom of religion, it is certainly not unprecedented. What is unusual about the situation of Canadian evangelicalism is that it has been so long since we were significantly persecuted that we have come to believe that tolerance of our faith is the norm. In fact, historically speaking, it is the exception. This does not excuse the rising tide of intolerance against Christians – inflicting legal consequences on Christians for obedience to scripture is always unjust, according to a transcendent understanding of justice – but it does remind us that Christ advised us not to be surprised when such times come, and promised to be very much with us when we suffer for his name. Remembering that we are surrounded by a great cloud of witnesses who have faced (historically) and are still facing (globally) far greater persecution, can take the edge off of our shock and fear, and remind us that this broken world will never be able to provide consistent justice and security. We are forced to face the fact that our security and ultimate citizenship is elsewhere. In times when we feel suddenly insecure, we are reminded not to build up for ourselves treasures on Earth, but instead to use worldly wealth in such a way that we will be welcomed into eternal dwellings. We are reminded of the most frequent command in scripture: fear not. God is sovereign.

How, then, shall we live? With the same faithfulness as the faithful throughout history, and throughout the world today. There is much wisdom for us to rediscover from those who have gone before us, and those who suffer alongside us elsewhere in the world. We need to

rediscover this wisdom within our churches, and we need to teach it to our children, who need to be prepared to live in a culture which will tell them that they practice and believe wrong and harmful things, and which may mistreat them as a result.

We need to rediscover the lost practice of lament: grieving the not-rightness of our experience and our world. Through lament we name the truth of what is wrong, and are driven on our knees to the God who hears and responds to our cries; indeed, the God who weeps with us.

We need to learn to face pressure, unfairness, even persecution, with dignity, love, truth, and grace. Christ is the true source of tolerance, because Christ is the true source of dignity and love. May the church in Canada respond with kindness and love when it is wronged. God Himself commands us to pray for those who wish us ill, or do us ill. May we extend forgiveness and thereby testify to the higher Kingdom to which we have pledged allegiance. May they see our love and good deeds, and give credit to our father in heaven.

We need to be steadfast, resisting the temptation to simply give in on this or that issue because the pressure is so high or the cost so great. We will be tempted to believe that if we simply bow the knee here, we will finally be free of the pressure to conform, and nothing more will be demanded of us, but the truth is that Caesar is never satisfied by one concession – he demands your total obedience. The Supreme Court decision is not simply about sexual morality, it is more fundamentally about a state unwilling to accommodate a prophetic minority which publically disputes the truth claims of the majority. That is part of the purpose of the church: prophetic witness. Prophets are often rejected in their own time. Yes – be wise as serpents and innocent as doves, and discern well when to speak. But do not yield. If we yield on this or that issue, the lines will simply be advanced and there will be a new issue about which believers will be told that they must yield. You cannot appease Caesar unless you are willing to accept whatever he commands. Stand firm, then. We cannot control the culture but we can choose to draw the line where we cannot follow.

And for so long as Canada is a democratic country, engage! There is still a strong shared Christian ethic underlying our public life. The case can yet be made for a measure of true pluralism. Other cases present different facts, different judges, different opportunities. We have opportunities to remind the courts and legislatures that the road represented by this judgment is against many of its own deeper principles. Elections present opportunities to influence those will rule over us, and judge us. We have as much right as everyone else to be part of this process, and we should be. There is a great deal of difference between the narrow and broad consequences of the majority judgment, and we all have an opportunity to be part of the public and legal dialogue about which of those paths is charted by government decisions and court judgments in the years ahead. Most Christians throughout history and our world have not had the opportunity to directly influence who ruled over them, and how. We are privileged. It is not ultimately our responsibility to ensure a particular political and legal outcome, of course. Our job is simply to be faithful in our situation. The ultimate results are out of our hands, but in the hands of the one who can be trusted.

Which leads us to one more command: to pray earnestly for those in authority over us, that those whom the Lord has caused or permitted to rule would do so justly, for the sake of all under their authority. This is the universally available tool for believers throughout history and the world to influence their government. May our democratic action be grounded in, and matched by, our first action – in prayer.

Yes, the majority judgment is, potentially, very bad for religious freedom in Canada. Only time will tell how quickly things move, and how bad things get. The tide could yet be reversed. But it appears to me that we would be wise to prepare ourselves to live with more heat than we have become accustomed to. But this does not spell the end of the kingdom of God. God is still sovereign. Let us lament, pray, speak, love, serve, and engage. And over all, let us trust God with our lives, or children, our institutions, and our country.

Additional resources on the TWU law school decision are available at the website of The Evangelical Fellowship of Canada at www.TheEFC.ca/TWULaw.