NOVA SCOTIA
BARRISTERS' SOCIETY

Trinity Western University Law Degree Approval: Review of Submissions

April 16, 2014

Table of Contents

Introduction

This document provides a comprehensive summary of issues raised in the submissions to the Society regarding the approval of a law degrees from TWU. It does not attempt to provide answers or solutions. Rather, it highlights the issues using the language and arguments framed by the authors of the submissions themselves.

Regardless of the outcome, it will be important to respect and honour the time that lawyers and members of the public took to consider this issue and provide their thoughts and feedback. The submissions we received were from individuals who care deeply about the outcome. The Society is committed to an open and transparent engagement on this matter. The final decision will respect and reflect the many perspectives presented in the submissions.

In keeping with the concept that this is a summary of the submissions received, this paper does not look at or examine issues that have not been raised in the submissions, for example, it does not examine issues that have been raised in other forums such as blogs and media sites or in materials that were provided to other law societies on this topic, unless those materials were also directly provided to the NSBS by the author.

The Public Interest: s. 4 of the *Legal Profession Act*

The purpose of the Society is set out in Section 4 of the *Legal Profession Act*[1]:

(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. 2004, c. 28, s. 4; 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.

The public interest, as articulated by the Act, requires the Society to take two types of self-regulatory action: 1) efforts to regulate the lawyer-client relationship, and 2) efforts to regulate the impact of the legal profession and the administration of justice on society.[2]

The first type of regulation, articulated by Benjamin Perryman in his submission as: "the 'nuts and bolts' of legal regulation" addresses admissions standards and professional responsibility. That is, "when the Society creates the modules for the Bar Admission Course or specifies the required number of Continuing Professional Development hours or audits a lawyer's trust account, it is protecting the public interest by carrying out the "nuts and bolts" of legal regulation."[3]

However, the *Legal Profession Act* makes it clear that the Society's obligation to protect the public interest is broader than just the "nuts and bolts" of legal regulation. "This second type of regulation—what one might call the "broad, liberal and purposive" aspect of legal regulation—concerns things like how the practice of law is

[1] S.N.S. 2004, c 28, as amended by S.N.S. 2010, c 56
[2] Perryman: February 10, 2014
[3] *ibid*

conducted, and how the administration of justice functions, in Nova Scotia."[4] The Society's equity and access to justice work are examples of this second type of regulation.

Over the past 17 years, the Equity Office has played a crucial role in upholding the public interest in the practice of law by seeking to improve the administration of justice by working closely with diverse communities and building equity and diversity values and principles into the policies, programs and procedures of the Society and for its members. Included in this work are initiatives to ensure that both the law and the practice of law reflect Nova Scotia's diverse population, including African Nova Scotian, Mi'kmaq and other equity-seeking communities. It is through the Equity Office that the Society exercises its public interest mandate to address issues of equality, access to justice and discrimination.

To fully understand the Society's commitment to addressing discrimination and working to improve the administration of justice it is essential to reference the Marshall Commission. The Marshall Commission was a defining moment for the justice system in Nova Scotia and ultimately the findings and recommendations from the Marshall Commission have shaped this Province's understanding of justice in the public interest.

These findings deeply impacted Nova Scotia's legal community and significant changes came about as a result of the Marshall Commission findings and recommendations. In particular, the Society acknowledged the existence of discrimination in the legal profession and made concrete commitments to refuse to tolerate discrimination in the future. F.B. Wickwire Q.C. in a 1991 Society Report on the Marshall Commission made the following statement: "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 the decision to support the Equity Committees, the Equity Office and future decisions 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 Blacks and Mi'kmaq Initiative, advocating for a diverse judiciary, encouraging sensitivity and understanding for the concerns of equity-seeking law students and lawyers, increasing awareness of systemic discrimination among lawyers, and working closely with diverse communities on access to justice challenges and issues.

Ultimately, "the Marshall Commission teaches us an important lesson about legal regulation: A failure to adopt a broad, liberal and purposive approach, beyond concern for the lawyer-client relationship, has the potential to cause significant harm to the public interest, especially for vulnerable populations."[6] It is no coincidence that the development of the Equity Office has progressed in line with the development and understanding of our public interest mandate and our work to enhance the administration of justice. The commitment to improve access to justice for equity seeking groups which is central to our 2013-2016 Strategic Framework evolved out of this history. [7]

Thus, it is essential to consider s. 4 of the *Legal Profession Act* in light of the historical developments that have led us to understand and interpret our public interest mandate as a responsibility address discrimination and to improve access to justice for equity seeking groups.

---

[4] *ibid*
[5] Wickwire QC, "The Nova Scotia Barristers' Society's Review of the Conduct of its Members Criticized in the Report of the Royal Commission into Donald Marshall Jr., 1991
[6] *Supra* note 2
[7] *Supra* note 5

Delegation

There were a number of submissions that offered arguments as to why the Society has jurisdiction to approve law degrees for the purpose of entry to the Bar in Nova Scotia.[8] These arguments stated that the Society has no authority to delegate this decision to the Federation of Law Societies. Although it appeared undisputed that the Federation has authority to do much of the pre-work needed to prepare law societies to make their decisions, ultimately the decision to approve a degree is the responsibility of each individual Law Society in Canada. This argument was articulated in two submissions below:

From Perryman[9]:

> When analyzing whether or not the Act permits delegation, we look to the nature, scope, and duty that's outlined in the Act. Every time the legislature has chosen to delegate within the LPA, it's explicit about who it's delegating to, what their powers are, and what they're to do.
>
> I count seven instances of delegation; Council, the Executive Director, this Executive Committee, Committees, Complaints Investigation Committee, Fitness to Practice Committee, Hearing Committee. Each time, the Act defines who discretion is being delegated to, what their powers are and what they're to do. The Act does not talk about delegation to the Federation.
>
> The Society's core purpose is to protect the public interest. If you can delegate that core interest, I would expect, like these other seven instances, to have the legislature have expressly put that in that. It is not there. It is possible to rely on the recommendation of the Committee. That's not a complete delegation. But for many of the reasons that the previous panel has shared, I believe that that report is flawed.
>
> If there's a clash between the Act and the Regulations, the Act governs. All you need is the Act to confer the authority for you to make the decision. I think it's good practice for the Regulations to find ... every regulation should have a tether to a provision in the Act and it should be consistent with the Act. If there's an inconsistency between the Act and the Regulations, the Act governs. Regulations specify what the legislature has described in the Act. I do think it would be better if the regulations were clarified. You don't need that. The statutory authority for the decision is within the Act. The Regulations sit below the Act. So, yes, I do think the Regulations should be amended to reflect the process that the Society has taken, but I don't think that that is necessary because I think you have the statutory authority to act.

From Downie et al[10]:

> We would also argue that Bar Council has a responsibility to form its own independent opinion on: 1) whether approval of the TWU program is in the public interest… The FLSC Approval Committee recognized that the former is required as "law societies continue to have the statutory authority to set policies for admission to the legal profession in their respective jurisdictions." (Approval Committee Report at 1) As you will be aware, Bar Council has the statutory authority and responsibility to act in the public interest in establishing criteria for admission to the legal profession (and approval of law programs is inextricably bound up in the establishment of these admission criteria).
>
> First, the determination of the National Requirement issue is a component of the determination of the public interest. The Special Advisory Committee noted that "[s]etting appropriate standards for admission to the legal profession is an essential component of the public interest mandate shared by Canada's law societies. The National Requirement approved by each of the law societies was developed as part of this public interest mandate." *(Special Advisory Committee Report at 5)*

[8] Sakalauskas, MacDonald: February 10, 2014; Craig: February 5, 2014
[9] Perryman Oral Submissions Transcript: February 13, 2014 at pg. 78
[10] Downie, Devlin, Cotter, Kaladjdzic: January 24 2014

Given that the responsibility to approve law degrees in Nova Scotia has not been delegated to the Federation, it is therefore the responsibility of the Society to consider and decide whether to approve the law degree program at TWU.

Process

At the outset, when the Society began the process of engaging the public on this issue, the Society President, René Gallant, wrote a letter to the membership setting out the purpose and framework for engagement on this issue. Excerpted below are sections of that letter that highlight the Society's process:

> As the public-interest regulator of the legal profession in this province, it is critical for the Society to have a robust, transparent discussion about the legal and societal issues addressed in the Federation's reports. This is even more important in the context of our strategic framework, which is examining the nature and extent of our role as a regulator, and in which the Society is committed to advocacy on the issue of access to justice for equity-seeking groups. The reasoning and decision making in the Federation reports is not the final word in the discussion here in Nova Scotia.
>
> We encourage you to take part and have your voice heard. The reports and the materials referred to in them, including the legal opinions and analysis, will provide the basis for Council's deliberations and, as always, Council welcomes input from members of the profession and from the public. [11]

In response to this memo the Society received more than 160 submissions. Of these submissions more than 100 were from Nova Scotians. Submissions were received from the general public, and the majority of the submissions were from members of the Nova Scotia Bar. The submissions came from managing partners at law firms, rural practitioners, articled clerks, clergy, academics, and individuals with lived experience in religious institutions, as well as others.

We received submissions indicating that the Society should follow the reasoning presented by the Federation and approve law degrees from TWU. These submissions ranged in topic from statements regarding the balancing of freedom of religion with equality to support for a pluralistic society to concern that this is about a ban on certain students based on their religious beliefs rather than an issue of law degree accreditation.

Excerpts from these submissions can be found below:

> Human rights involve a balancing act. The Charter protects freedom of religion; it does not stipulate "freedom from religion". Pursuing the legitimate goal of inclusion of equity-seeking individuals should not be accomplished on the basis of forced marginalization of other (in this case Christian) individuals.[12]
>
> So we have a group of potential candidates to the bar who have had the audacity to state their religious beliefs publicly, including the belief that marriage should be between one man and one woman. In other words the NSBS is being asked to block admission to our profession on the basis of the candidates' religious and moral beliefs. Throughout the last century there have been several examples of groups who have tried to restrict admission to the professions to those who agree with the societal norms of the day. In every case it ended very badly for both the profession

[11] Gallant Memo: December 20, 2013
[12] Clarke: February 4, 2014

and society. How can the legal profession protect individual rights and freedoms when it denies those same rights and freedoms to its own members?[13]

While I whole-heartedly believe that regulating the sexual conduct of law students is a silly project, and I have concerns about how that targets gay and lesbian students, I also believe that the question of discrimination can and should be entirely determined by reference to provincial human rights legislation. My understanding is that British Columbia's human rights legislation permits a private educational institution with a religious mandate to have an admissions policy which discriminates against gay & lesbian students in this way. This is not surprising, and in my experience most Canadian human rights regimes make similar accommodations for religious organizations. To my mind, this ought to be a complete answer to concerns about the discriminatory impact of TWU's admissions policy.[14]

To adopt such a resolution would be to discriminate against TWU, its faculty, and students, on the basis of their conscientiously held religious beliefs, and to deny them their freedom to associate, on the terms they choose to associate, in accordance with their freedom of religion.[15]

Opponents of the TWU law school argue that its graduates will discriminate against gays and lesbians. This argument pre-supposes that lawyers are incapable of advocating resolutely and effectively on behalf of clients who hold beliefs or who engage in conduct with which a lawyer disagrees. This, in turn, is disproven every day by tens of thousands of Canadian lawyers who competently and professionally represent clients whose values, religion, socio-economic status, sexual orientation, and political beliefs are different from those of the lawyer. Lawyers routinely act for clients whose lifestyles, behaviour and beliefs differ from their own.[16]

During my 40+ year career I have represented a large number of people. I also have worked with a wide variety of opposing counsel. Normally I had no idea what the personal beliefs of these clients and opposing counsel were. Why would I, unless those beliefs were a necessary component of the matter I was dealing with. There have been occasions when I have represented clients, or had dealings with opposing counsel, whose personal beliefs I considered to be outrageous. I believed fervently, however, that they were entitles to have me, or any other practicing lawyer, represent them, or deal with them professionally, to the best of my ability.[17]

The average number of first year law students in Canada is 2000. TWU plans an entrance class of some 60 students, which would represent only 3% of the first year law class in Canada. With TWU law school coming on stream, approximately 97% of law students in Canada will be attending secular law schools. The question we have to ask is, with there being 97% of the law students in secular institutions, can 3% have an existence of their own? Or, paraphrasing Douglas Laycock, we ask, is the secular model so absolutist that it cannot tolerate a 3% minority with a different solution?[18]

The very name of the university indicates to me that I would have different religious views than those who attend that university. That is not a concern for me. I respect their right to believe differently than I do, and I would expect them to respect my right to believe differently than they do. Despite doctrinal differences, it would appear that we hold many values in common. The values in question, interestingly, appear to be those which were the gold standard of behaviour in this country a mere half century ago. I speak of the standards which all students at Trinity Western agree to abide by in their everyday life. I belong to a church which is in a definite minority position in Canada and throughout the world. Because I am a member of The Church of Jesus Christ of Latter-day Saints, some people insist that I am a non-Christian - a designation which I strongly reject. I respect their right to be wrong.

---

[13] Angus: February 4, 2014
[14] Kindred: January 28, 2014
[15] BC Civil Liberties Association: March 2, 2014
[16] The Justice Centre for Constitutional Freedoms: February 26, 2014
[17] MacDonald: February 28, 2014
[18] Canadian Council of Christian Charities: February 10, 2014

> My church supports and operates a private institution of higher education - Brigham Young University. It has a Law School. All students attending Brigham Young University are required to agree to live by a code of behaviour which represents the values of our church while attending the university. That does not prevent students of any other faith from attending the university; they must simply behave according to our standards while at the university. Graduates of the Law School at BYU are practicing in every state of the United States, serve in the judiciary of various states, have served as aides to Justices of the United States Supreme Court, and hold seats in both houses of the United States Congress. If this level of service and respect is possible in the United States, is there something different about the legal system in Canada which would prevent graduates of Trinity Western Law School from performing their duties in keeping with the standards of the legal profession? [19]

Many submissions asked the Society not to approve TWU on the grounds that it is not in the public interest to approve a law degree that is offered at an institution that has a discriminatory admissions policy. These submissions provided a range of perspectives on this topic from specific concerns about the Society condoning discrimination to the view that the Community Covenant is not a tenet of Christianity and therefore should not be protected under religious freedom.

Excerpts from these submissions can be found below:

> There are already significant barriers to accessing law school that work to systematically disadvantage people, particularly along the lines of race, class, gender, and ability. This is an opportunity for you as representatives of our profession to reassert your commitment to creating a legal education environment that is accessible to, and inclusive of, all members of our society. Condoning a law school that explicitly discriminates against a historically marginalized group significantly undermines this goal, and would be a serious step backwards for the legal community in Nova Scotia. Recognizing and upholding human rights is at the cornerstone of our legal system. As such, we urge you to oppose TWU's Nova Scotia accreditation. We also encourage you to create an accreditation requirement in Nova Scotia that prevents any law school from discriminating on a constitutionally protected ground, such as sexual orientation.[20]

> Jesus would have been very familiar with homosexual relationships within the culture of the Roman Empire. Yet, he does not mention it. He remarks on several other aspects of human sexuality; for example, he broke several sexual taboos by touching vaginally bleeding women and he uplifted the rights of other socially rejected women (even adulterous ones). He made several recommendations about divorce (although these differ between gospels). However, he was clearly not concerned enough about homosexuality to offer an opinion. Most Christian doctrine upholds that sexual intimacy within Christian marriage is for 1) the increased intimacy and closeness of the couple, 2) the creation and nurturing of children and 3) an earthly representation of the joining of the spirit and the body. There is no reason that homosexuals cannot be married, given these three purposes of marriage. Many homosexuals have found ways to have children. As well, most heterosexual couples continue to have sex long beyond the point of fertility.[21]

> With histories and lives structured by past legalized inequality, the communities served by the IB&M initiative know the extraordinary value of an anti-discriminatory legal education. African Canadian and Aboriginal communities, which of course include lesbian, gay, bisexual, transsexual, and transgender (LGBTT) members, continue to struggle against racism, homophobia, and other intersecting forms of oppression. the law, while often complicit in past discrimination, has also held real promise as a sword and shield in the fight for equality and justice. African Canadians and Aboriginal Peoples, long denied access to legal education, value

[19] Ross: February 10, 2014
[20] OUTLaw Society: February 10, 2014

[21] St. Johns United Church: February 9, 2014

such an education because it provides vital tools to effect justice. TWU's proposed law school cannot possibly provide such tools in the face of a requirement that students and faculty sign a discriminatory "Community Covenant Agreement".[22]

We may not refuse a TWU law graduate application on the basis of the law school itself; however, we expect it would be difficult to positively assess that a particular applicant, having previously affirmed the exclusionary TWU Community Covenant, fits our values as a firm and is capable of making a positive contribution to our diverse and inclusive work environment.[23]

At a most basic level, it is unjust for a Nova Scotia institution to indirectly condone conduct that is contrary to Nova Scotia law. I therefore strongly recommend that the NSBS oppose or otherwise place conditions on any accreditation of TWU.[24]

TWU's mandate to essentially exclude the LGBTQ community is morally repugnant and legally discriminatory. It's 2014; let's not start moving backwards.[25]

To the average Canadian (who is not taking a narrow and legalistic approach), the position of the Federation is one of acceptance of discrimination. As members of the Nova Scotia Barristers' Society, we need to be very mindful of that.[26]

The public is entitled to trust that the Barristers' Society is vetting licensees not only for their ability to tell a mortgage from a mandamus, but for their readiness to vindicate the basic rights of any client. It is not enough for a lawyer to be *aware* of the right to equality; every lawyer must incorporate that principle into the practice of law.

A person who has received their education—and perhaps even chosen to be educated—in a setting where this fundamental right is not practiced is, in my view, calling into doubt their ability to practice it once licensed.[27]

It is a privilege to be a member of the Nova Scotia Barristers' Society, a privilege only earned following years of study at an accredited law school and successful articles in compliance with the Nova Scotia *Legal Profession Act*. It is those formative years in law school, when a student is immersed in substantive law, that provide the foundation upon which our profession relies – public confidence in a lawyer's knowledge of the law, integrity and judgment in pursuit of the rule of law. In my opinion, Trinity Western University Law School seeks to discriminate on the basis of sexual orientation. An institution that discriminates on the basis of a fundamental human right is not intending to provide, nor can be deemed by our profession as providing, that foundation.[28]

No law school should be truly unique in the legal education that it offers. It is that which makes us all the same that matters, not that which makes us unique. Collectively, we represent the rule of law. That is the golden thread that binds us all together. In Canada, part of that law is embodied in the Charter and the values it espouses. Any law school that prides itself on practicing a policy that is in direct contravention of those values and of human rights legislation in this province should not be accredited by our Society.[29]

The role of the NSBS, in addition to being our professional regulator, is to protect the public interest. I cannot comprehend how the NSBS can recognize a law school that disregards the *Charter* and human rights legislation. In my respectful opinion, if the NSBS approves this accreditation the public interest will not be protected. This is not an issue of which rights trump. It

---

[22] Williams: February 10, 2014
[23] Adlington: February 6, 2014
[24] Campbell: February 6, 2014
[25] Eliasson: January 30, 2014
[26] Haugg: February 4, 2014
[27] Henderson: February 4, 2014
[28] Bugden: February 10, 2014
[29] Butler: February 7, 2014

> is an issue of whether discriminatory practices (which run contrary to the Code of Conduct of our own Society) will be sanctioned by the NSBS.[30]

Finally, we received a number of submissions from individuals with personal experiences that provide them with particular insight into the experiences of students at TWU and at other religious educational institutions. Although anecdotal, these submissions provide evidence about the lived experience of discrimination[31]:

> I want to put a human face on this institution by very briefly telling you about the six graduates of Trinity that I have met…
>
> The other five graduates I have met are members of our congregation at Grace Chapel.
>
> Mike and Lisa came to Nova Scotia from B.C. seven years ago. Since they have been here, they have made wonderful contributions to our province. They have been co-owners of a popular cafe in South End Halifax that employed scores of young adults. Lisa is currently working with Immigrant Settlement and Integration Services, developing educational and recreational programming designed to help new Canadians adjust to our culture. Mike has coordinated youth ministry for the Anglican Diocese of Nova Scotia and Prince Edward Island. He's a gifted writer who contributes articles to national surfing magazines. And for the last four years he has been a member of our pastoral team at Grace Chapel. In a matter of weeks he will be taking a team of ten young people from our church to Haiti where they will continue to be shaped by Mike's compassion for the poorest of the poor, his passion for social justice.
>
> Chris and Janice is another couple who attend our church.
>
> Janice is a dietitian who is currently working at Health Information Technological Services Nova Scotia. She has also worked in Food and Nutrition Services for Capital Health. Chris is a teacher in our public school system. In addition to his regular workload, he has coached soccer teams at the university and high school level, and has been a faculty member of Shad Valley International, a summer program for highly gifted secondary students. He teaches Theory of Knowledge in the International Baccalaureate Program. Within the last twelve months, Chris has also helped to lead a team of university students in a short term development project in rural Uganda.[32]
>
> I am a TWU alum, I identify with Christianity, I'm gay, and I will apply for TWU's law school program.
>
> I am a proud TWU alum from the class of 2006 with a Bachelor of Arts. I was privileged to serve the university community for three years as an employed student leader, and will toot my own horn claiming creative license behind the tradition now titled, "Fort Week" - probably the most, highly anticipated and fun week of TWU campus life….
>
> I identify with Christianity, and with Christians. I was raised in Christian community in my hometown of Agassiz, BC near Vancouver. I was employed as an evangelical missionary for two years throughout Canada and started a "house church" at SFU, as well as incorporating a church here in Ottawa…
>
> I am not a fan of the Community Covenant's interpretation of biblical scriptures regarding "healthy sexuality," however, I adhered to it once and I can do it again….
>
> I will put in an application to be one of TWU's first law school graduates. If successful, I expect Canadian law societies will recognize this achievement and allow me to practice common law in my country….

---

[30] Levangie: February 4, 2014
[31] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, 199 DLR (4th)
[32] Pastor Harris: February 10, 2014

But this is a single man writing, could TWU kick me out if they discovered I was a married man?[33]

I have no doubt that the intentions of the TWU community are sincerely rooted in their understanding of righteousness, morality, and love rather than hate, prejudice, and vengeance. Indeed, I walked in their shoes before I had the courage to put on my own…

I was raised a member of the Mormon faith. I attended Brigham Young University, whose Honor Code distinguished and excluded gay people in a substantively identical fashion as the Community Covenant at TWU. As a young gay Mormon attending BYU, I lived a paradoxical life that allows me to genuinely empathize with what it feels like to be on both sides of this issue. I do not doubt that the intentions of my religion and my university were genuine and well-meaning. However, discrimination does not require intention, and I recognize that the feelings of internalized shame, homophobia, and being misunderstood that I experienced as a gay man at BYU were directly exacerbated by an institutional policy which explicitly legitimized and enforced the idea that I was "lesser than" my heterosexual peers."[34]

Lastly I would like to speak to my experience at Trinity Western in the hopes it may add some perspective and refocus the framing of perceived concerns. While at Trinity Western I came to realize the atmosphere of sanctuary the community values were able to create for its students. I personally spoke in confidence with a number of students who came from backgrounds of abuse and trauma. The non-consumption of alcohol clause in the covenant for example was particularly comforting for these individuals who had a heightened sensitivity or even fear of being around alcohol or being around people consuming alcohol. There have also been in the past and will be in the future, students at Trinity Western that have been victims of sexual abuse. For many this is a trauma that one does not like to share causing some victims to suffer in silence. One may even take judicial notice that sexual abuse and trauma does not respect one's sexual orientation. University life can be one of the most sexually charged times in a young person's life.

I can personally attest to the fact that the community created at Trinity Western which calls for abstinence, may not eliminate, but does greatly reduce the sexual charge on whole at the university. I have never personally experience more sexual harassment then upon attending law school at a secular Canadian institution. I was at one time advised by a group of individuals not to walk to dorms alone as they perceived a genuine concern for my safety due to sexual fantasies another student on campus was sharing about me with the populous. I was repeatedly scoffed at for sharing my views on abstinence, which I generally only revealed to counter sexual advances. I have been marginalized and or demeaned for my faith while a student at public institutions, and even during an interview I had for admissions to a certain Canadian law school when asked about my time at Trinity Western. Juxtaposing my experience at Trinity Western however, I cannot recall being sexual harassed while there. Nor did I experience at Trinity Western such intolerance from people when asked to express my perspective on certain matter as I did at secular universities.[35]

I am both a TWU alum and former employee. I signed the then-Community Standards as they were required for admission and employment, however I understood their enforcement would not be draconian. My experience there indicated no discriminatory conduct or harassment toward minority groups, indeed the campus culture was supportive and welcoming. While there was some discussion of LGBT rights, and occasionally mentions of LGBT students in the student body, there was no incitement or known misconduct against them. TWU won a Supreme Court case while I was a student there, largely on the grounds of there being no evidence led by the BC College of Teachers that TWU students would discriminate. It is my understanding from reading some public input on this issue that people fear TWU grads to be discriminatory just by virtue of signing the Community Covenant/Standards document. In my experience such fears are groundless and overbroad themselves. I believe and expect that like myself, any TWU law grad would treat clients and opponents with courtesy, respect, and dignity, regardless of creed, colour,

[33] Wouda: March 4, 2014
[34] Arnesen: February 7, 2014
[35] Ferrari: February 7, 2014

gender, or orientation. TWU students should not be presumed to be discriminatory just by the fact that they signed the code of conduct - it is a compulsory element in their ability to study at the school.

All that said, I oppose the TWU law school application on two grounds. First, that it couldn't have worse timing for adding graduates to a saturated pool, and making it even harder for Canadian law grads to find articling positions. No articles mean law grads cannot practice law in Canada. Until the articling system or requirements are changed no school should be increasing its pool of graduates, and no new schools should be approved.

My second objection relates to the allegations of discrimination. I reject the charges that TWU grads would be discriminatory themselves. I accept the possible public perception that TWU grads might hold beliefs that run contrary to principles of equality, and that such a perception might undercut their effectiveness as lawyers in Canada.[36]

Growing up in Langley, I personally know people who have been asked to withdraw from TWU programs for violating the Community Covenant, including one person who may have been required to withdraw because of sexual orientation. In my many discussions with former high school colleagues who have gone on to study at TWU, they demonstrate a remarkable closed-mindedness on equality issues, and on freedom of expression issues for those who support ideas not in accordance with their faith. As a teacher myself, what makes the classrooms at the Schulich School of Law so vibrant a learning environment is the diversity of the student body. We have students of many races, religions, ages, sexual orientations, backgrounds, and beliefs. The ideas that come from our students are as varied as the students themselves and it is this environment that makes learning about equality possible.[37]

The Law

Many submissions carefully address various aspects of the law that are engaged in relation to the question of approving law degrees from TWU.

Before addressing the BCCT case[38] and other case law that looks at the balancing of religious freedom and equality, other legal questions have been raised and identified in submissions as potentially impacting the decision of Council.

THE STANDARD OF REVIEW

Professor Sheila Wildman discusses the point of deference to administrative decision makers in detail below:

> I suggest that (unlike the situation in B.C. College of Teachers in Trinity Western University *v*. College of Teachers, [2001] 1 S.C.R. 772), deference is likely to be shown to an NSBS decision regarding proportionate balancing of equality and freedom of religion in such a case as this. This reflects my understanding of the present case as engaging the principles set out in Doré *v*. Barreau du Québec, 2012 SCC 12. Dore builds on principles from earlier case law on the exercise of discretion – elaborating in particular on the central principle that the exercise of administrative discretion must reflect "the values underlying the grant of discretion" (Baker v. Canada), including Charter values.

[36] Martens: February 7, 2014
[37] Shapiro: January 24, 2014
[38] *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, 199 DLR (4th)

> Doré further indicates that discretionary decisions, where they affect Charter-protected interests, should be reviewed in accordance with administrative law principles and not by way of s.1 of the Charter. This is the case, at least, with what the Court describes as "individualized" (rather than, one assumes, policy) decisions. Moreover, discretion engaging Charter values is likely (as in the case of Dore itself, involving a law society disciplinary committee decision) command deference on review (i.e., will be reviewed on a standard of reasonableness). In such cases, the central question for reasonableness review, to be pursued in a manner reflective of deference, is whether the discretion has been exercised in a manner that secures *proportionality* as between the competing values. In Dore, the central values in issue are those animating the disciplinary committee's (and more broadly, the Barreau's) mandate or specifically, the value of lawyer civility, weighed against freedom of expression.
>
> There may be disagreement about whether a decision to accredit TWU is an example of "individualized" discretion, or alternatively, a more general policy decision. I am assuming the former for the sake of argument. As such, in accordance with the principles of deference on review, the reviewing court would presumably be open to recognizing that there may be multiple alternative "reasonable" ways of balancing the competing *Charter* values at stake (Doré at paras 55-58). The administrative decision would however be expected to be defended, and defensible, with regard to its advancing the Barristers' Society's public mandate in a manner that proportionately balances the value of freedom of religion against the counterweighing value of equality. To sum up, the decision in TWU was quashed on a standard of correctness -- not the standard of reasonableness that is now likely to apply to the exercise of discretion where Charter values are at stake. [39]

THE CHARTER

In 2001, the Supreme Court found that TWU, as a wholly private college was not subject to the s. 15 equality provision of the Charter.[40] There have been a number of submissions that have indicated that any analysis should be framed from this perspective and with the understanding that TWU is a private institution. However others have suggested that at best this is an incomplete characterization.[41]

The question that is currently before the Society appears to be public in nature. Pothier and Walsh submit that the act of approval of TWU's proposed law school is a public act to be undertaken by public actors (Canada's law societies) in the public interest.

> In *Doré v. Barreau* du Québec, the Supreme Court of Canada explicitly recognized the public character of law societies and the correlating obligation of law societies to "act consistently with the values underlying the grant of discretion, including Charter values"
>
> Setting aside the question of whether the non-operating funding and research grants that TWU receives from the federal government support its characterisation as a 'private' University, both the issue of accreditation and the fundamentally public dimension of the work that lawyers do renders the 'private' character of TWU moot.
>
> Regardless of whether lawyers work at private firms or for private companies, the moment that we become lawyers we become public servants. Our work requires us to act as stewards of the laws of Canada. Our laws belong to all Canadians, not a private subsection of Canadians.
>
> As the representative body of Nova Scotia's legal profession the NSBS has an obligation to ensure that the public servants who are accredited as stewards of the law in our jurisdiction are trained by institutions that do not discriminate on the basis of any immutable characteristic, be it religion, race, sex, gender or sexual orientation. This obligation arises from the NSBS' statutory obligation to carry out its work in the public interest and its constitutional obligation only to act in a manner consistent with equality before and under the law.

---

[39] Wildman: February 10, 2014
[40] *BCCT Case*
[41] Pothier: January 24, 2014; Sakalauskas, MacDonald: February 10, 2014

> In your deliberations on this issue, I urge you not to interpret TWU's rights as a private institution as relief for the NSBS, a public institution, from your obligations to reach accreditation decisions in the public interest and according to Charter values.[42]

THE COMMUNITY COVENANT UNDER NOVA SCOTIAN HUMAN RIGHTS LEGISLATION

The TWU Community Covenant which indicates that marriage is defined as "between one man and one woman" is subject to human rights legislation in British Columbia. President Kuhn, in his oral submission to the Society indicated that the language in the Community Covenant is lawful discrimination as it is not contrary to the B.C. Human Rights Code.[43] In B.C. s. 41 of the Human Rights Code indicates that religious institutions can discriminate in favour of members of their faith. We did not receive any submissions that provide any contrary perspective on this issue.

The Nova Scotia Human Rights Commission submission states that the discriminatory language of the Community Covenant would not be lawful under Nova Scotia's human rights laws. That is, were TWU to open a campus in this province, signing the Community Covenant would not be a legal entrance requirement.

> Institutions providing secular services with a religious view have not been permitted an accommodation exemption under the Nova Scotia *Human Rights Act* to support a freedom of religious expression in the provision of these public services if it discriminates against another protected group. The Act only allows an exemption to an otherwise discriminatory practice if an "exclusively" religious group creates the initiative to "primarily" foster the welfare of a "religious group."[44]
>
> The Nova Scotia *Human Rights Act* provides for the protection of discrimination based on sexual orientation and marital status, section 5 (1) (n) and (s), respectively. Additionally, it protects religious organizations by providing exemptions with respect to discrimination in employment in section 6 (1) (c) (ii) and (iii) and with respect to discrimination in the volunteer public service industry in section 6 (1) (d).
>
> The following are the exemptions provided to religious organizations. The Commission inserts in square brackets factual annotations to the provisions:
>
> Exceptions
>
> 6 Subsection (1) of Section 5 does not apply
>
> (c) in respect of employment, to
>
> > (ii) In exclusively religious [Trinity Western University is not exclusively religious] or ethnic organization or an agency [law school of Trinity] of such an organization that is not operated for private profit and that is operated primarily to foster [primary to provide legal education] the welfare of a religious or ethnic group [the welfare of Evangelical Free Church members' welfare is enhanced in a secondary way by having a law school that shares their worldview] 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 [This exemption

[42] Walsh: January 24, 2014
[43] Kuhn, oral submission transcript, p 105 ff
[44] NSHC: February 10, 2014

would only allow them to compel teaching staff not students to sign the Covenant if they otherwise qualified in the rest of the definition which they do not], 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 [this section opens up the exception to enhancing the religious members but confines it to a volunteer organization];

In applying the above sections to TWU in the Nova Scotia context, on a plain reading, it appears that the discrimination contained in the Covenant would not be protected.

Section 6 (1)(c) (ii) would not protect TWU for promoting discrimination against sexual minorities to law students or teachers. TWU is not "exclusively religious," nor is it operated primarily to foster the welfare of a religious group with respect to persons of the same religion. This may be a secondary benefit. TWU operates for the primary purpose of providing a legal education to religious and non-religious students alike; it does so through the lens of its religious worldview. Finally, the Covenant would only operate as a bona fide occupational requirement and therefore only apply to staff. The Commission anticipates the Covenant would therefore be found discriminatory in Nova Scotia and not qualify for an exception under the Act.

Nor would the volunteer public service exception in section 6 (1) (d) protect TWU since its teachers do not volunteer to work at the school.

In Nova Scotia, therefore, this school would be reasonably and likely considered to be acting in a discriminatory fashion. We have no reported cases on this exception.

TWU V. BRITISH COLUMBIA COLLEGE OF TEACHERS

TWU v. BCCT involved a teacher training program, where TWU was seeking certification for their final year of teacher training (prior to that, TWU students in the teacher training program did their 4th and final year at Simon Fraser University). BCCT rejected TWU's application to bring their final year in house and the Supreme Court of Canada, like all earlier levels of court, found that the decision of BCCT was invalid. The Society has received submissions that suggest there are a number of factors that distinguish the SCC's decision from the situation before Council today.

In addition to the factual differences between BCCT and the question of approval currently before the Society, there have been submissions that state that other significant social changes have occurred since this case was decided. In particular: changing social mores and values around homosexuality, changes to the law (such as the legalization of gay marriage), and subsequent case law that deals with balancing religious freedom and equality rights, need to be considered.

A number of submissions address these issues and are excerpted below:

Much of the discussion of TWU's proposed Law School has involved debate over the impact of the Supreme Court of Canada's decision in *British Columbia College of Teachers v. Trinity Western University*, [2001] S.C.R. 772. I think a strong argument could be made that this case would be decided differently today by the Supreme Court of Canada. That Court has not been averse to reversing itself, particularly in the area of constitutional and human rights law: e.g. *Health Services and Support – Facilities Subsector Bargaining Association v. British Columbia*, [2007] 2 S.C.R 391, incorporating a right to collective bargaining within constitutional protection of

freedom of association, reversing the 1987 Labour Trilogy; *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union,* [1999] 3 S.C.R. 3 (Re *Meiorin*), adopting a unified approach to direct and adverse effects discrimination, reversing the earlier bifurcated approach; *Saskatchewan Human Rights Commission v. Whatcott*, 2013 SCC 11, modifying in part the definition of hatred in the context of human rights legislation prohibitions of hate speech. However, it is quite speculative to contend that the SCC would be ready to reverse itself in *BCCT v. TWU*. I am prepared to proceed on the basis that *BCCT v. TWU* remains good and binding law. On that assumption, I respectfully disagree with the view of the Federation's Special Advisory Committee, and the opinion of John Laskin on which it relied, that the *BCCT v. TWU* decision is determinative. In my assessment, it can be distinguished.

BCCT v. TWU involved an application by TWU for certification of its teacher training program. The BCCT rejected the certification application, a decision that was held invalid by the majority of the Supreme Court of Canada. The SCC recognized that the TWU Community Covenant raised serious concerns, but concluded it was improper to deny certification in the absence of specific evidence that TWU graduates as a group would actually discriminate against students. To avoid a conflict between religious freedom and equality, the majority of the SCC drew a "line … between belief and conduct" (para. 36), leaving individual discriminatory teacher conduct liable to disciplinary proceedings (para. 37). It is important to note the context of TWU's application. The *status quo ante*, which already had certification, was four years of education at TWU followed by a final year at Simon Fraser. TWU's new proposal was to replace the final year at Simon Fraser with one at TWU. The majority of the SCC relied on the nature of that fifth year at Simon Fraser, where "[o]n the evidence, it is clear that the participation of Simon Fraser University never had anything to do with the apprehended intolerance from its inception to the present" (para. 38), questioning: "[a]fter finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation?" (para. 38).

The Simon Fraser teacher training curriculum did not have any anti-discrimination component. In contrast, Law Schools are mandated to teach legal principles of equality, in the constitutional and statutory context. Furthermore, while public school teachers carry only the obligation of all members of the community not to discriminate in the provision of public services, lawyers have an extra level of responsibility. Lawyers are potentially involved in the administration of constitutional and statutory equality and anti-discrimination provisions. Thus there is good reason to impose a higher bar than in *BCCT v. TWU*, i.e. good reason for going beyond looking for specific evidence that TWU Law School graduates will, as a group, engage in discriminatory conduct.

The extra step of a year at Simon Fraser was neither designed for, nor effective in, addressing the discrimination issues raised by the TWU Community Covenant. In contrast, Law Societies are in a position to address those issues by adding an extra step to the bar admission process.[45]

TWU submits that *BCCT* is determinative and binding in the current context.

The opponents of TWU argue that *TWU v. BCCT* is not determinative. This argument takes a number of forms. Some TWU opponents suggest that the decision was specific to British Columbia law and that, as a result, acknowledging TWU's freedom of religion and association rights to maintain the Community Covenant is unnecessary because not all human rights legislation across the country contain the same provisions.

Similarly, others argue that the Supreme Court of Canada's analysis related to TWU's right to equal treatment is merely a finding that TWU is in compliance with B.C. legislation. Some opponents attempt to avoid the binding result of *TWU v. BCCT* because "the issue here is whether it is contrary to the public interest" to accredit graduates of TWU. With respect, that was exactly the issue and argument advanced by the BCCT. The BCCT decided not to approve TWU's program "because Council still believes the

[45] Pothier: January 24, 2014

> proposed program follows discriminatory practices which are contrary to the public interest…" The Court held that while the BCCT could consider the discriminatory practices as part of its review of the public interest, it also had to consider religious freedom and was wrong to have "inferred without any concrete evidence that such views will limit consideration of social issues …[or] have a detrimental impact on the learning environment…"The case is directly applicable to, and clearly undermines, the reasoning advocated by TWU's opponents.
>
> The arguments advanced by the opponents of TWU's proposal were made by the B.C. College of Teachers and expressly rejected by the Supreme Court of Canada. The decision in *TWU v. BCCT* was a recognition and balancing of TWU's constitutional rights and not, as suggested by others, a narrow and reluctant decision to allow TWU to exist within British Columbia.
>
> While it is without question that there have been some important societal changes since *TWU v. BCCT* was decided, these changes have not undermined the constitutional protection afforded TWU and the members of its community.[46]

One societal change in the past 13 years relates to an understanding that being gay or lesbian is far more than sexual intimacy; same-sex intimacy is a fundamental part of gay and lesbian identity. Therefore, it is suggested in some submissions, that it is not correct to say that TWU is not discriminating by banning same-sex intimacy. The act of banning same-sex intimacy, particularly married same-sex intimacy, is discrimination under the Charter and in relation to the Nova Scotia human rights law.

The case of *Whatcott* was referenced in a number of submissions in support of this position:

> In *Whatcott* in 2012, the Supreme Court of Canada specifically rejected TWU's argument that there is a distinction between prohibiting same sex conduct and prohibiting gays and lesbians. The Court concluded that it is not possible to condemn same sex intimacy "without thereby discriminating against gays and lesbians and affronting their human dignity and personhood."
>
> In rejecting the specious argument that a legally significant distinction can be drawn between discriminating against homosexual behavior and discriminating against homosexuals, the Court in *Whatcott* stated: "Courts have recognized a strong connection between sexual orientation and sexual conduct and where the conduct targeted by speech is a crucial aspect of the identity of a vulnerable group, attacks on this conduct stand as proxy for attacks on the group itself."
>
> It could not be clearer that the Supreme Court of Canada today rejects exactly the kind of distinction between act and identity that TWU and the SAC suggests bears some legal significance. Indeed, on this issue, the Court in *Whatcott* draws its authority from Justice L'Heureux-Dube's dissenting decision in *BCCT* (finding that TWU's covenant was discriminatory and that it was acceptable for the College of Teacher's to modify its accreditation of the TWU program as a result). The Court in *Whatcott* states with approval:
>
> 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

[46] TWU to Exec: February 28, 2014

> 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. [47]

THE *OAKES* TEST

The question before the Society involves a clash of rights between freedom of religion and equality. Professor Pothier provides an example from the Hutterites case of a balancing question that was run through the Oakes test that addressed the balancing of rights: "whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices?"[48]

Perryman highlights four cases in his oral submissions where the Supreme Court of Canada has addressed a balancing of rights under s. 1 of the Charter:

> In each of these cases, the Court ultimately makes its decision in the **Oakes** test, usually on the third prong, the balancing test. What I'd like to go back to, and I think what the proponents of TWU fail to recognize, is that there are instances where Canadian Courts say: You can hold the belief, but if you want to hold that belief, it will come with a consequence.
>
> You can believe that you shouldn't have your picture taken, but the consequence of that is that you cannot get a driver's license. You can believe that you have to wear a particular religious dress, but the consequence of that is that you might not be able to testify in open court. You can believe in polygamous marriage; the consequence of that is that you might have to move to another jurisdiction or face criminal sanction. And you can believe that people of the same sex should not be married, but that might mean that you have to choose a different job. So there are instances where we say that people's beliefs have to take a back seat to equality.[49]

Pothier also raises the question of balancing in her oral submissions:

> Admission to a Bar is a privilege. And that is what distinguishes this context from the **Whatcott** case, because that was a penal provision. And the Court made it clear that the latitude for limiting freedom of religion was a lot less in a penal context than in a privilege context, which is what we're talking about here.
>
> Denial of accreditation would simply provide an opportunity to address this question of understanding that you cannot impose your own personal views like that code of conduct imposed on others.
>
> That's what the real crunch is here. Any incidental interference with freedom of religion here is outweighed by the significance of equality because we're talking about enforcing one's personal code of conduct on others and the importance of not enforcing one's code of conduct on others.
>
> To accredit TWU would enable ... or, sorry, would involve an unjustified limitation on equality. Denial of accreditation would be a justified limitation on freedom of religion. And although I don't like it, I am prepared to concede that within TWU, they have the right to impose this community covenant. But that also means they take the consequences of doing so if they choose to have a community covenant like this and that the consequences, in my analysis, are that they get disentitled to accreditation as a common-law law school.

---

[47] Craig: February 5, 2014
[48] *Supra* note 48
[49] *Supra* note 51

> As long as the current community covenant or a substantially similar version is in place, my submission to you is that they have disentitled themselves to accreditation as a law school.[50]

TWU addresses the question of balancing rights in their submission but arrives at a different conclusion in regards to limitation on religious freedom:

> In *Alberta v. Hutterian Brethren of Wilson Colony*, the majority accepted that Alberta's mandatory photo requirement for driver's licensing breached the s.2(a) rights of the Hutterian Brethren as they had a religious objection to having their photos taken. Applying the logic of TWU's opponents, there would have been no breach of freedom of religion since the Hutterian Brethren would be able to maintain their beliefs without having driver's licenses. The courts disagree, as removing or denying a benefit as a result of religious belief imposes a burden on, and hinders, religious belief and practice.
>
> The denial of approval of TWU's graduates because of the Community Covenant would unquestionably deny access to an opportunity or benefit available to students at public institutions based on the religious beliefs of the TWU community.[51]

We received many submissions that spoke about the harm on both sides.

> Sexual orientation is not programmable, or able to be turned off and on at will. It is an inherent part of ourselves, one that the rest of the world often uses when determining how to treat one another. It informs our sense of ourselves as inherently worthy or unworthy, valuable or invaluable, and how we act as citizens – and the level of faith we have in our systems to protect or expose us. Not because we are inherently different, but because homophobia and transphobia can touch each and every part of a person's life, and have long-lasting impacts on how we think of LGBT people. Religion is not immune to this, as reflected in covenants and expectations put on LGBT students to hide, ignore, or switch off this piece of their identity.[52]
>
> When Scott and I met, we were 19 years old and he was in the closet. He didn't want to come out because of fear that people wouldn't understand, fear that people would judge him, fear of homophobia, fear of violence. Scott's in rehab. He's being positive, his spirits are high. But he's going to be in a wheelchair for the rest of his life, in my opinion, because someone was scared or ignorant, someone didn't understand, someone maybe was taught that being gay was wrong or bad.
>
> I'm telling you all of this because not allowing gay people to participate in parts of society ... whether it be legal institutions some legal institutions ... because of religion shakes me to my core. It doesn't matter whether the covenant is enforced or not. It's that it exists. Even if they allow people ... gay people to attend the school, they are still sending the message that being gay is not acceptable.[53]

In his oral submissions, Mr. Kuhn indicated that it is essential to the freedom of religion of Evangelical Christians to have an educational community that prohibits married lesbian and gay couples. He stated that it would cause Christians harm (as it is fundamental to their religion) were they not permitted to enforce restrictions on sexual intimacy that would ultimately have the effect of barring married gay and lesbian students from attendance at the school:

> It's peculiar to say the least that some advocates for that position seeks to silence a perspective different than their own within the Canadian legal community in the name of diversity. While they express a

---

[50] Pothier, oral submissions: February 13, 2014 at pg. 62
[51] *Supra* note 49
[52] Jamieson (The Youth Project): February 13, 2014
[53] Chapman, oral submissions: February 13, 2014 at pg. 200

> concern that Trinity Western School of Law will have a limited tolerance of diversity their opposition exhibits exactly that, a limited tolerance of diversity. In fact, an intolerance of diversity…
>
> But let's face it, it's not about six words. It's about people who wish to maintain religious views for their community that differ from the majority. It's about men and women who wish to have the freedom to participate fully in society without penalty, loss or benefit due to their religious views or loss of benefit.[54]

This perspective has been shared by others and is captured in the submission below:

> As I've thought about this issue, I have reflected about the irony that within a matter of months the church community I'm a part of will be welcoming a refugee from Eritrea whom we are sponsoring.
>
> According to Amnesty International, Eritrea has one of the worst records of human rights abuses in the world. Christians in that country have faced severe religious persecution and in many cases, martyrdom.
>
> I would not look forward to telling this young man, who is coming to us after experiencing religious persecution, that while we in Canada do thankfully enjoy many religious freedoms he has not had in Eritrea, in fact, as his pastor, I feel obligated to tell him that if he ever thought he would like to educate his children in Christian schools or universities here in Canada, or perhaps even identify himself with a religious community like ours that has traditional religious practices, he should think twice, because he and his children would be severely limiting the range of opportunities they might have to make a contribution to the social fabric of this country.
>
> Once again, he would see himself as a second class citizen.
>
> Is this really the kind of Canada we want to welcome people to?
>
> I can imagine the puzzled look on this young man's face. He's expecting to arrive in a country that celebrates diversity, and practices principled tolerance for a wide range of beliefs and practices.[55]

THE CIVIL MARRIAGE ACT

The TWU Community Covenant requires students to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman." In their submission, TWU identifies the *Civil Marriage Act* as giving religious institutions the legal right to define marriage as they choose.

From TWU:

> In this regard, the preamble and section 3.1 of the *Civil Marriage Act*81 are worth noting:
>
> WHEREAS nothing in this Act affects the guarantee of freedom of conscience and religion and, in particular, the freedom of members of religious groups to hold and declare their religious beliefs and the freedom of officials of religious groups to refuse to perform marriages that are not in accordance with their religious beliefs;
> WHEREAS it is not against the public interest to hold and publicly express diverse views on marriage;
> …
> 3.1 For greater certainty, no person or organization shall be deprived of any benefit, or be subject to any obligation or sanction, under any law of the Parliament of Canada solely by reason of their exercise, in respect of marriage between persons of the same sex, of the freedom of conscience

[54] Kuhn. Oral submissions: March 4, 2014 at pgs 58 and 79
[55] *Supra* note 35

> and religion guaranteed under the Canadian Charter of Rights and Freedoms or the expression of their beliefs in respect of marriage as the union of a man and woman to the exclusion of all others based on that guaranteed freedom.
>
> This language again shows that the recognition of same-sex marriage was not intended to undermine freedom of religion or freedom of association by those holding and expressing religious beliefs that marriage is "the union of a man and woman to the exclusion of all others". The portion of the Community Covenant to which TWU's opponents object indicates nothing beyond the recognition of such religious beliefs within a religious educational community.

Sakalauskas and MacDonald in their submission stated that this is a misread and a mischaracterization of the *Civil Marriage Act*.

> At its base, marriage is a legal relationship. A secular relationship. For those who choose to get married by way of a religious ceremony, it is also a rite. There may be separate (additional) requirements for a marriage to qualify as a rite (i.e., the Catholic sacrament of marriage). The preamble to the *Civil Marriage Act* confirms that adherents to a particular religion remain free to establish those requirements.
>
> In the January, 2011, *Marriage Commissioners Appointed Under The Marriage Act (Re*)7 case, the Saskatchewan Court of Appeal ruled that provincial marriage commissioners could not refuse to perform same sex marriages on account of their religious beliefs. The Court explained that forcing the couple looking to be married to go to another, willing, commissioner was contrary to fundamental principles of equality in a democratic society. The Court also reasoned that by allowing commissioners to opt out because they did not want to marry people of the same sex, the door was opened to allowing them to opt out because they did not want to marry people from different races.
>
> In this recent example of a balancing of freedom of religion and equality, the Appeal Court decidedly followed the Supreme Court of Canada's holding that religious freedom is not absolute, and wrote, "This is clearly one of those situations where religious freedom must yield to the larger public interest".
>
> This is in keeping with the continually growing interpretations of equality for gays and lesbians, including when faced with discrimination purportedly justified by freedom of religion. It is disappointing that the Federation's Special Advisory Committee did not consider the recent case law in its considerations.
>
> In the end, the only real assistance to the Society (in performing a contextual balancing of freedom of religion and equality) offered by the *Civil Marriage Act* is its affirmation of the need to protect the equality interests of gays and lesbians. The *Civil Marriage Act* did not create any new right or freestanding recognition to religious groups, including in relation to their views on marriage.[56]

[56] Sakalauskas, MacDonald: February 10, 2014

THE GRADUATES OF TWU

There have been a few submissions that have suggested that graduates of TWU will be likely to discriminate as lawyers. We received a number of submissions that argue to the contrary, that graduates of TWU's undergraduate program have gone on to attend law school and to be good lawyers or have held other important roles in Society and there has been no evidence of discrimination from these graduates presented.

> The idea that a graduate of Trinity is predisposed to discrimination is something I find difficult to understand. As my wife and I have listened to the news coverage and read the submissions, we've been left wondering where's the animosity coming from. It used to be that there tended to be sort of a sense of insecurity in the school because no one knew who we were. We were this small school. People often would mistake it as a Bible college as opposed to a university. And it seems that that has changed now, it has become spoken about. But still there's no greater understanding of the school and what it really means to be part of that community.
>
> Once again, we've been struck by the lack of knowledge about the school or any direct experience with the school, which ultimately makes sense because I think the person who makes the argument that the community values of Trinity lead to discriminatory behaviour is someone who doesn't know the community.[57]
>
> And although I've heard the objections to TWU's application, at its core, I don't see anything in the evidence of the record that indicates to me that a graduate from TWU should be excluded from eligibility to practice law simply because they come from an institution that caters to and seeks the agreement of all of their students to that Christian principle ... to what they see as a Christian principle.[58]
>
> To claim that a gay lawyer is incapable of providing excellent legal representation to an Evangelical Christian client would be anti-gay bigotry. And yet, opponents of the TWU law school argue that its graduates, because of their presumed disagreement with same-sex marriage, will discriminate against gay and lesbian clients. This argument, if true, would mean that if a student commits to abstain from illegal drugs and pornography while attending TWU, this commitment will cause the student to discriminate against those who use illegal drugs or pornography. There is no evidence for such causal link. To the contrary, lawyers disprove its existence every day by representing diverse clients whose beliefs and behaviors differ from those of the lawyer.[59]

There has been some suggestion in a few submissions that quite apart from the issues arising from the discriminatory entrance policies posed by the Community Covenant, other issues exist in regards to the teaching of ethics at TWU.

> The question is whether the TWU program would be capable of ensuring that TWU graduates meet the competencies spelled out in the National Requirement (particularly, with respect to understanding equality and engaging in critical thinking about ethics). Indeed, given TWU policies and practices (including institutionalized discrimination on the basis of sexual orientation and the requirement that teaching and learning be conducted within the bounds of the Scripture as "wholly authoritative and truthful"), we would argue that a law program at TWU would not be capable of meeting the National Requirement: the program would not ensure that students: 1) understand the ethical dimensions of the practice of law (including the value of equality and the ethical duty not to discriminate); and 2) can engage in critical thinking about legal ethics.
>
> The relevant TWU policies and practices at issue here include the Community Covenant Agreement, the Core Values Statement Series, and the TWU Statement of Faith. It is very important for anyone evaluating the TWU proposal for a law school to carefully read all of these documents. To explain why we have come to the conclusions we have with respect to the TWU

---

[57] Roper, oral submissions: February 13, 2004, at pg. 209
[58] Kindred, oral submissions: February 13, 2004, at pg. 147
[59] *Supra* note 30

> proposal, we offer the following illustrative quotes and comments on some of them (organized under the two headings of the principal bases for the conclusion that the FLSC decision on the TWU proposal should be rejected). It is important to note that while the TWU documents considered by the Approval Committee and the Special Advisory Committee proclaim commitments to equality, critical thinking, and academic freedom, careful consideration of the required commitments and conduct required by TWU as opposed to its proclamations, reveal a very different reality.[60]

We have received correspondence from TWU indicating that they will teach equality and ethics consistent with the law and values espoused in the Charter:

> A number of opponents have suggested that TWU is not able to train future lawyers in ethics and professionalism. Others have said that legal education at TWU with respect to equality and human rights will be inherently flawed. They suggest that the fact of TWU's religiously-based Community Covenant is incompatible with the ethical and legal training appropriately required of those seeking entry into the legal profession.
>
> TWU has consistently and expressly recognized that human rights laws and section 15 of the Charter protect against and prohibit discrimination on the basis of sexual orientation. TWU has no desire to teach against these important protections.
>
> The courses that will be offered at the TWU School of Law will ensure that students understand the scope of these protections in the public and private spheres of Canadian life. You will note from the course outlines in TWU's proposal that standard texts are proposed for such topics, all of which cover and include the historical inequality afforded homosexuals. No course on section 15 of the Charter or on provincial human rights protections would be complete without addressing cases such as *Vriend v. Alberta*, *Egan v. Canada*, and *Reference re Same-Sex Marriage*.
>
> As noted above, TWU's program of study has two required courses on professionalism and ethics (LAW 508 and LAW 602), the latter of which will specifically challenge students to "reconcile their personal and professional beliefs within a framework of service to clients and community while respecting and performing their professional obligations and responsibilities". This is, of course, the obligation of every practicing lawyer in Canada.[61]

If TWU establishes a law school and upon review from the Federation it appears that ethics and equality are not being adequately taught, TWU may face sanctions and/or requirements that it make important changes to the curriculum.

[60] *Supra* note 12
[61] *Supra* note 49