



## Human Rights Commission

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February 10, 2014

Executive Committee and Council Members  
Nova Scotia Barristers' Society  
Cogswell Tower  
800–2000 Barrington Street  
Halifax, NS B3J 3K1

Dear Members:

**RE: NSBS request for submissions regarding TWU’s application for a law school**

### **I. Introduction**

1. Please accept the following as the written submissions by the Nova Scotia Human Rights Commission (“Commission”) in response to the following request of the Nova Scotia Barristers Society (“NSBS”):

*“The Society’s Executive Committee and Council are aware of the concerns expressed about the granting of approval of the TWU application for a law school and we are sensitive to the concerns about discrimination, in particular, in connection with the TWU Community Covenant Agreement.....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.”*

2. The Commission applauds the NSBS for encouraging a transparent and robust discussion of such an important issue facing the legal community of Canada.
3. Canadians recognize the need to protect religious freedom. The law creates safe spaces for religious adherents to practice religious activities and observances and accommodates them to the point of undue hardship. Canadians also recognize the importance of preserving the ability of religious groups to support their members, educating and advancing their membership.
4. Canada also prides itself on its other democratic principles, one of which is a separation of church and state. The state maintains itself as secular so that all religions are protected

equally, without the power of the state supporting one over the other, and non-religious persons can co-exist without religious coercion.

5. Trinity Western University (“TWU”) is a Canadian charity and private institution in British Columbia (“BC”) that is affiliated with the Evangelical Free Church of Canada, a church that believes in the historic orthodox Christian religion.<sup>1</sup>
6. The *Charter of Rights and Freedoms* does not apply to Trinity Western as a private institution;<sup>2</sup> however, the Federation of Law Societies of Canada (“FLSC”) and provincial law societies must consider Charter values<sup>3</sup> in their consideration of the public interest.
7. At the heart of the issue facing the legal community is the TWU Community Covenant (“Covenant”), which among other things, mandates faculty and students to abstain from “*sexual intimacy that violates the sacredness of marriage between a man and a woman.*” Other requirements of concern in the Covenant relate to divorce and alcohol and drug dependency. There are vague references to consequences for not adhering to this Covenant both on and off campus.
8. TWU offers education to the general public. One does not have to belong to the Evangelical Free Church to attend the school. The Covenant is *prima facie* discriminatory against sexual minorities and also infringes on the protections provided based on marital status.
9. The Approval Committee of the FLSC has given preliminary approval to TWU’s proposed law school and has concluded that TWU’s proposed law school meets the national requirements. However, the FLSC has noted three areas of concern, including the teaching of public law and ethics as well as concerns around the budget. Outside its mandate were other issues of clear concern to members of the legal community.
10. The Special Advisory Committee of the FLSC was mandated to address issues outside the mandate of the Approval Committee. The Committee considered whether there were additional public interest issues that should be addressed when determining the eligibility of future graduates of TWU’s law school. This Committee concluded that the *TWU v. BCCT*<sup>4</sup> case is the current law as it stands and that there is a requirement for evidence of actual harm when there are competing rights at stake.<sup>5</sup>
11. The Commission will address a narrower issue, which is that Trinity Western University’s Covenant creates an erosion of the democratic values that maintain a separation of church and state. The Commission recommends that the Nova Scotia Barristers’ Society create a barrier of admission for Trinity Western students on this basis and because the Covenant would be discriminatory in Nova Scotia. The reasoning of Professor Diane Pothier’s

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<sup>1</sup> Trinity Western University, “Statement of Faith” (2009) Online: <http://twu.ca/divisions/hr/employee/documents/statement-of-faith.pdf>

<sup>2</sup> *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, at 25 [“*TWU v. BCCT*”].

<sup>3</sup> *Doré v. Barreau du Québec*, 2012 SCC 12 at para 24 law societies “must act consistently with the values underlying the grant of discretion, including *Charter* values.”

<sup>4</sup> *TWU v BCCT*, *supra* note 2.

<sup>5</sup> Special Advisory Committee on Trinity Western’s Proposed Law School, (2013) “Final Report” pp. 8-9.

submission,<sup>6</sup> the Commission suggests, is a reasonable expression of this barrier. She suggests Trinity Western students could write the exams required by the National Committee on Accreditation for the areas of concern: public law, constitutional law and ethics, similar to students from foreign jurisdictions.

12. The barrier created may then have the effect of triggering a judicial review of this issue and possibly allow the Supreme Court of Canada to reconsider its 2001 decision. That decision did not consider the issues as they are framed in the following submissions.

## II. CHURCH AND STATE

13. The Supreme Court of Canada (“SCC”) decided the *Trinity Western University v. British Columbia College of Teachers*<sup>7</sup> case in 2001. Considering this decision was made 13 years ago, it may be decided differently based on both legal and societal changes. The law of human rights evolves and reflects ever-changing societal values. For example, Ontario’s decision to recognize same-sex unions in 2003<sup>8</sup> was followed by similar decisions in other provinces and the national legalization of same-sex marriages in Canada in 2004.<sup>9</sup> The protection of sexual orientation as a human rights characteristic has strengthened since this 2001 SCC decision. The SCC itself commented on the “unfavourable differential treatment” the Covenant created for LGBT[I ]people.
14. The majority of the Supreme Court found that “*at the heart of the appeal is how to reconcile religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system, concerns that may be shared by society generally.*”<sup>10</sup>
15. The Commission suggests the “heart” of what Trinity Western brings to the law societies (and the BC teaching regulators in 2001) is not a freedom to practice religion but the freedom to impose those practices on others in the provision of secular services (law training). More specifically, Trinity Western is asking to impose *prima facie* discriminatory practices on the receivers of those services whether or not they are adherents of the religion.
16. The legal analysis and test provided by the Supreme Court of Canada in *TWU v. BCCT* is inapplicable when framed in this way; there is no need to examine whether harm can be shown by lawyers who graduate and exhibit discriminatory practices. The harm has already been created by the imposition of a religious practice on a non-religious student in a secular context (legal training available to the general public).

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<sup>6</sup> Pothier, Diane, Submissions to the NSBS, dated January 18, 2014 Online: [http://nsbs.org/sites/default/files/ftp/TWU\\_Submissions/2014-01-24\\_Pothier\\_TWU.pdf](http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-24_Pothier_TWU.pdf)

<sup>7</sup> *TWU v. BCCT*, *supra* note 2.

<sup>8</sup> *Halpern v. Canada (Attorney general)*, 2003 CanLII 26403 (ON CA).

<sup>9</sup> Reference re Same-Sex Marriage, 2004 SCC 79, [2004] 3 SCR 698.

<sup>10</sup> *TWU v. BCCT*, *supra* note 2, at 28.

17. The Court defined freedom of religion as:

The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination....<sup>11</sup>

18. This definition of freedom of religion is traditionally what attracts a duty to accommodate.

The Commission suggests, however, that there is a difference between the freedom to *practice* religion, and the freedom of expression of a “world (religious) view” within an institution offering secular services. In this case, the church operates institutions that produce public school teachers, nurses and, shortly, lawyers.

19. An institution that provides services unrelated to its core religious observances enters into the public secular domain. Operating a law school is not intrinsic to the religious observances of the Evangelical Free Church. Rather, the freedom of expression at stake for the church is its ability to create mainstream institutions open to the public that reflect their values.

20. When an organization with a religious view can impose their worldview on the public as a condition of enrollment, it creates a state within a state. As the Supreme Court notes, Canada has a long history of churches being involved with education.<sup>12</sup> In Nova Scotia, however, we do not have a history, since the advent of the Charter, of these institutions successfully imposing discriminatory values on the non-religious public attending the institutions.

21. 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.”<sup>13</sup>

22. In this instance, the primary purpose is the provision of legal services. Under Nova Scotia’s Act, Trinity Western is not “an exclusively religious or ethnic organization” and therefore would not, on a plain reading of the Act, fit within the Act’s exception. Trinity Western is a law school with a religious worldview. It is not a religious group asserting its right to practice religion.

23. Freedom to practice the faith of the Evangelical Free Church law students is therefore not at risk. What is at risk for TWU is the freedom to compel discriminatory conformity of all persons entering the institution. The freedom to create a religious state, including its discriminatory components within a Charter values state, is also at risk. The “right” at stake is the freedom of Trinity University to impose the discriminatory practice behind its worldview on those students who have protected characteristics in the provision of services

<sup>11</sup> *Ibid*, quoting: *R. v. Big M Drug Mart Ltd.*, 1985 CanLII 69 (SCC) at pp. 336-337.

<sup>12</sup> *TWU v. BCCT*, *supra* note 2, at 34.

<sup>13</sup> Nova Scotia *Human Rights Act*, c.214, RSNS 1989, s. 6(2) (“The Act”).

offered to the general public.

24. The Supreme Court found that “*the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. Acting on those beliefs, however, is a different matter.*”<sup>14</sup>
25. With respect, the individual students at TWU were not prevented from adhering to their religious beliefs. Their beliefs still exist without the Covenant. Nor would students’ religion be hindered or limited if they did not sign the Covenant. The religious beliefs of TWU students and other Evangelical Christians must be respected and protected by the freedom of religion.
26. Recent SCC case law on the freedom of religion states that this freedom is only infringed where:
- (1) the claimant sincerely holds a belief or practice that has a nexus with religion; and
  - (2) the provision at issue interferes with the claimant’s ability to act in accordance with his or her religious beliefs.
27. The interference must be so serious that it ... “threatens actual religious beliefs or conduct.”<sup>15</sup>

### **III. N.S. Human Rights Act exemption for religious organizations**

28. 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).
29. 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) an 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

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<sup>14</sup> *TWU v. BCCT*, *supra* note 2, at 36.

<sup>15</sup> *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 SCR 467, at 155.

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 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];

30. 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.

31. 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.

32. 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.

33. 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.

#### **IV. B.C. *Human Rights Code* exception for religious educational organizations**

34. The British Columbia *Human Rights Code* (“BC Code”) provides for an exemption in section 41. The exemptions in the British Columbia and Nova Scotia human rights legislation differ in many ways. In BC, the Code recognizes an educational organization, which Nova Scotia does not explicitly protect. Of most importance, however, is that the BC exemption is not as narrow as the one included in the Nova Scotia Act.

35. Section 41 (1) states the following:

**Exemptions**

- 41 (1)** If a charitable, philanthropic, educational [Trinity], fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose [legal services] the promotion of the interests and welfare of an identifiable group [secondary purpose is the support with a worldview to the students who are Evangelical Free Christians] or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.
36. In BC, should an organization such as TWU fall into this exemption under the Code, it would be legally able to give preference to members of its religious sect if that were the primary purpose of the organization. It is not clear, even on these facts, that the BC Code would allow this exception to be used. TWU has never had the Covenant challenged under the BC Code directly. The Supreme Court of Canada in 2001 only superficially touches on it, since the issue was not brought to them in this context. The Supreme Court does not appear to go far enough into the analysis of this provision.<sup>16</sup> The Court concludes that TWU meets the exemption because it is an educational institution affiliated with a well-known religion.

**V. Conclusion**

37. The Commission considers that in Nova Scotia the TWU Covenant would be discriminatory under the Act.
38. Given this significant divergence in history and law between Nova Scotia and BC, Professor Pothier's suggestion of treating Trinity law graduates like foreign students is a reasonable response from the Nova Scotia's Barristers' Society.
39. Given our human rights legislation and history, Nova Scotia may be uniquely and better positioned than other jurisdictions to object to the imposition of discriminatory religious beliefs into secular activities and onto secular students.
40. The Nova Scotia Barristers' leadership may also have the additional benefit of triggering a judicial review by TWU. A judicial review would open up the possibility of the Supreme Court of Canada revisiting its reasoning. The High Court could consider the issues reframed in terms of the preservation of democratic state values of maintaining a separation of church and state for secular activities that conflict with discriminatory religious beliefs.
41. In such an eventuality, the Commission would seek leave to intervene in this judicial review and appeal process, given the pressing democratic and human rights issues at stake.

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<sup>16</sup> *TWU v. BCCT*, *supra* note 2, at 32.

42. Finally, the Commission provides these forward-looking questions to consider:

- a) How do we justify the Covenant if, in ten years time, the top three most prestigious law schools in the county are law schools with a religious worldview that exclude married lesbian and gay students?
- b) How do we justify the Covenant if, in ten years time, one third of Canadian law schools have a fundamentalist Islamic worldview that permits female students but requires that they must always be accompanied by a male adult?

Yours Truly,

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