



NOVA SCOTIA
BARRISTERS' SOCIETY

MEMORANDUM TO COUNCIL

From: Executive Committee

Date: April 16, 2014

Subject: Trinity Western University Proposed School of Law – Options for NSBS

For: **Approval**
Introduction
Information

Recommendation/Motion:

Council has asked the Executive Committee to provide a report with options for Council arising from the public consultation process with respect to the request by Trinity Western University (TWU) for approval of admission of law school graduates from a proposed law school at TWU into the NSBS articling program. This report provides options but does not make a recommendation to Council. Council will require a motion to be made in order to make a decision in this matter, and in that regard several options are proposed at the end of this report.

Executive Summary:

The Federation of Law Societies of Canada (FLSC) Approval Committee has granted preliminary approval of the TWU Law School. A Special Advisory Committee of the FLSC has determined that there is no public interest reason to exclude future graduates of the program from law society bar admission programs as long as the program meets the National Requirement, and has noted that each Law Society must make its own decision about the admission of law school graduates. The Nova Scotia Barristers Society (NSBS) held a public consultation that provided for written and oral submissions from members of the public, the profession, students, clergy, and representatives from TWU. This report identifies three (3) options available to Council:

- A – Accept the FLSC Approval Committee conclusion and approve the TWU Law School
- B – Decline to approve TWU Law School
- C – Conditionally approve TWU Law School

The Report also provides background and analysis on certain matters raised during the consultation.

Analysis:

On January 24, 2014, Council assigned to the Executive Committee the tasks of receiving submissions and identifying options with regard to the request of Trinity Western University (TWU) for the approval of its law degree. Since then, the Society has solicited public input on this issue and published all of that input on its website. Two public meetings of the Executive Committee were held, on February 13 and March 4, 2014, where submissions were received both favouring and opposing the Society's approval of a TWU law degree. Its president, met with the Executive Committee on March 4 to provide its perspective.

Trinity Western University proposes to establish a new Law School and as such requires approval to allow future graduates of the program to be admitted to the NSBS bar admission program. As noted by TWU, "the approval decision of the Federation is subject to the applicable jurisdiction of each of the provincial law societies so that graduates of the TWU law school may undertake articles in each applicable province".¹

The FLSC Approval Committee has explained the approval process and the responsibility of the provincial and territorial bar societies:

1. The Canadian Common Law Program Approval Committee (the "Approval Committee") is responsible for determining whether existing and proposed common law programs meet the national requirement that establishes the knowledge and skills that all applicants for entry to the admission programs of the law societies in the Canadian common law jurisdictions must possess.
2. The Approval Committee has reviewed the application by Trinity Western University ("TWU") for approval of its proposed law school program and has determined that, subject to the concerns and comments described below [in the Approval Committee Report], if implemented as proposed, the program will meet the national requirement. The Approval Committee's detailed analysis is set out in the chart attached as Appendix "A".
3. The Approval Committee's decision is only one step in the process. Pursuant to the British Columbia *Degree Authorization Act* the proposed program also must be approved by the British Columbia Minister of Advanced Education.
4. The Approval Committee's report must also be considered by the law societies. Although, in the interests of consistency, the law societies mandated the Approval Committee to determine whether law degree programs meet the national requirement, the law societies continue to have the statutory authority to set policies for admission to the legal profession in their respective jurisdictions.²

In Nova Scotia Regulation 3.1(b)(1)³ is applicable. This Regulation was adopted by Council in 2012 when it amended the previous regulation that defined a 'law degree' as: "A bachelor's degree, or an equivalent

¹ January 6, 2014 Letter from President Kuhn to the NSBS

² Report of the FLSC Approval Committee at page 1

³ 3.1 In this Part

(a) "Committee" means the Credentials Committee;

(b) "law degree" means

degree, from a Canadian law school, as determined by the Credentials Committee.” The amendment was intended to align the Society with the work of the Federation so that applications for new law schools would be considered centrally. Given the nature of the considerations involved and the complexity of a thorough review of a proposed new faculty of law, the regulation change was intended to allow the Federation to undertake that work once and to advise the law societies of the outcome of that analysis through a recommendation for approval (with or without qualifications) of a new law school.

Regulation 3.1(b)(1) is not a delegation of Council’s decision-making authority. Prior to the change to the regulation in 2012, the Credentials Committee was responsible for the pre-work and advice to Council, and the final decision-making authority rested with Council. After the change, the Federation is responsible for the pre-work and advice to the Society, and the final decision-making authority rests with Council.

Section 4 of the *Legal Profession Act* requires the Society to “establish standards for the qualification of those seeking the privilege of membership in the Society”. That responsibility is assigned to Council, which may make regulations regarding “requirements to be met by members”⁴ In making these Regulations, Council has authority to delegate to a committee or to the Executive Director but not to any body outside the Society.

Therefore as Council has defined a law degree to be “Bachelors of Law or a juris doctor from a faculty of common law at a Canadian university approved by the Federation . . .” this constitutes a qualification or requirement that must be met by a person seeking membership of the Society. In the context of the matter before Council that membership is as an articled clerk through admission to the Society’s articling program.

Based on this analysis, it is for Council to receive the recommendation from the Federation, which it has done, and to determine, given its ultimate responsibility for setting standards and qualifications for admission, whether to accept or reject the Federation’s conclusion. Based on the broad language of Section 4 of the *Act*, to “uphold and protect the public interest in the practice of law”, Council has jurisdiction to accept or reject the recommendation of the Federation’s Approval Committee and to set standards it determines appropriate for those seeking membership by the Society. Council’s decision may require further action, including amendments to the Regulations. The options that are set out in this report are premised on these conclusions.

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- i) a bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degree, or an equivalent qualification; or
 - ii) a degree in civil law, if the holder of the degree has passed a comprehensive examination in common law or has successfully completed a common law conversion course approved by the Credentials Committee, or
 - iii) a Certificate of Qualification issued by the National Committee on Accreditation of the Federation of Law Societies of Canada;

⁴ Section 5(8)(b)

MULTIPLE CONTEXTS FOR CONSIDERATION OF THE TWU PROPOSAL

In considering the options outlined below there are multiple contexts that Council members must keep in mind. While none of them may be determinative of the ultimate question Council must address, they are relevant to Council's deliberations.

The Society's unique commitment to equity in the legal profession

A seminal event in the history of the justice system in Nova Scotia, as well as the Society, was the Royal Commission on the Wrongful Conviction of Donald Marshall Jr. which focused significant attention on the legacy of racism and discrimination in the Nova Scotia justice system.

The Marshall Commission found that racist and discriminatory attitudes existed at every level within the province's justice system, from lawyers to judges to court staff and that discrimination led to the wrongful conviction of Donald Marshall Jr. and ultimately took away eleven years of his life.

These findings deeply impacted Nova Scotia's legal community and significant changes came about as a result of them. In particular the Society clearly acknowledged the existence of discrimination in the legal profession and made concrete commitments to refuse to tolerate discrimination in the future.

In a 1991 Report to Council on the Marshall Commission, F. B. Wickwire QC, President of the Society, stated, "Our commitment as the governing body of the legal profession in Nova Scotia is firm; to do all that we can to eliminate discrimination in the justice system."⁵ This sentiment shaped future decisions to support the creation of equity committees, the Equity Office, and many others relating to equality and discrimination.

In the years following the Marshall Commission, the Society's commitment to addressing discrimination was far reaching and touched on every aspect of the legal system from legal education to access to justice. Through the Equity Office and equity committees the Society continues to recognize, support, and work towards accomplishing many of the Marshall Commission recommendations including support of the Indigenous Black and Mi'kmaq Initiative, advocating for a diverse judiciary, encouraging sensitivity in understanding the concerns of equity-seeking law students and lawyers, increasing awareness of systemic discrimination among lawyers (through cultural competence training), and working closely with diverse communities on access to justice challenges and issues.

It is because of the Marshall Commission that we in Nova Scotia have a unique and critical perspective from which to understand the damage that discrimination can do to public faith in the justice system and to the administration of justice as a whole.

A direct line can be drawn from the Society's initial response to Marshall and the establishment of the Race Relations Committee⁶ (1994), the establishment of the Equity Office (1997), the inclusion of "public interest" in the first Society "Objects Clause" and eventually in the *Legal Profession Act* (1997 and 2004), the adoption of anti-discrimination language in the *Legal Ethics Handbook*, and then in the Code of Professional Conduct

⁵ F. B. Wickwire QC "The Nova Scotia Barristers' Society review of the conduct of its members criticized in the Report of the Royal Commission on Donald Marshall Jr. 1991.

⁶ Now the Racial Equity Committee

(1996 and 2011), the inclusion of language in the *Legal Profession Act* requiring the Society to work to improve the administration of justice and to consult with various communities reflecting the “the economic, ethnic, racial, sexual, and linguistic diversity of the province” (2004), the annual co-sponsoring of the Pride Reception (initiated in 2003) and the adoption of improving access to justice and the emphasis on equity-seeking groups in the Society’s Strategic Framework (2013). This list of initiatives reflects how the Society has demonstrated its commitment to equity and is inextricably linked to the Society’s role as a public interest regulator of the legal profession.

It has been for more than two decades that the Society has shone a light on issues of discrimination, has committed itself to doing what it can to eliminate discrimination in all aspects of the justice system, and has made access to all aspects of that system and the legal profession for equity-seeking groups a core mandate. The Society recognizes that more remains to be done. Thus it maintains its dedication of leadership and resources in this area.

It is in light of this history of commitment to equity that Council must undertake its analysis of the public interest issues that are raised by the TWU application and Council’s consideration of how it fulfils its obligations to “establish standards for the qualification of those seeking the privilege of membership in the Society” (LPA Section 4).

Council Authority – Membership

The purpose of the Society is set out in Legal Profession Act, SNS 2004, c 2

4 (1) The purpose of the Society is to uphold and protect the public interest in the practice of law.

(2) In pursuing its purpose, the Society shall (a) establish standards for the qualifications of those seeking the privilege of membership in the Society;

(b) establish standards for the professional responsibility and competence of members in the Society;

(c) regulate the practice of law in the Province; and

(d) seek to improve the administration of justice in the Province by

(i) regularly consulting with organizations and communities in the Province having an interest in the Society’s purpose, including, but not limited to, organizations and communities reflecting the economic, ethnic, racial, sexual and linguistic diversity of the Province, and

(ii) engaging in such other relevant activities as approved by the Council.

Council is the governing body of the Society⁷. It may take any action 'consistent with the Act' that it considers necessary⁸ and may make regulations to pursue the Society's purpose⁹. Council may take any action consistent with the Act by resolution¹⁰. In each instance where Council takes action it must do so in a manner that is consistent with the Society's purpose and in particular the requirement "to uphold and protect the public interest in the practice of law."

Key to the matter before Council is s.4(2)(a) which states:

In pursuing its purpose, the Society shall (a) establish standards for the qualification of those seeking the privilege of membership in the Society.

Thus Council, in pursuing the Society's purpose, may establish standards and make regulations.

Section 5 of the Act specifies that both lawyers and articled clerks are 'members of the Society.' In s.5 (2) it provides that 'no person may become a member ... unless the Council is satisfied that the person meets the requirements established by the regulations.'

Council may 'authorize' the Executive Director or a committee to carry out its power or jurisdiction under the Act (s.9 (1) and 12(1)).

Thus when dealing with a person who seeks to become a member of the Society, Council may set standards and may delegate the setting of standards and the implementation or application of standards to particular or individual applications to the Executive Director or a committee.

Council Authority – Law Schools

The Act and regulations are silent with regard to the specific matter of accreditation or approval of a new faculty of law, other than through the general provisions referred to above with regard to 'establishing standards for....membership' and the provisions of reg. 3.1(b) which defines a 'law degree' as:

A bachelor of laws degree or a juris doctor degree from a faculty of common law at a Canadian university approved by the Federation of Law Societies of Canada for the granting of such degrees, or an equivalent qualification.

Also relevant is reg. 3.2 which states:

The Executive Director may, in exceptional circumstances and when it is in the public interest to do so waive one or more of the requirements for admission.

⁷ *Legal Profession Act*, s.6 (1).

⁸ s.6 (2)

⁹ s.6 (4).

¹⁰ s. 6(3).

Council Policies – Govern Council Decision Making

In addition to the Act and Regulations, Council decision making is governed and circumscribed by its own policies about its approach to its work in all matters. The relevant council policies include:

CP1 – Council’s Governance Responsibilities

1. Council members protect the public interest:

1.3 By striving for excellence in regulation and the highest levels of ethical and competence standards from members, Council ensures that the Society carries out its various functions in the public interest.

1.7 Council members, in fulfilling each of their governance responsibilities, must demonstrate leadership in both their Council and committee activities, and recognize, at all times, the paramountcy of the public interest.

CP 2 – Council Roles

2.5 To seek to improve the administration of justice, Council shall:

2.5.1 identify and then seek to eliminate barriers to entry to the legal profession from members of historically disadvantaged communities;

2.5.2 encourage and facilitate retention of lawyers from historically disadvantaged communities; and

2.5.3 encourage and facilitate access to leadership roles of the profession and the Society from members of historically disadvantaged communities.

3.0 Council Values

Diversity - We promote equality and encourage the profession to embrace the value of diversity. We are inclusive and supportive of women and men from diverse backgrounds, cultures, practice environments and life experiences.

CP5 - Code of Conduct

5.8 Council is committed to effective decision making....

5.8.1 Council will endeavour to make decisions by consensus. A consensus decision is one that is acceptable to all, provided that a variety of points of view have been reasonably considered. Where this is not possible, decisions will be made by majority vote unless otherwise required.

5.8.2 Council will encourage and provide an atmosphere conducive to the respectful expression of different viewpoints and perspectives, since a broad range of ideas increases the potential for more informed and effective decisions. Members shall respect each member’s contribution to the discussion and encourage each other to present their views.

5.8.3 Council members have an obligation to ensure that their opinions and views are expressed appropriately.

5.8.4 Council members have an obligation not to undermine the decisions of Council. However, Council members may, in good faith, challenge or question a decision of Council by use of appropriate processes designed to have the decision reconsidered or challenged in an appropriate forum.

5.8.5 Council members shall refrain from critically discussing in a public forum the actions or submissions of specific Council members.

Case Law

The FLSC Special Advisory Committee concluded that there is no public interest reason to exclude future graduates of TWU from law societies' bar admission programs. This conclusion was based on its analysis of written submissions, consideration of the Supreme Court of Canada case, Trinity Western University v. The British Columbia College of Teachers, 2001 SCC 31, and legal advice.

The Special Advisory Committee specifically rejected reliance on human rights legislation in jurisdictions other than British Columbia. The Committee's reasoning on this point is set out in paragraph 39 which provides:

TWU has been recognized by the government of British Columbia as a degree granting institution. The issue is not whether TWU could operate in the same manner in another jurisdiction, but whether it is operating lawfully in the jurisdiction in which it is located and whether its policies are consistent with the values expressed in the Charter and human rights legislation. The Supreme Court of Canada concluded in the BCCT case that the Community Standards document, a forerunner to the Community Covenant that was more explicit in its prohibition of homosexual behavior than the current Community Covenant, **was not contrary to human rights values given the need to balance quality rights and freedom of religion. The Special Advisory Committee is not persuaded to reach a different conclusion in relation to TWU's proposed law school program.** (Emphasis added)

The Special Advisory Committee drew support for this conclusion from a legal opinion of John Laskin, a senior lawyer in Toronto, which advised "that if approval of the TWU proposal were refused on the basis of concerns about its discriminatory practices and the decision were challenged, the *British Columbia College of Teachers* decision would govern the result."

In *British Columbia College of Teachers*, the College denied an application from TWU for certification of its teacher training program. Previously, the College had certified a teacher training program that included four years of study at Trinity Western University followed by one year at Simon Fraser University. The Simon Fraser University Teacher Training Program had no instruction in any way related to the discriminatory practices of TWU.

The decision of the Supreme Court of Canada in the *British Columbia College of Teachers'* case does not address the issues that would have to be considered determining whether the policies and practices of Trinity Western University are consistent with the prohibitions on discrimination in the *Nova Scotia Human Rights Act*. The Court seems to accept that those policies and practices were inconsistent with similar prohibitions in the British Columbia Human Rights Code; however, those practices were not unlawful because Trinity Western University was exempted from the application of those provisions. A key part of the reasoning of the Court can be found in the following passage at paragraph 35 of the decision:

35 Another part of that context is the *Human Rights Act*, S.B.C. 1984, c. 22, referred to by the Court of Appeal and the respondents (now the *Human Rights Code*), which provides, in s. 19 (now s. 41), that a religious institution is not considered to breach the Act where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully

participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a “natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it”. In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers.

The British Columbia Human Rights Code governs the operation of Trinity Western University, pursuant to which TWU appears to be exempt from the prohibition against discrimination on the basis of sexual orientation.

The approach to the balancing of Charter rights and values taken by the Supreme Court of Canada in *British Columbia College of Teachers* must be considered by Council. As recently as 2013, the Supreme Court re-emphasized that it does not accept a hierarchy of rights and values. Rather, the Court seeks to balance competing Charter rights and values including equality rights and values. The Court in *British Columbia College of Teachers* recognized that students who chose to attend Trinity Western University based on their religious beliefs were exercising their freedom of religion. At paragraph 35 of the decision the Court states as follows:

Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society.

The balancing exercise requires Council to balance the values underlying freedom of religion with the competing Charter rights and values which embody a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.

The Executive Committee received submissions that suggest the institutionalized discrimination practices by TWU are of sufficient importance to override or limit the freedom of religion of future graduates. Any limitation on freedom of religion and any specific amendment to the Regulations must be rationally connected and proportionate to the objective of the limitation, and minimally impair the rights of those future graduates. Those issues were not considered in *British Columbia College of Teachers*, and they represent a further challenging step facing the Society if the balancing exercise leads to the conclusion that the freedom of religion of future graduates of TWU would be infringed by refusing to recognize the TWU law degree.

Nova Scotia Human Rights Act

The Society’s mandate to uphold the public interest in the practice of law in Nova Scotia requires us to take into account the standards of non-discrimination in Nova Scotia. Council should consider the norms of non-discrimination which are embodied in the *Nova Scotia Human Rights Act*. Section 5 of the *Nova Scotia Human Rights Act* prohibits discrimination in respect of the provision or access to services on account of

sexual orientation, gender identity, gender expression and family status. Section 4 of the Act defines discrimination as follows:

Meaning of discrimination

4. For the purpose of this Act, a person discriminates where the person makes a distinction, whether intentional or not, based on a characteristic, or perceived characteristic, referred to in clauses (h) to (v) of subsection (1) of Section 5 that has the effect of imposing burdens, obligations or disadvantages on an individual or a class of individuals not imposed upon others or which withholds or limits access to opportunities, benefits and advantages available to other individuals or classes of individuals in society. 1991, c. 12, s. 1.

The *Human Rights Act* provides that the prohibitions in Section 5 do not apply in certain circumstances related to discrimination in employment and volunteer service. Section 6 provides in part:

Exceptions

6. Subsection (1) of Section 5 does not apply

(c) in respect of employment, to

(ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or

(iii) employees engaged by an exclusively religious organization to perform religious duties;

(d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;

It has not really been disputed that requiring students to adhere to the TWU Community Covenant discriminates against individuals on account of sexual orientation, gender identity and gender expression and marital status. TWU submits this to be lawful discrimination.¹¹

The Community Covenant requires students to “abstain from ... sexual intimacy that violates the sacredness of marriage between a man and a woman” and provides that TWU may “discipline, dismiss or refuse a student’s re-admission to the University” for failure to comply with the Community Covenant. These requirements impose burdens on lesbian, gay, bi-sexual and transgender individuals not imposed on married, heterosexual individuals.

Likewise, the admissions policies of TWU requiring agreement to the Community Covenant withhold or limit access to the opportunities of lesbian, gay, bi-sexual and transgender individuals to study law at TWU. As noted by the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*

¹¹ See Transcript, March 4, 2014, President Kuhn, pp105 ff.

“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 considerable personal cost.”

The Community Covenant prohibits conduct which is inseparable from the identity of lesbian, gay, bi-sexual and transgender individuals. TWU argues that its requirement to adhere to the Community Covenant does not exclude or denigrate lesbian, gay, bi-sexual and transgender individuals but only exclude sexual intimacy between them¹². This approach was rejected by the Supreme Court of Canada in its recent decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 in the following passage at paragraphs 122 – 124:

[122] I agree that sexual orientation and sexual behaviour can be differentiated for certain purposes. However, in instances where hate speech is directed toward behaviour in an effort to mask the true target, the vulnerable group, and this distinction should not serve to avoid s. 14(1)(b). One such instance is where the expression does not denigrate certain sexual conduct in and of itself, but only when it is carried out by same-sex partners. Another is when hate speech is directed at behaviour that is integral to and inseparable from the identity of the group. - 74 -

[123] L'Heureux-Dubé J. in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, in dissent (though not on this point), emphasized this linkage, at para. 69:

I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the “sexual sin” of “homosexual behaviour” from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. . . . The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as per Madam Justice Rowles: “Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person” (para. 228). She added that “the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people” (para. 230). This is not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

See also *Egan v. Canada*, [1995] 2 S.C.R. 513, at para. 175, and *Owens (C.A.)*, at para. 82.

[124] Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the

¹² See Transcript March 4, 2014, President Kuhn, pp 115 ff and 118, 119

group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. Therefore, a prohibition is not overbroad for capturing expression of this nature.

By imposing burdens on lesbian, gay, bi-sexual and transgender individuals not imposed upon others and by limiting access by such individuals to the opportunity of to study law at TWU, the requirement to sign the Community Covenant, when seen through the lens of the *Nova Scotia Human Rights Act*, would be *prima face* discriminatory in Nova Scotia. This is the position of the Nova Scotia Human Rights Commission.

The Community Covenant also discriminates on the basis of marital status contrary to Section 5(1)(a)(s) of the *Nova Scotia Human Rights Act*. Marital status is defined in the *Human Rights Act* as “the status of being single, engaged to be married, married, separated, divorced, widowed or two people living in the same household as if they were married.” The Community Covenant has the effect of imposing burdens on unmarried individuals that are not imposed on a married man and woman.

None of the exceptions in Section 5 of the *Human Rights Act* dealing with religious organizations apply to a university program. In its submissions to the Society, TWU argues that its program would nonetheless fall within an exception¹³. Section 5 of the *Human Rights Act* would not apply because of the exception on Section 6(f) whereby “a denial, refusal or other form of alleged discrimination is ... **a reasonable limit imposed by laws** can be demonstrably justified in democratic society.”(Emphasis added). Whatever its merit, the Community Covenant is “not prescribed by law” and so this exception does not apply.

Therefore the TWU Community Covenant measured against the prohibitions of discrimination of the *Nova Scotia Human Rights Act* would not be lawful discrimination in this province. This raises the issue of whether Council, in pursuing its mandate to regulate the practice of law in Nova Scotia in the public interest, should approve a law program from a university which engages in institutionalized discrimination which would be prohibited in Nova Scotia.

National Standards

One of the most direct results of a regime that promotes a mobile profession has been the development of national standards. In addition to the standards set by the National Mobility Agreement (NMA), through the Federation, the Society is actively participating in the establishment and adoption of national discipline and national admission standards. They are both premised on the principle that regulation of the legal profession should be as similar as possible in all jurisdictions. As the regulators design programs and make key determinations about individuals, through both credentialing and disciplinary processes, the outcomes of those processes should be, as near as possible, the same regardless of where the determination is made.

In adopting the national competency profile for admission to the bar, the Society signaled its endorsement of this concept and its commitment to it. In working to develop national discipline standards, in the area where we have the greatest public profile and scrutiny of our work, again the Society has demonstrated its commitment to uniformity of approach of regulation.

¹³ Written submissions of TWU, February 28, 2014, pp 32ff

In considering the issue of a new law school at TWU, Council should be aware of the decisions of other law societies, even though it is not bound by them, because of a long-demonstrated commitment to the establishment of similar, if not uniform, national regulatory standards. The law societies in Alberta, Saskatchewan and Yukon have accepted the Federation's recommendations and will not be considering the matter further at this time. Thus graduates of a law school at TWU would be able to article in each of those jurisdictions.

On April 11, 2014, the Benchers of the Law Society of British Columbia also accepted the Federation's recommendations and approved the TWU law school.

A decision by the Law Society of Upper Canada regarding TWU is being made on April 24, 2014 and will be available to Council.

The Law Society of New Brunswick has commenced a public consultation process which will result in a public meeting and a decision by its Council in June. The other law societies have yet to make a definitive decision and report that they are awaiting completion of current processes.

Mobility and a TWU Graduate Applicant

The Society is a signatory to the *National Mobility Agreement* (NMA) and is subject to the provisions of the Agreement on Internal Trade (AIT) which has been enacted in legislation in Nova Scotia. In leading development of the *National Mobility* regime and indeed being amongst the first to adopt it, the Society recognizes that because clients and their work frequently cross provincial borders, there was a public interest in facilitating clients' choice of counsel, in promoting multi-jurisdictional practices and encouraging competition across the profession. Mobility, under both the AIT and the NMA, creates a high level of interdependence among Canadian law societies, since a lawyer licensed in one jurisdiction may practice anywhere in Canada and may relocate anywhere with minimal regulatory impediments.

If TWU establishes a law school, given that other law societies have already adopted the Federation's recommendations for approval, its graduates, once becoming lawyers, will be entitled to mobility and therefore to practise temporarily or to relocate to Nova Scotia. This specific question, however, is not before the Council at this time – the TWU proposal and the decision of Council relates only to approval of the law school itself.

A resolution that does not approve TWU, should that be Council's decision, will likely be premised on Council's conclusion that TWU's Community Covenant amounts to institutionalized discrimination against individuals on account of their sexual orientation and other characteristics protected by Nova Scotia human rights legislation. The Society puts a high priority on anti-discrimination generally. The Code of Professional Conduct applicable to all members includes the obligation not to discriminate.

Just as there is no LGBTQ individual who has attempted to gain entry to a TWU law school and now claims evidence of discrimination on the basis of a violation of equality rights, there is no TWU law school graduate who has attempted to gain admission to the Society's Bar Admission Program and who claims evidence of discrimination on the basis of a violation of religious freedom. If the Society does not approve TWU, it is not

necessary at this time to reach conclusions or draft regulatory solutions about situations which, by necessity, require a factual foundation that cannot yet exist.

If the Society were to deny approval of the TWU law school and TWU establishes its law school on the basis of approvals from other law societies and from the government of British Columbia, a future TWU law graduate may seek admission to the Society's Bar Admission Program. Assuming such a student can demonstrate that the refusal of the Society to recognize the TWU law school violates that student's right to religious freedom, the Society will need to balance the competing rights that are at play. The Society's treatment of such a future law student must meet the *Oakes*¹⁴ test relating to s.1 of the Charter, and the Society may need to take steps to accommodate the graduate applicants. That is, the Society's treatment of such a future TWU law school graduate must be proportionate to the pressing and substantial objective of anti-discrimination, be rationally connected, and minimally impair the Charter right to religious freedom. If Council decides not to approve the TWU law school, Council will be required to consider and adopt a Regulation or resolution with respect to such an applicant. This decision can be made in future, but in any event no later than by the time of the first such applicant.

There will likely be, in that future situation, a range of measures that could be taken by the Society to meet its objectives of ensuring respect for equality rights and that applicants for articling are adequately prepared in matters of human rights and discrimination. Within this range of possible measures, a minimal impairment analysis requires consideration of whether the less onerous alternatives would achieve the Society's objective in a real and substantial manner.

Each of the resolutions presented below contemplate that further regulatory action may be required by the Society to fully implement Council's decision. However, at this stage it is the view of the Executive Committee that it is not necessary for Council to address the balancing of interests that an *Oakes* test analysis would require. Both the Executive Committee and the Executive Director agree that Council can await the adoption of the initial policy decision by Council about the TWU law school, which will determine what regulatory approach will be undertaken. For example, if Council approves the TWU law school, these questions about the treatment of future graduates will become moot. If Council declines to approve the TWU law school, the questions about the treatment of future graduates in a manner that complies with the *Oakes* test will be relevant.

Therefore, it is important for Council to understand that in the event of a denial of the TWU law school by Council, future graduates of such a law school will likely be able to article and/or practice law in this province, by virtue of the Society's obligation to respect their individual right to freedom of religion and by virtue of National Mobility and that additional specific decisions will need to come back to Council in this regard.

¹⁴ *R. v. Oakes*, [1986] 1 SCR 103 (SCC)

SUBMISSIONS TO THE SOCIETY

The Society received 168 submissions throughout its process of considering this matter. They have all been posted on the Society's website. All have been read and reviewed. To assist in understanding the nature of the issues discussed, the Executive Committee requested Society staff to develop a summary of the submissions organized by theme. Not every submission is addressed or identified, but we believe all significant legal and policy issues have been covered by the Summary that has been provided to Council in a separate document, which is also a public document.

THREE OPTIONS

With the above as background, the Executive Committee believes that Council has three options available. Each option is presented as if it is the correct solution. That means that there are inconsistencies as between the options, which reflect the nature of the competing or opposing submissions that were provided during the consultations. Council members can consider the submissions, the legal context and the public interest arguments, and be in a position to choose a preferred option.

None of the options are adopted by Executive Committee as a recommendation. Members of the Executive Committee will be free to consider and make an independent decision with respect to the outcome of this matter, like any other member of Council.

The options are:

- A – Accept the FLSC Approval Committee conclusion and approve the TWU Law School
- B – Decline to approve TWU Law School
- C – Conditionally approve TWU Law School

Each option is supported by a proposed motion that could be put on the table at the April Council meeting should a member of Council wish to support the option.

Option A – Accept the FLSC Approval Committee conclusion and approve the TWU Law School

Proponents of Option A accept the analysis and conclusions of the Federation committees, and no further action needs to be taken. The Federation processes were lengthy and led by capable individuals including legal regulators, with advice from legal academics and written input from stakeholders. TWU and its students have a right to freedom of religion, including declaring religious beliefs and requiring students to comply with a code of conduct, which is no different than many schools in North America that graduate students who become lawyers that practice in Nova Scotia and elsewhere. The Society should act in the same manner as some law societies, such as the Law Society of Alberta, and approve the law school, which is in both the public interest and in the interest of national regulation.

TWU is a private religious university that has no obligation to balance competing Charter rights. The Community Covenant's provisions relating to sexual conduct outside of a marriage between a man and

a woman constitutes lawful discrimination (if it is discriminatory at all). The Supreme Court of Canada Decision in *BCCCT* is determinative of the law as it stands today in Canada. There is no reason to conclude the law would change, and in any event it is not the role of the NSBS to be the agent of such change by becoming embroiled in litigation.

Also to be considered is the National Mobility Agreement to which the Society is a signatory along with all of the other provincial law societies. The National Mobility Agreement has resulted in national professional mobility and admissions standards under the auspices of the FLSC which the Nova Scotia Barristers' Society has endorsed. It is on that basis that the NSBS must respect the fact that the admission of any TWU graduate to any provincial law society, such as the Law Society of Alberta or the Law Society of British Columbia, would automatically entitle that graduate to admission in Nova Scotia. The statutory and public policy differences which may exist between Nova Scotia and British Columbia with respect to human rights recognitions, protections and exemptions are not relevant to that assessment. As such, it is not appropriate, and would be futile in any event, to try to establish a different standard for admission of TWU graduates to the bar in Nova Scotia than exists in any of the other provinces. This analysis would apply equally to applicants seeking to article in Nova Scotia and to lawyers admitted in other Canadian provinces seeking admission here.

The Federation itself has recognized that there needs to be further work in considering whether there should be a non-discrimination provision in the requirements for law school approval. This was specifically identified in the Report of the Special Advisory Committee and was recently the matter of discussion by the Council of the Federation and a resolution at the mid-winter meeting of the Canadian Bar Association. Society participation in such ongoing discussions is assumed.

Proposed Motion for Option A:

Council accepts the report of the Federation Approval Committee, that, subject to the concerns and comments noted, the TWU program will meet the national requirement and the Report of the Special Advisory Committee and thereby approves the proposed law school at Trinity Western University.

Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

Option B – Decline to approve TWU Law School

Proponents of Option B cannot accept that a Canadian Law School could be allowed to have discriminatory admissions and hiring practices that fundamentally discriminate against LGBT individuals and others. The Society's Values and Strategic Framework call upon us to reject discrimination, to stand up for diversity and

to advocate for equity. It must be determined that it is not in the public interest to allow graduates of a law school that discriminates to be enrolled in the Society's Bar Admission Program

Rejection of the TWU law school is the right option if we mean what we say about matters of equity. The Covenant, as is noted above, when viewed through the Nova Scotian legal lens is discriminatory and it is not saved by any exceptions in the *Human Rights Act*. It perpetuates negative treatment of individuals on the basis of sexual orientation and family status and therefore contravenes the public interest.

The Decision in *BCCT* can be distinguished given the different context in which this matter is being considered and given the significant developments in the law, including the recognition of same sex marriage in Canada. Freedom of religion cannot be used as a sword to justify discrimination.

Supporters of this option may also believe that the Mission of TWU as reflected in the Community Covenant raises concerns about the ability of the school to teach legal ethics and public law as they relate to the fundamental concepts of non-discrimination which underlie Canadian constitutional and human rights norms.

Considering the Community Covenant, the Society's purpose, the public interest, and the requirement to set standards for those seeking the privilege of membership, it can be concluded that the TWU Law School cannot be approved by the Society.

Proposed Motion for Option B:

Even though the Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted, the TWU program will meet the national requirements, Council resolves that the Community Covenant is discriminatory and therefore does not approve the proposed law school at Trinity Western University.

Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

Option C – Conditionally Approve TWU Law School

Proponents of Option C align with the perspective of various submissions suggesting the NSBS should appropriately balance the competing values relating to freedom of religion and equality, which has not presently been done by virtue of the Community Covenant. The Covenant, as is noted above, when viewed through the Nova Scotian legal lens is discriminatory and it is not saved by any exceptions in the *Human Rights Act*. TWU is allowed to believe, practice, promote and value its religious beliefs – but by requiring prospective students to execute a contract that contains discriminatory statements and by threatening discipline in the event of violation of the contract, TWU exceeds the bounds of protected religious freedom. The BCCT Decision is not determinative due to developments in the law and society. Further, there is a significant difference between a teacher education program and a law school, the latter of which is training individuals to balance competing Charter rights and to protect citizens from the potential tyranny of the state. This option does not condemn the students or future

graduates as being unqualified to practice law; rather the systemic discrimination of the institution is what must be addressed and rejected.

It is neither the responsibility nor the right of the NSBS to revise the Community Covenant so, in the context of the historical discrimination in the Nova Scotia justice system, the consequence of TWU preserving the Covenant in its present form is that its law school graduates should not be enrolled in the articling program in Nova Scotia.

TWU has the power to take action to address this discrimination. The University can continue to believe in the sanctity of marriage between a man and a woman so long as the actions it takes in that regard do not negatively affect LGBT individuals. Given the work of the Federation Approval Committee, TWU has an acceptable proposal in all respects other than the Community Covenant. If TWU were to change the Covenant or exempt law students from the Covenant, the school can be approved in Nova Scotia. This approach would minimally impair freedom of religion and promote equality. It balances the competing values by placing freedom of choice on the school rather than on students, and by allowing TWU to find an appropriate and lawful way to promote and practice its religious freedom in a manner that respects the equality of all Canadians.

Proposed Motion for Option C:

Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted; the TWU program will meet the national requirement;

Council resolves that the Community Covenant is discriminatory and therefore Council does not approve the proposed law school at Trinity Western University unless TWU either:

- i) exempts law students from signing the Community Covenant; or*
- ii) amends the Community Covenant for law students in a way that ceases to discriminate.*

Council directs the Executive Director to consider any regulatory amendments that may be required to give effect to this resolution and to bring them to Council for consideration at a future meeting.

Council remains seized of this matter to consider any information TWU wishes to present regarding compliance with the condition.

CONCLUSION

This report provides context for Council's decision about the proposed TWU law school. Three options are presented, each with a high level summary of the argument that might support such an outcome. It will be for individual Council Members to decide which option they prefer.

The Executive Committee appreciates the respectful, thoughtful and thorough submissions that were received from the public, from lawyers and from TWU during the consultation process. Council will make the final decisions about this matter.