TRINITY WESTERN UNIVERSITY
Office of the President

April 23, 2014

J. René Gallant
President, Nova Scotia Barristers' Society
Cogswell Tower
800-2000 Barrington Street
Halifax, N.S. B3J 3K1

Dear President Gallant:

RE: Trinity Western University ("TWU") School of Law

Thank you for your email of April 17, 2014 and access to the two reports referenced therein. We have concern with some misstatements and errors in the reports and we respectfully ask that this letter be distributed to all Benchers who will participate in the meeting on April 25th.

Both reports make the statement that the writer acknowledged during oral submissions on March 4, 2014 that TWU engages in discrimination, but that such discrimination is lawful. Page 10 of the April 16, 2014 Memorandum to Council contains the incorrect statement that that "it has not really been disputed that that requiring students to adhere to the TWU Community Covenant discriminates…" The reports cite p.105ff of the Transcript.

This is not an accurate description of what was said. Please see lines 3-8 on p.105, which records a question from the Chair:

> *Is it your view, is it the school's position that the Community Covenant is not discriminatory by virtue of those six words in respect of LGBTQ equality?*
>
> ***A.*** *Yes, it's my view that it's not discriminatory.*

That exchange was followed by a discussion to the effect that any meaningful discussion regarding "discrimination" must be grounded in the law (see pp.106-107 of the Transcript).

The Chair made the comment that he does not "want the B.C. *Human Rights Code* to be the answer to why it's lawful" (p.105, lines 18-19). In this context, there are two additional errors made in the April 16, 2014 Memorandum to Council:

1. On page 11, it is stated that the proposition that a restriction on sexual practices based on religious teachings does not denigrate members of the LGBT community "was rejected by the Supreme Court of Canada in ...*Whatcott*..."

   This is not accurate. At para. 122, the Supreme Court of Canada specifically stated:

   > *I agree that sexual orientation and sexual behaviour* ***can be differentiated*** *for certain purposes.[Emphasis added]*

   Given TWU's constitutional rights and those of its community, a respectful differentiation based on religious belief continues to be valid. *Whatcott* must be read in its context, as it dealt with the constitutionally permissible extent of prohibitions on expressions of hate.

2. On page 12, it is stated that the Community Covenant would not be lawful "measured against ... the *Nova Scotia Human Rights Act*." On page 13, it is stated that a resolution rejecting TWU graduates "will likely be premised on Council's conclusion that TWU's Community Covenant amounts to institutionalized discrimination ... protected by Nova Scotia human rights legislation". Such a determination would not be valid.

   The *Nova Scotia Human Rights Act* cannot be applied to organizations or acts outside of Nova Scotia. To do so would be the extra-territorial application of provincial legislation, contrary to law. In *Grimm v. Co-operative Fire & Casualty Co.* (1990), 50 N.S.R. (2d) 462 at para. 18, the Nova Scotia Supreme Court (Trial Division) reiterated the principle that provincial legislation in respect of property and civil rights cannot apply extra-territorially. This legal principle was more recently repeated in *Cahill Instrumentation Ltd. and IBEW, Local 625, Re* (2007), Carswell NS 792, paras. 22-23, citing:

   > *P. A. Côté The Interpretation of Legislation in Canada, 2nd ed. 1991 (Les Éditions Yvon Blais Inc.) at p. 170 where the author states:*
   >
   > > *Unless it is implicitly or explicitly provided otherwise, the legislator is presumed to enact for persons, property juridical acts and events within the territorial boundaries of his jurisdiction.*
   >
   > *And at p. 171:*
   >
   > > *"Where provincial statutes are concerned, the presumption against extra-territorial effect is reinforced by another favouring a construction that validates an enactment over one that renders it invalid. Because provincial legislatures have no power to legislate extra-territorially, they are deemed to respect the constitutional limits of their powers."*

   Cases in Ontario specifically apply this legal principle to human rights legislation. In *Hughes v. 507417 Ontario*, 2010 HRTO 1791 at para. 10, the Tribunal properly held that the *Code* is a provincial statute that cannot be applied "extra-territorially":

> *The Tribunal was created by a provincial statute and the rights provided for in the Code are statutory in nature. As a provincial statute, the Code is subject to the constitutional limitation that provinces may not legislate "extra-territorially". The Constitution Act, 1867, makes it clear that provincial legislative jurisdiction is confined to "property and civil rights in the province" (section 92(13)), and "generally all matters of a merely local or private nature in the province" (section 92(16)).*

Even more on point, in *Cohen v. Law School Admission Council*, 2011 HRTO 703 at pars.7-9 the Tribunal found that it could not apply the Ontario *Code* to the law school at Dalhousie University because the Ontario *Code* cannot apply to acts occurring outside of Ontario. The proceedings against Dalhousie were therefore dismissed.

Neither the Nova Scotia Human Rights Commission, nor any Board of Inquiry, may give extra-territorial effect to the *Nova Scotia Human Rights Act*. The Nova Scotia Barristers' Society is similarly constrained. It would not be proper to ground a rejection of TWU's graduates on the extra-territorial application of provincial legislation.

While the writer would certainly have preferred to be in attendance during your deliberations on April 25th, TWU graduation and other travel obligations have made this impossible.

We look forward hearing from you following the meeting of Council.

Sincerely,

Bob Kuhn

Bob Kuhn, J.D.