

*Federation of Law Societies
of Canada*



*Fédération des ordres professionnels
de juristes du Canada*

SPECIAL ADVISORY COMMITTEE ON TRINITY WESTERN'S PROPOSED SCHOOL OF LAW

FINAL REPORT

December 2013

Introduction

1. In 2010, Canada's law societies approved a uniform national requirement that graduates of Canadian common law programs must meet to enter law society admission programs. Developed by the Federation of Law Societies of Canada (the "Federation")¹ Task Force on the Canadian Common Law Degree, the national requirement specifies the competencies and skills graduates must have attained and the law school academic program and learning resources law schools must have in place. The national requirement will apply to graduates of existing and prospective Canadian law schools effective 2015.
2. The Federation's Canadian Common Law Program Approval Committee (the "Approval Committee"), is mandated to review existing and proposed law school programs to determine whether they comply with the national requirement. In the case of new law school programs, a positive determination by the Approval Committee is but one step in the process. New law school programs must also be approved by the relevant provincial government authority.
3. In June 2012, Trinity Western University ("TWU"), a Christian faith-based university in British Columbia, submitted a proposal for a law school program to the Approval Committee. Founded in 1962, TWU has been recognized as a university by the government of British Columbia since 1985. It currently offers 42 undergraduate and graduate degree programs and has a student enrollment of approximately 4,000.
4. The TWU proposal, which identified as one of its objectives the integration of a Christian worldview into the law school curriculum, provoked a strong response from many in the legal community. Many written submissions from groups and individuals were made to the Federation and the Approval Committee. Copies of those submissions are available at <http://www.flsc.ca/en/twu-submissions/>. Many of those writing alleged that TWU would discriminate against lesbian, gay, bisexual and transgendered ("LGBT") individuals and called on the Approval Committee to reject the TWU proposal. Others wrote in favour of the proposed law school citing the right of religious freedom, the value of diversity in law school education and TWU's reputation as an educational institution.
5. At the heart of the debate is TWU's Community Covenant, a statement of commitment to the Christian faith that includes an undertaking to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."² All students, faculty and staff are required to abide by the Community Covenant. The proposal to integrate a Christian worldview into the curriculum of the law school has also raised concerns amongst those who made submissions to the Federation.

¹ The Federation of Law Societies of Canada is the umbrella organization of Canada's 14 provincial and territorial law societies.

² Trinity Western University (TWU), *Community Covenant Agreement*, <http://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html>.

6. The Approval Committee is responsible for assessing whether the law school program proposed by TWU would meet the national requirement. That assessment process is currently underway. There are, however, a number of issues raised in the various submissions made to the Federation about the TWU proposal that are outside of the mandate of the Approval Committee. Recognizing the importance of addressing these issues, the Federation established the Special Advisory Committee on Trinity Western University's Proposed School of Law (the "Special Advisory Committee"). In establishing the Special Advisory Committee, the Council of the Federation approved the following mandate:

1. *The specific mandate of the Special Advisory Committee is to provide advice to the Council of the Federation on the following question:*

What additional considerations, if any, should be taken into account in determining whether future graduates of TWU's proposed school of law should be eligible to enroll in the admission program of any of Canada's law societies, given the requirement that all students and faculty of TWU must agree to abide by TWU's Community Covenant Agreement as a condition of admission and employment, respectively?

2. *In its consideration of the question, the Special Advisory Committee shall take into account:*

(a) *all representations received by the Federation to date including any responses to those representations by TWU;*

(b) *applicable law, including the Canadian Charter of Rights and Freedoms, human rights legislation, and the Supreme Court of Canada decision in Trinity Western University v. British Columbia College of Teachers (2001 SCC 31); and*

(c) *any other information that the Special Advisory Committee determines is relevant to the question.*

7. John J.L. Hunter, Q.C., Past-President of the Federation and the Law Society of British Columbia was appointed to chair the Special Advisory Committee. The other members of the committee are:

- Mona T. Duckett, Q.C., former Council member representing the Law Society of Alberta and Past-President of the Law Society of Alberta
- Derry Millar, former Treasurer of the Law Society of Upper Canada
- Madame la Bâtonnière Madeleine Lemieux, Ad. E., former Council member representing the Barreau du Québec and former Bâtonnière of the Barreau
- Morgan C. Cooper, Past-President of the Law Society of Newfoundland and Labrador

Support to the Special Advisory Committee is provided by Frederica Wilson, Federation Senior Director, Regulatory and Public Affairs and Daphne Keevil Harrold, Federation Policy Counsel.

8. In considering the question put to it, the Special Advisory Committee reviewed all of the submissions made to the Federation, together with responses to those submissions received from TWU. A number of email submissions from individuals sent directly to members of the committee were also considered. In addition, the Special Advisory Committee reviewed relevant law, and considered legal advice obtained by the Federation on the applicability of the Supreme Court of Canada's decision in *Trinity Western University v. British Columbia College of Teachers*³ ("BCCT"). The committee's review of the issues and its conclusions are set out below.

Role of Federation and Law Societies

9. In correspondence to the Federation dated April 24, 2013 and May 17, 2013 (copies attached as Appendices "A" and "B" respectively) TWU questioned whether consideration of broader public interest issues in relation to its application for approval of its proposed law school program is within the jurisdiction of the Federation. TWU also suggested that in establishing the Special Advisory Committee the Federation is "interposing itself into an area that the law societies themselves may not wish, or be statutorily permitted, to tread," and have not asked the Federation to enquire into.
10. The Special Advisory Committee believes that the Federation can and should consider whether there are any broader public interest issues outside of compliance with the national requirement raised by TWU's proposed school of law.
11. Canada's law societies are mandated by statute to regulate the legal profession in the public interest, and as the umbrella organization of the law societies the Federation shares a public interest focus. Examples from some of the relevant provincial statutes serve to illustrate the point.

Section 4.2 of Ontario *Law Society Act* provides in part:

- 4.2. In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:

.....

3. The Society has a duty to protect the public interest.

The Saskatchewan *Legal Profession Act* contains a similar provision:

³ 2001 SCC 31 (CanLII), <http://canlii.ca/t/dmd>.

3.1 In the exercise of its powers and the discharge of its responsibilities, it is the duty of the society, at all times:

(a) to act in the public interest;

...

The *British Columbia Legal Profession Act* includes an obligation to preserve and protect the rights and freedoms of all persons within its statutory duty to uphold and protect the public interest. Section 3 of that Act reads in part:

3. It is the object and duty of the society to uphold and protect the public interest in the administration of justice by

(a) preserving and protecting the rights and freedoms of all persons,

(b) ensuring the independence, integrity, honour and competence of lawyers,

(c) establishing standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission,

...

12. The Federation's public interest focus is evident from its mission statement, which opens with the words "[a]cting in the public interest."

13. In its decision in *BCCT* the Supreme Court of Canada held that the public interest jurisdiction of the teachers college permitted it to consider broad public interest issues such as those related to equality. The court held that the power of the teachers college to establish standards for entrance into the profession must be interpreted in light of the general purpose of its constating statute and in particular its public interest mandate.⁴ In reaching this conclusion, the Court rejected the argument put forward by TWU that the powers of the teachers college were limited to establishing standards to ensure that teachers were properly trained, competent, and of good character.⁵

14. The Special Advisory Committee can see no reason for coming to a different conclusion in the case of TWU's application for approval of its proposed law school. Like the teachers college in the *BCCT* case, Canada's law societies are required to exercise their overall mandate in the public interest. Setting 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. It reflects the law societies' collective view of the competencies new members of the profession must possess to be able to practise. Assessing whether an applicant meets the national requirement is, however, only one aspect of the admissions process. Law societies must, for example, determine what

⁴ *Ibid*, at paragraph 26.

⁵ *Ibid*, at paragraphs 12-13.

additional training or exams applicants must undertake and must assess whether applicants are fit to practise and are of good character. In each case, the ultimate decision on admissibility rests with the individual law societies.

15. The consideration of public interest issues is one aspect of the overall responsibility of law societies for determining whether an applicant should be admitted to the legal profession. Assisting the law societies with the exercise of this responsibility is entirely consistent with the mandate of the Federation. The decision to establish the Special Advisory Committee was made by the Council of the Federation, a body comprised of representatives from every law society in Canada. The advice to be provided by the Special Advisory Committee is intended to assist the law societies, the bodies ultimately charged with determining whether graduates from the proposed TWU school of law should be admitted to the profession.
16. It is important to distinguish the task assigned to the Special Advisory Committee from the role of the Approval Committee. As noted above, the mandate of the Approval Committee is to determine whether TWU's proposed law school program, if implemented in a manner consistent with its proposal, would meet the national requirement. That matter is currently under consideration by the Approval Committee. The mandate of the Special Advisory Committee is quite different. The committee has no power to decide whether TWU's application should be approved. It has been asked only to provide advice on whether the application raises any additional public interest considerations.

The Law

17. As is more fully described below, many of the individuals and groups who made submissions to the Federation on the subject of TWU's proposed law school raised concerns about the Community Covenant that students, faculty, and staff are required to abide by. More particularly, many of the submissions argued that given what they see as the inherently discriminatory nature of the Community Covenant, approving a law school at TWU would be contrary to the public interest. Others, writing in support of TWU, cited the right of freedom of religion and argued that withholding approval of TWU's proposed school of law would violate the rights of those wishing to study law at a faith-based school.
18. In considering these issues and answering the question put to it by its terms of reference, the Special Advisory Committee has taken into account relevant case law, statutes, and the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). The committee has also considered a legal opinion on the applicability of the Supreme Court of Canada's decision in *BCCT* prepared for the Council of the Federation by John B. Laskin, (see Appendix "C") a copy of which was provided to the Special Advisory Committee.
19. TWU is a private institution to which the *Charter* does not apply and which is exempt, in part, from the provisions of the *British Columbia Human Rights Code* (the "*Human Rights Code*"). Section 41(1) of that statute states:

41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group 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.

20. In the *BCCT* case the Supreme Court held that although the *Charter* does not apply to TWU (as it is a private institution) and the university is exempt from certain provisions of the *Human Rights Code*, the rights and values articulated in the *Charter* and human rights legislation are relevant in considering broader issues of public interest.⁶

21. The *BCCT* case involved an application by TWU to the British Columbia College of Teachers for approval of its teacher education program. The college rejected the application, basing its decision on the fact that students, faculty and staff were required to abide by a Community Standards agreement (the forerunner to the current Community Covenant) that forbid “biblically condemned” practices including “homosexual behaviour.” In finding that the teachers college erred in rejecting the TWU application, the Court noted that the *Charter* both protects against discrimination on the basis of sexual orientation and guarantees freedom of religion. The Court held that equality rights and freedom of religion must be balanced, and that neither right is to be preferred over the other.⁷

22. In reaching this finding, the Supreme Court confirmed the approach to reconciling different rights and values under the *Charter* articulated in its decision in *Dagenais v. Canadian Broadcasting Corp*:

A hierarchical approach to rights, which places some over others, must be avoided, both when interpreting the *Charter* and when developing the common law. When the protected rights of two individuals come into conflict . . . *Charter* principles require a balance to be achieved that fully respects the importance of both sets of rights.⁸

23. The majority held that “the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence.”⁹ The Court held:

It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the *Charter* does not apply. To state that the voluntary adoption of a code of conduct based on a person’s own religious

⁶ *Ibid*, at paragraph 27.

⁷ *Ibid*, paragraphs 27-30.

⁸ 1994 CanLII 39 (SCC), <http://canlii.ca/t/1frnq>, as cited in *BCCT* supra, note 3 at paragraph 31.

⁹ *Ibid*, at paragraph 25.

beliefs, in a private institution, is sufficient to engage s.15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.¹⁰

24. The Court found that section 41 of the *Human Rights Code* protects a religious institution from a finding that it is in breach of the *Human Rights Code* "where it prefers adherents of its religious constituency."¹¹ The Court also held that this statutory exemption accommodates religious freedom.

25. In reaching these findings the Supreme Court distinguished between belief and conduct stating:

. . . the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.¹²

26. Some of those making submissions to the Federation about TWU's proposed school of law have suggested that the Court would take a different approach today to reconciling competing *Charter* rights. It has also been suggested that the Court might not require evidence of actual harm as it did in *BCCT*.

27. The Special Advisory Committee notes that since the *BCCT* case the Supreme Court has confirmed its approach to reconciling competing rights, most recently in its decision in *Saskatchewan (Human Rights Commission) v. Whatcott*, released in February 2013.¹³ In its decision in *Whatcott*, a case involving the prohibition of hate speech contained in Saskatchewan human rights legislation, the Court described its task as requiring it:

to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.¹⁴

28. It is the view of the Special Advisory Committee that the approach of the Supreme Court in *BCCT* to reconciling competing rights under the *Charter* and the requirement of evidence of

¹⁰ *Ibid.*

¹¹ *Ibid.*, at paragraph 35.

¹² *Ibid.*, at paragraph 36.

¹³ 2013 SCC 11 (CanLII), <http://canlii.ca/t/1frng>, at paragraphs 6, 66, and 145. See also *Reference re Same-Sex Marriage*, 2004 SCC 79 (CanLII) (SCC), <http://canlii.ca/t/1jdhv>, at paragraph 50.

¹⁴ *Ibid.*, at paragraph 66.

actual harm continue to be the law in Canada. Although the Special Advisory Committee cannot know what evidence might be presented in the event of a court challenge to TWU's proposed school of law, the committee has not received evidence that would, in its opinion, lead to a different outcome than occurred in the *BCCT* case.

Issues raised in submissions

29. The Federation has received representations from a number of individuals, organizations and groups of individuals (including TWU). These submissions, and a number of the emails sent directly to members of the committee, raise important issues that the Special Advisory Committee has considered in its deliberations. The committee has also considered the arguments made by Professor Elaine Craig in her paper *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program*.¹⁵
30. Many writing in opposition to TWU's proposed law school argue that the policies of TWU, particularly its Community Covenant agreement, discriminate against LGBT individuals and are contrary to societal values of equality and non-discrimination. Approval of the proposed law school program, they argue, would thus not be in the public interest.
31. Some express concern that approval of TWU's proposed law school would result in LGBT students having fewer choices and opportunities than other students. Others question the ability of TWU to provide a balanced, high quality legal education and suggest that its stated intention to teach law from a Christian worldview would make TWU incapable of teaching legal ethics, constitutional and human rights law. A related argument suggests that students would not be taught important critical thinking skills. Concerns were also expressed about TWU's respect for academic freedom and the impact this would have on the legal education students would receive.
32. One submission points to the United States experience and suggests that the American Bar Association ("ABA") has adopted a new standard that prohibits law schools from discriminating on the basis *inter alia* of sexual orientation.
33. It must be noted, however, that not all individuals and organizations who wrote to the Federation oppose the TWU application. A number of the submissions argue in favour of approval of the proposed law school citing TWU's record as a high quality educational institution and suggesting, for example, that as a faith-based institution it would be well placed to impart an ethical view to its students. Others argue that secular schools should not have a monopoly on legal education in Canada and that the legal profession benefits from a diversity of views amongst its members. Many challenge the suggestion that a TWU law school would not properly teach Canadian law and legal values. They argue that in the absence of evidence that TWU would fail to do so, there is no reason to deny approval of its proposed law school program.

¹⁵ Canadian Journal of Women and the Law, Vol. 25, No. 1, 2013.

34. The Special Advisory Committee's consideration of these issues follows.

Whether approving TWU's proposed law school would be contrary to the public interest

35. The Special Advisory Committee has concluded that consideration of the public interest is clearly relevant in determining whether it would be appropriate to permit future graduates of TWU's proposed school of law to enroll in law society admission programs. As noted above, in the *BCCT* case the Supreme Court held that consideration of human rights principles and the values enunciated in the *Charter* are relevant to this consideration notwithstanding that TWU is a private institution that is exempt from certain provisions of British Columbia human rights legislation and is not bound by the *Charter*.
36. Recent submissions to the Federation have argued that TWU bans LGBT individuals from attending the school. They argue that approving a law school at an institution that bans students on the basis of sexual orientation would be contrary to the public interest. To the knowledge of the Special Advisory Committee, however, the suggestion that TWU bans LGBT individuals is inaccurate. The Special Advisory Committee recognizes that the Community Covenant may result in differential treatment of LGBT individuals. Faced with a requirement to commit to a code of behaviour that prohibits sexual activity outside of marriage between a man and a woman, LGBT students would legitimately feel unwelcome at a TWU law school. The Supreme Court has made it clear, however, that the religious freedom rights of those who might wish to attend such a faith-based institution must also be considered and it is clear from the submissions received by the Federation that there are many such students.
37. The Court also made it clear in *BCCT* that the assessment of the public interest cannot be based solely on the religious precepts of the school, or in this case, the proposed school and that the admissions policy requiring students to adhere to the Community Covenant is not sufficient to establish unlawful discrimination. Absent evidence for example, that graduates of the proposed law school would engage in discriminatory conduct or would fail to uphold the law, freedom of religion must be accommodated. No such evidence has been brought to the attention of the Special Advisory Committee; nor is it aware of any.
38. It has been suggested by some, that while TWU's policies may be lawful in British Columbia by virtue of the specific provisions of the *BC Human Rights Code*, the university's policies would be contrary to human rights legislation in other jurisdictions. In light of the Supreme Court of Canada's findings on the requirement to balance equality rights and freedom of religion, it is not evident to the Special Advisory Committee that this would be the case. In any event, the Special Advisory Committee has concluded that this suggestion misconstrues the nature of the analysis required in determining whether approval of the proposed TWU law school and admission of future graduates of the program to law society admission programs would be consistent with the public interest.

39. TWU has been recognized by the government of British Columbia as a degree granting institution. The issue is not whether TWU could operate in the same manner in another jurisdiction, but whether it is operating lawfully in the jurisdiction in which it is located and whether its policies are consistent with the values expressed in the *Charter* and human rights legislation. The Supreme Court of Canada concluded in the *BCCT* case that the Community Standards document, a forerunner to the Community Covenant that was more explicit in its prohibition of homosexual behaviour than the current Community Covenant, was not contrary to human rights values given the need to balance equality rights and freedom of religion. The Special Advisory Committee is not persuaded to reach a different conclusion in relation to TWU's proposed law school program.
40. The Special Advisory Committee believes that it is important to note that if TWU's proposed school receives preliminary approval from the Approval Committee and if evidence of actual harm emerges following such approval it would be appropriate to address it at that time.

Whether TWU's Christian worldview and intention to teach from this perspective makes it incapable of effectively teaching legal ethics, constitutional and human rights law

41. Some opponents of TWU's proposed law school argue that it will not provide a balanced, quality legal education. They suggest that TWU's policies and intention to teach from a Christian worldview would prevent free, open dialogue and that students in such a program would, as a consequence, fail to develop necessary critical thinking skills. It has also been suggested that TWU's intention to teach law from a Christian worldview would interfere with effective teaching of legal ethics, constitutional and human rights law. The inability to effectively teach legal ethics, particularly to teach students to think critically about ethics, is also one of the central arguments advanced by Professor Elaine Craig in her article, *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program*.¹⁶
42. Others take the opposite view, arguing that as a faith-based institution TWU would be well placed to impart ethics to its students and that teaching from a Christian worldview might actually stimulate discussion and debate. It has also been suggested that "[t]he legal profession and the classrooms of Canada's law schools would benefit greatly from the expansion of legal education in institutions that hold non-mainstream views."¹⁷
43. TWU has made strong representations in response to the suggestion that it cannot and will not teach legal ethics, constitutional and human rights law appropriately and that students in its proposed program will not develop critical thinking skills. The May 17, 2013 letter from TWU to the Federation includes a clear commitment to "fully and appropriately" teaching legal ethics and professionalism and a recognition of its duty to teach equality and non-

¹⁶ Note 15, *supra*.

¹⁷ March 19, 2013 letter from UBC law students – Group 2, Submissions to the Special Advisory Committee, <http://www.flsc.ca/en/twu-submissions/>

discrimination in both its legal ethics and substantive law courses.¹⁸ The letter highlights the fact that course outlines contained in its proposal indicate that TWU intends to rely on standard texts for teaching in the areas of legal ethics, constitutional and human rights law. TWU has also unambiguously acknowledged “its duty to teach equality and meet its public obligation with respect to promulgating non-discriminatory principles in its teaching of substantive law and ethics and professionalism.” In its May 17th letter, TWU also states that “TWU agrees with Egale Canada that ‘the dignity and value of all individuals irrespective of their sexual orientation . . . now form part of the fabric of professional ethics and the rule of law.’”

44. In the view of the Special Advisory Committee the argument that TWU’s Christian worldview will have a negative impact on the quality of legal education at the proposed law school and that students will fail to acquire necessary critical thinking skills is without merit. Such a finding cannot be based on TWU’s stated religious perspective or its Community Covenant; as the Supreme Court made clear in *BCCT* it could be based only on concrete evidence.¹⁹ Not only has no such evidence been brought to the attention of the Special Advisory Committee, the evidence that we do have demonstrates an understanding by TWU of its obligation to appropriately teach legal ethics and other substantive law subjects. We see no basis to conclude, as some have suggested, that individuals holding particular religious views are incapable of critical thinking and of understanding their ethical obligations, or that the quality of the legal education provided by a law school at TWU would not meet expected standards. There can be no doubt that TWU’s Christian worldview is shared by many current members of the profession and the judiciary. There is no evidence that such individuals are any less capable of critical thinking or any less likely to conduct themselves ethically than any other members of the bar or the bench. Graduates of the proposed law school admitted to the profession would be subject to the supervision of the law societies and would be obliged to follow the ethical rules governing all members of the profession. Individuals breaching those ethical rules would be subject to disciplinary sanctions.
45. It is also worth noting that the proposed law school would not be the only professional faculty at TWU. The university operates both nursing and teacher education programs and has done so for many years. Graduates of those programs licensed to practise their respective professions must meet codes of professional conduct.²⁰ To the knowledge of the Special Advisory Committee, there is no evidence that graduates of the nursing and teaching programs at TWU are any less able to fulfill their ethical obligations than are graduates from programs at other schools.

¹⁸ See Appendix “B”.

¹⁹ *BCCT*, paragraphs 32-33.

²⁰ See, for example, *Standards for the Education, Competence, and Professional Conduct of Educators in British Columbia*, http://www.bcteacherregulation.ca/documents/AboutUs/Standards/edu_stds.pdf and the *Profession Standards* of the College of Registered Nurses of British Columbia, <https://www.crnbc.ca/Standards/ProfessionalStandards/Pages/Default.aspx>. Similar professional codes apply to teachers and nurses licensed in other Canadian jurisdictions.

Whether TWU respects academic freedom

46. Some of the submissions to the Federation have argued that TWU fails to respect academic freedom. Support for this argument is drawn from an October 2009 report published by the Canadian Association of University Teachers (the "CAUT") that concluded that TWU's policy on academic freedom allowed for "unwarranted and unacceptable constraints on academic freedom."²¹ The CAUT report followed an investigation by an *ad hoc* committee charged with determining whether TWU employed a "faith test" in employment and whether "all academic staff at TWU have a full measure of academic freedom."²²

47. The *ad hoc* committee concluded that although TWU's policy on academic freedom "appears to affirm a commitment to open critical thought in teaching and research" that commitment is qualified by a requirement that the teaching and investigation occur "from a stated perspective" and as such violates academic freedom.²³ In reaching its finding the *ad hoc* committee also relied on the CAUT Academic Freedom Policy²⁴ which states, in part:

Academic freedom includes the right, without restriction by prescribed doctrine, to freedom to teach and discuss; freedom to carry out research and disseminate and publish the results thereof; freedom to produce and perform creative works; freedom to engage in service to the institution and the community; freedom to express one's opinion about the institution, its administration, and the system in which one works; freedom to acquire, preserve, and provide access to documentary material in all formats; and freedom to participate in professional and representative academic bodies. Academic freedom always entails freedom from institutional censorship.

48. The Special Advisory Committee agrees that a commitment to academic freedom is important in a law school program. We note, however, that there is no single definition of academic freedom. In October 2011, the Association Universities and Colleges of Canada (the "AUCC"), the national organization of Canadian universities and colleges,²⁵ adopted a Statement on Academic Freedom²⁶ that includes a more limited definition. The AUCC statement provides for the possibility that academic freedom may be limited by the "academic mission" of the educational institution. Key provisions of the statement include the following:

Unlike the broader concept of freedom of speech, academic freedom must be based on institutional integrity, rigorous standards for enquiry and institutional autonomy, which allows universities to set their research and educational priorities.

²¹ *Report of an Inquiry Regarding Trinity Western University*, p. 10, <http://www.caut.ca/docs/reports/report-of-caut-ad-hoc-investigatory-committee-on-twu.pdf?sfvrsn=0>.

²² *Ibid*, at p. 1.

²³ *Ibid*, at p. 4.

²⁴ <http://www.caut.ca/about-us/caut-policy/lists/general-caut-policies/policy-statement-on-academic-freedom>.

²⁵ The AUCC is a member-based organization representing 97 universities and colleges.

²⁶ <http://www.aucc.ca/media-room/news-and-commentary/canadas-universities-adopt-new-statement-on-academic-freedom/>.

...

Academic freedom is constrained by the professional standards of the relevant discipline and the responsibility of the institution to organize its academic mission. The insistence on professional standards speaks to the rigor of the enquiry and not to its outcome.

49. The criteria for membership in the AUCC include a requirement to respect the spirit of the AUCC Statement on Academic Freedom.²⁷

50. The academic freedom policy of TWU, a member of the AUCC, recognizes that it “is an essential ingredient in an effective university program.”²⁸ The full policy reads as follows:

Trinity Western University recognizes that academic freedom, though varyingly defined, is an essential ingredient in an effective university program. Jesus Christ taught the importance of a high regard for integrity, truth, and freedom. Indeed, He saw His role as in part setting people free from bondage to ignorance, fear, evil, and material things while providing the ultimate definition of truth.

Accordingly, Trinity Western University maintains that arbitrary indoctrination and simplistic, prefabricated answers to questions are incompatible with a Christian respect for truth, a Christian understanding of human dignity and freedom, and quality Christian educational techniques and objectives.

On the other hand, Trinity Western University rejects as incompatible with human nature and revelational theism a definition of academic freedom which arbitrarily and exclusively requires pluralism without commitment, denies the existence of any fixed points of reference, maximizes the quest for truth to the extent of assuming it is never knowable, and implies an absolute freedom from moral and religious responsibility to its community.

Rather, for itself, Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research. Students also have freedom to inquire, right of access to the broad spectrum of representative information in each discipline, and assurance of a reasonable attempt at a fair and balanced presentation and evaluation of all material by their instructors. Truth does not fear honest investigation.

²⁷ Association of Universities and Colleges of Canada, *Criteria to Become a Member*, <http://www.aucc.ca/about-us/member-universities/membership-eligibility/criteria-to-become-a-member/>.

²⁸ <https://twu.ca/academics/calendar/2012-2013/academic-information/academic-policies/>.

51. In the view of the Special Advisory Committee, the qualification in the TWU policy that academic freedom be exercised from “a stated perspective” is consistent with the provision in the AUCC statement recognizing the right of an institution to constrain academic freedom to accord with its academic mission. In these circumstances, it is not open to the Special Advisory Committee to conclude that academic freedom will not be respected at the proposed law school.

Whether approving TWU’s proposed law school would result in LGBT students having fewer opportunities and choices than others

52. If approved, a law school at TWU will bring to 20²⁹ the number of law schools in Canada offering common law programs and will result in an increase of the overall number of available law school places. Some have argued that even with this increase, approval of the TWU proposal would result in fewer choices for LGBT individuals wishing to attend law school than would exist for other students as TWU would not be a choice for LGBT students.

53. As a starting point, we are not aware of any evidence that TWU limits or bans the admission to the university of LGBT individuals. A number of those who made submissions to the Federation noted that there are LGBT students at TWU. It is reasonable to conclude that the requirement to adhere to the Community Covenant would make TWU an un welcoming place for LGBT individuals and would likely discourage most from applying to a law school at the university, but it may also be that a faith-based law school would be an attractive option for some prospective law students, whatever their sexual orientation. It is also clear that approval of the TWU law school would not result in any fewer choices for LGBT students than they have currently. Indeed, an overall increase in law school places in Canada seems certain to expand the choices for all students.

The ABA standards on discrimination on the basis of sexual orientation

54. In their joint submission³⁰ urging the Federation to consider the public interest issues related to TWU’s proposed law school, the Canadian Bar Association’s Sexual Orientation and Gender Identity Conference (“SOGIC”) and its Equality Committee referred to the experience in the United States. The submission cites the American Bar Association’s (“ABA”) *Standards and Rules of Procedure for Approval of Law Schools* and in particular Standard 211 as a potential source of “inspiration” as to how to balance freedom of religion and equality.

²⁹ This number includes existing law schools and law schools that have received preliminary approval from the Approval Committee.

³⁰ March 18, 2013 letter to Gérald R. Tremblay, Submissions to the Special Advisory Committee, <http://www.flsc.ca/en/twu-submissions/>

55. ABA Standard 211 prohibits discrimination in law school admission and hiring practices. Since 1981, when Standard 211 was amended in settlement of a lawsuit brought by Oral Roberts University, law schools with religious affiliations have been permitted to have admission or employment policies that relate to the institution's religious affiliation. The relevant section of Standard 211 reads:

(c) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (i) notice of these policies has been given to applicants, students, faculty, and staff before their affiliation with the law school, and (ii) the religious affiliation, purpose, or policies do not contravene any other Standard, including standard 405(b) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability. This Standard permits religious affiliation or purpose policies as to admission, retention, and employment only to the extent that these policies are protected by the United States Constitution. It is administered as though the First Amendment of the United States Constitution governs its application.

56. Pursuant to the current version of the standard, law schools are precluded from discriminating against applicants or students on the basis, *inter alia*, of sexual orientation. According to Interpretation 211-2 (which forms part of the official standard), however, "the prohibition concerning sexual orientation does not require a religiously affiliated school to act inconsistently with the essential elements of its religious values and beliefs." The ABA has confirmed that the standard distinguishes between discrimination on the basis of a person's status, and rules or codes that prohibit certain conduct. The former is prohibited, the latter permitted.

57. In considering the American treatment of religiously affiliated law schools, the Special Advisory Committee also considered the bylaws of the Association of American Law Schools ("AALS"), a voluntary member-based organization dedicated to "the improvement of the legal profession through legal education."³¹ Membership is open to law schools that have been operating for at least five years and have graduated their third class. Members are also required to adhere to a comprehensive list of requirements set out in the association's bylaws similar to those contained in the ABA standards.³² The list of members of the AALS includes a number of religiously- affiliated schools. Several other religiously-affiliated schools are in a category of "non-member, fee paid schools", which receive many of the benefits of full membership, including access to AALS publications and resources, but are not required to conform to all of the membership requirements.

³¹ AALS Bylaws, Article 1, Section 1-2, http://www.aals.org/about_handbook_bylaws.php.

³² AALS Bylaws, Article 6.

58. Section 6-3(a) of the bylaws of the AALS prohibits discrimination on the basis, *inter alia*, of sexual orientation. Guidance on the application of this section of the bylaws to religiously-affiliated law schools is provided by the AALS Executive Committee Regulations. Like ABA Standard 211, AALS Executive Committee Regulation 6-3.1 permits religiously-affiliated schools to have admissions and employment policies based on their religious affiliation provided such policies do not directly discriminate on the basis of sexual orientation and are consistent with the association's regulations on academic freedom. Notice of such policies must be provided in advance of a student, faculty or staff member becoming affiliated with the school.

59. Further guidance on the application of the non-discrimination bylaw to religiously affiliated law schools is provided in the AALS Statements of Good Practices. *Interpretive Principles to Guide Religiously Affiliated Member Schools as They Implement Bylaw Section 6-3(a) and Executive Committee Regulation 6-3.*³³ opens with the following paragraph:

These principles are intended to guide religiously affiliated member schools as they implement Bylaw Section 6-3(a) and revised ECR 6-3.1. They seek to strike a fair and sensitive balance between the values of religious liberty and nondiscrimination based upon sexual orientation. These principles are based on the premise that Bylaw 6-3(a) protects against discrimination on the basis of sexual orientation. When applied to religiously affiliated schools, that absolute protection of the status of sexual orientation continues, but in the unique context of religious liberty, Bylaw 6-3(a) and ECR 6-3.1 should be interpreted to permit the regulation of conduct when that conduct is directly incompatible with the essential religious tenets and values of a member school. These principles will guide the Accreditation Committee in reviewing whether a member school is in compliance with the Association's Bylaws and Executive Committee Regulations.

60. There are currently more than 50 religiously affiliated law schools in the United States, the majority of them ABA approved schools. Many religiously affiliated law schools are also members of the AALS. Religiously-affiliated law schools in the United States span a broad spectrum of religious beliefs. In some, there is little overt focus on the religious orientation of the institution, but in others the religious affiliation is reflected in the course content and the perspective from which the law is taught. At least some law schools approved by the ABA require students, faculty and staff to abide by codes of conduct or policies that include prohibitions on same-sex sexual conduct. Examples of such law schools include Baylor University, a Baptist institution, that bans "sexual misconduct" defined as "sexual abuse, sexual harassment, sexual assault, incest, adultery, fornication and homosexual acts,"³⁴ J. Reuben Clark Law School at Brigham Young University (affiliated with the Mormon Church), which requires students to abide by an Honour Code that expressly prohibits homosexual

³³ http://www.aals.org/about_handbook_sgp_rel.php.

³⁴ Baylor University, Sexual Misconduct Policy, <http://www.baylor.edu/content/services/document.php?id=39247>.

conduct;³⁵ and Liberty Law School, a self-described Christian institution, whose non-discrimination policy states expressly that while not discriminating on the basis of sexual orientation the school does “discriminate on the basis of sexual misconduct including . . . any form of sexual behaviour that would undermine the Christian identity or faith mission of the University.”³⁶

61. Approval by the ABA and membership in the AALS of religiously-affiliated schools that restrict same-sex sexual conduct is consistent with the distinction that the policies of both organizations draw between discrimination on the basis of status and restrictions on specified conduct. Although both the ABA and the AALS require as a condition of approval or membership that law schools not “preclude admission of applicants or retention of students on the basis of . . . sexual orientation . . .” neither the ABA standard nor the bylaws of the AALS prevent religiously-affiliated law schools from imposing restrictions on sexual conduct similar to those imposed by the TWU Community Covenant.
62. The Special Advisory Committee sees merit in the non-discrimination provisions of the ABA and the AALS discussed above and recommends that the Federation consider whether it would be desirable to add a similar provision to the national requirement. We note, however, that if the national requirement included a standard similar to that of the ABA and the AALS it would not be a bar to approval of the TWU proposal. Although those standards prohibit discrimination on the basis of sexual orientation, both permit the prohibition of certain conduct deemed incompatible with the religious values of the institutions.

Conclusion

63. The Special Advisory Committee was asked to consider whether the requirement that students and faculty at TWU must agree to abide by the Community Covenant raises additional considerations that should be taken into account in determining whether graduates of the proposed law school program should be permitted to enter law society admission programs.
64. Although the Approval Committee is charged with reviewing TWU's proposal to determine whether it would, if implemented as described, meet the national requirement, it is the individual law societies that must decide on the eligibility of each individual applicant to their bar admission programs. The public interest issues considered by the Special Advisory Committee are expected to be relevant to those decisions.
65. In carrying out its mandate, the Special Advisory Committee carefully reviewed all of the submissions received by the Federation, and reviewed and analyzed applicable law and statutes. While the arguments made in the various submissions raise important issues that

³⁵ Brigham Young University, Honor Code, http://www.law2.byu.edu/page/categories/admissions/pdf_documents/part3_byu_law_application.pdf.

³⁶ Liberty University, Notice of Nondiscrimination, <http://www.liberty.edu/law/index.cfm?PID=8533>.

implicate both equality rights and freedom of religion, in light of applicable law none of the issues, either individually or collectively raise a public interest bar to approval of TWU's proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies.

- 66. It is the conclusion of the Special Advisory Committee that if the Approval Committee concludes that the TWU proposal would meet the national requirement if implemented as proposed there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.**



BY E-MAIL
(Original By Mail)

April 24, 2013

Canadian Common Law Program Approval Committee
Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON
K1P 1A4

Attention: Gérald R. Tremblay, President

Dear Mr. Tremblay:

RE: CREATION OF A SPECIAL ADVISORY COMMITTEE

Thank you for your phone call last week and subsequent letter dated April 22, 2013. We also very much appreciate the time and work that the Federation of Law Societies of Canada (the "Federation") is putting into the review of Trinity Western University's (TWU) School of Law proposal.

Your letter raised two significant concerns. The first is with respect to the mandate of the Special Advisory Committee and the Federation itself. Your letter of December 4, 2012 to Dean Flanagan, along with your letter of April 22, 2013, indicates that consideration of TWU's Community Covenant is outside of the mandate of the Approvals Committee. It is clearly stated in the Terms of Reference that "*certain issues have been raised regarding the proposal that are outside of the mandate of the Approval Committee.*" If these issues are



outside of the mandate of the Approval Committee, why would they be within the mandate of the Special Advisory Committee?

Our understanding of the correct mandate of the Federation and the Approval Committee is exactly as set out in the Terms of Reference; which is to determine whether graduates of a School of Law at TWU would meet the national requirements. Consideration of other issues, whether by the Approval Committee or the Special Advisory Committee, would be extraneous to that mandate. Consideration of other issues would also be amending the requirements for approval part way through the approval process which is contrary to principles of procedural fairness.

Should the Federation elect to proceed with the Special Advisory Committee notwithstanding the above noted concern, a second concern would then be with respect to the record and representations available for consideration by the Special Advisory Council. The terms of reference indicate that the Special Advisory Committee *would take into account all representations received by the Federation to date including any representations by TWU*. This creates procedural unfairness. TWU is aware that the Federation has received letters from various people and groups. However, in reliance on the advice in your December 4, 2012 letter to Dean Flanagan (copied to us) that such matters are not relevant to the Approval Committee's consideration of TWU's proposal, the University did not deem it necessary to fully respond to each of those letters.

There is considerable support for the School of Law across the country. Again, in reliance on your letter we have intentionally not requested supporters of the School of Law to write to the Federation. There has clearly been an organized campaign by opponents of TWU's proposal that has largely gone unanswered by TWU. We have not attempted to "balance the ledger" or make substantive submissions as we had no notice or any indication whatsoever that such was necessary. In fact, the converse was communicated to TWU. If the record on which this matter is now to be reviewed is "representations received by the Federation to date," the University is placed at a significant disadvantage which, in our view, would constitute procedural unfairness.





We trust the Federation will reconsider the creation of a Special Advisory Committee and proceed with a review by the Approval Committee of TWU's proposal pursuant to its stated mandate.

Yours truly,

TRINITY WESTERN UNIVERSITY

A handwritten signature in cursive script that reads 'Jonathan S. Raymond'.

Jonathan S. Raymond, Ph.D.
President

JSR/hkp





APPENDIX "B"

BY E-MAIL
(Original By Mail)

May 17, 2013

Federation of Law Societies of Canada
World Exchange Plaza
45 O'Connor Street, Suite 1810
Ottawa, ON K1P 1A4

Attention: John J. L. Hunter, QC
Chair of the Special Advisory Committee on Trinity Western University's
Proposed School of Law (the "Special Advisory Committee")

Dear Sirs/Mesdames:

Re: Response to Special Advisory Committee

We write in relation to your letter of May 3, 2013 to Dr. Jonathan Raymond and the mandate given to the Special Advisory Committee by the Federation of Law Societies of Canada (the "Federation"). We thank you for your letter, but TWU continues to have serious concerns with the creation of the Special Advisory Committee.

Canada's law societies are charged with regulating the legal profession in the public interest. They have each approved a national requirement that reflects their collective view as to what is necessary to ensure that potential new members graduating from a law degree program in Canada are competent to practice and understand their professional and ethical obligations. With the express approval of each law society in Canada, the Federation established the Canada Common Law Program Approval Committee (the "Approval Committee"), which applies the national requirement to each proposed new law degree program. As you have noted, TWU's Proposal for a School of Law (the "Proposal") is in the process of being reviewed by the Approval Committee.

As has been clearly and correctly articulated by the Federation, the Approval Committee has no mandate or authority to consider TWU's Community Covenant (the "Covenant") outside of the national requirement. The authority of the Federation arises only from the express approval



given by each of the 14 Canadian law societies to the national requirement and the Approval Committee. The Federation has no mandate with respect to matters outside of the national requirement. You have attempted to address this lack of mandate by indicating that the Special Advisory Committee will only provide advice to the Federation. While this may be true, it does not address the fact that the Federation itself has no jurisdiction from the law societies to consider or make recommendations with respect to the Covenant.

On its website, the Federation attempts to justify the existence and role of the Special Advisory Committee on the basis that issues raised about the Covenant by certain advocates opposing TWU's Proposal "were not anticipated when the national requirement was developed".¹ With respect, this is not a justification for reaching outside of the Federation's mandate. In accordance with administrative law principles, the Federation must remain within that mandate.

TWU accepts that it must, and will, provide an institutional setting that appropriately prepares lawyers for public practice and for the diversity that its graduates will encounter. In *Trinity Western University v. B.C. College of Teachers*² ("TWU v. BCCT"), the Supreme Court of Canada found that such was the case with respect to TWU's education program and further held that denial of approval was unlawful since there was no "specific evidence"³ that graduates would not uphold the basic values of non-discrimination. If such were not also the case with respect to TWU's School of Law Proposal, presumably the Approval Committee would address that in considering whether graduates would meet the "Ethics and Professionalism" component of the "Competency Requirements" of the national requirement. In the context of the national requirement and the role of the Approval Committee, it is not relevant that the Covenant was not specifically anticipated. Either TWU's Proposal meets the national requirement or it does not (and we obviously believe strongly that it does).

The only purpose for the proposed work of the Special Advisory Committee is to provide advice to the Federation, and presumably through the Federation to its member law societies, pertaining to the religious foundations of TWU. It does not appear that the law societies have solicited this advice. The Federation is interposing itself into an area that the law societies themselves may not wish, or be statutorily permitted, to tread. For these reasons, TWU objects to the establishment and mandate of the Special Advisory Committee. We urge the Special Advisory Committee to recommend to the Federation that this matter is, as has been maintained by the Federation in the past, outside of the Federation's mandate. To the extent that matters are external to the national requirement and the work of the Approval Committee, they are of a political nature and, if relevant at all, best left to the Ministry of Advanced Education in British Columbia.

¹ <http://www.flsc.ca/documents/TWUQuestionsandAnswers.pdf>

² [2001] 1 S.C.R. 772

³ *TWU v. BCCT* at para.38 . See also paras. 12-13.

It is clear that there has been an organized political campaign to oppose TWU's Proposal, which commenced with the letter from the Council of Canadian Law Deans. You should be aware that in preparing the Proposal, TWU specifically consulted with a number of law deans, including all of the law deans in British Columbia. None of them raised any issues or concerns about the Covenant or TWU's religious nature.

All of that having been said, there are responses to all of the significant objections raised in the various submissions that you provided TWU with your letter of May 3, 2013. Below you will find TWU's responses, but these are provided with an express reservation of all of TWU's rights to seek legal redress against the Federation and any individual law society arising from the work of the Special Advisory Committee, including with respect to jurisdictional challenges, should that be necessary in the future.

RESPONSES TO OBJECTIONS RAISED BY OPPONENTS OF TWU'S PROPOSED SCHOOL OF LAW

It would be very difficult to respond to each and every discrete point raised in the unsolicited letters and submissions sent to the Federation, particularly given the short period of time you allowed. The letters in opposition to the Covenant and TWU's Proposal raise a number of similar arguments and we will address these in a summary format. We will provide examples of statements of opposition as appropriate to demonstrate the flaws in the reasoning of TWU's opponents. As part of the legal team that represented TWU in *TWU v. BCCT*, the writer can say that most of these arguments were also made in that case and were rejected by the Supreme Court of Canada.

(a) Compatibility of the Covenant with Training in Ethics and Professionalism

A number of opponents have suggested that the Covenant is incompatible "with the ethical and legal training appropriately required of those seeking entry into the legal profession"⁴. West Coast LEAF has gone so far as to argue that, because of the Covenant, TWU "cannot impart on prospective lawyers a sufficient understanding of the ethical duty not to discriminate and to honour the obligations enumerated in human rights laws"⁵. Others suggest that TWU is "not up to the challenge of having an open, honest, meaningful discussion about its policies and practices"⁶ and that TWU "cannot be trusted to promote [a] constitutionally mandated understanding" of equality⁷.

4 Egale Canada letter, January 25, 2013

5 See West Coast LEAF letter, February 25, 2013, page 3.

6 Letter from students of Schulich School of Law, undated

7 National Association of Women and the Law, March 8, 2013

These arguments are wrong at law, intellectually flawed, discriminatory in themselves and, at a minimum, deeply offensive to lawyers and students who hold religious beliefs similar to those on which TWU is founded.

It should be beyond question that TWU acknowledges that human rights laws and section 15 of the *Charter* protect against and prohibit discrimination on the basis of sexual orientation. The courses that will be offered at the TWU School of Law will ensure that students understand the full scope of these protections in the public and private spheres of Canadian life. We trust that you have access to TWU's full proposal, including the course outlines contained therein. You will note that standard texts are proposed for such topics, which reference the historical inequality suffered by homosexuals. No course covering section 15 of the *Charter* or educating students on provincial human rights protections would be complete without fully addressing cases such as *Vriend v. Alberta*⁸, *Egan v. Canada*⁹, and *Reference re Same-Sex Marriage*.¹⁰ We are certain that the Approval Committee will be reviewing these course outlines as part of its work in assessing the academic program to be offered at TWU.

You will also note that TWU's program of study will include a required first year course (LAW 508) that will introduce students to professionalism and ethics. There will also be a required second year course on Ethics and Professionalism (LAW 602). A summary description of this mandatory course in TWU's proposal states:

Is law a calling, a job or a business? The lawyer, as a professional, is governed by a professional body of peers that establishes a code of conduct and general practices. This course focuses on the practice of law as public service and addresses the question of what does it mean to be a professional? It will also address the principles of ethical practice, particularly issues covered by the Code of Ethics. *It challenges 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.*¹¹ [Emphasis added]

TWU is committed to fully and appropriately addressing ethics and professionalism and the opponents of the Proposal cannot credibly argue otherwise. We are certain that the Approval Committee will find more than sufficient coverage of these topics.

The opponents of our Proposal must therefore be suggesting that *the very fact of the Covenant* and the religious beliefs inherent therein, undermine the otherwise appropriate education to be provided at TWU on ethics and professionalism. This is the same error made by the B.C. College of Teachers, which argued that teachers graduating from TWU would not be "equipped to deal with students" and be unable to "offer comfort and support to

8 [1998] 1 S.C.R. 493

9 [1995] 2 S.C.R. 513

10 [2004] 3 S.C.R. 698

11 TWU Proposal, page 22. See also full description of course at page 93.

the students”¹². The Supreme Court of Canada clearly rejected this argument and line of reasoning:

While the BCCT says that it is not denying the right to TWU students and faculty to hold particular religious views, it has inferred without any concrete evidence that such views will limit consideration of social issues by TWU graduates and have a detrimental effect on the learning environment in public schools. ...

TWU’s Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools.¹³

TWU recognizes its duty to teach equality and meet its public obligation with respect to promulgating non-discriminatory principles in its teaching of substantive law and ethics and professionalism. TWU agrees with *Egale Canada* that “the dignity and value of all individuals irrespective of their sexual orientation ... now form part of the fabric of professional ethics and the rule of law”.¹⁴ Each graduate of a TWU School of Law will be expected to meet all of their professional obligations once in practice, including those related to non-discrimination and equality. This is no different than the obligation of lawyers already in practice who hold religious beliefs similar to those articulated in the Covenant. In this regard, we note that there are many TWU graduates who have gone on to Canadian law schools and are now successfully practicing law across Canada.

As evident from the submissions received by the Federation, there are students currently at public law schools that hold these same religious beliefs¹⁵. They are and will be expected to uphold the law and meet their ethical and legal obligations when in practice and no one suggests that they will not do so.

The oaths that graduating law students will take before being admitted to practice law require them to uphold the laws and rights and freedoms of all persons. For example, the oaths used in Ontario and British Columbia contain the following statements, respectively:

12 B.C. College of Teachers Factum in *TWU v. BCCT*, para. 121. Note that when intervening in *TWU v. BCCT*, *Egale Canada* made similar arguments.

13 *TWU v. BCCT*, paras. 32-33

14 See letter from *Egale Canada*, dated January 25, 2013

15 See letter from “Christian law students across Canada” dated March 10, 2013 indicating that the students “hold [the Biblical principles on which TWU’s Covenant is based] trust regardless of the law school [they] attend”. See also letter from current UBC law students dated March 19, 2013 where they make this same point: “Students at TWU law school would be taught the law, and will be required to uphold the law. To suggest otherwise does not accord with how our justice system works: judge and lawyers, regardless of their personal beliefs, are expected to apply the law.”

I shall champion the rule of law and safeguard the rights and freedoms of all persons¹⁶.

...uphold the rule of law and the rights and freedoms of all persons according to the laws of Canada and of the Province of British Columbia.¹⁷

If the opponents' line of reasoning prevails, it equates to denying accreditation to individuals on the basis of religious belief. The Supreme Court of Canada specifically addressed this concern in *TWU v. BCCT*:

Indeed, if TWU's Community Standards could be sufficient in themselves to justify denying accreditation, it is difficult to see how the same logic would not result in the denial of accreditation to members of a particular church.¹⁸

...

Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.¹⁹

It would clearly be abhorrent to suggest that the many lawyers across Canada holding similar religious views to those addressed in the Covenant are unworthy to practice law or unable to uphold their professional obligations. We have long ago moved away from prejudging behaviours based on personal beliefs²⁰. While the opponents of TWU's Proposal clearly do not share its religious beliefs, neither those beliefs nor their manifestation in the Covenant are a basis upon which TWU's application should be delayed or denied. As found by the Supreme Court of Canada, they are not a basis upon which the Federation should anticipate that graduates will fail to meet their professional and ethical obligations.

(b) TWU Graduates will require "Additional Study"

In a related argument, a number of opponents say that TWU should not have a School of Law as its students should "undertake additional study ... similar to the process for foreign trained lawyers"²¹ or that TWU graduates should not "become licensed to practice law without

16 Oath to practice law in Ontario as a barrister and solicitor (Bylaw 4(21):

<http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147485805>

17 Barristers' and Solicitors' Oath: <http://www.lawsociety.bc.ca/docs/publications/mmm/oath.pdf>

18 *TWU v. BCCT*, para. 33.

19 *TWU v. BCCT*, para. 36

20 See *Martin v. Law Society of British Columbia*, [1950] 3 D.L.R. 173 where admission to practice law was denied as the applicant was a communist. See also *Smith & Rhuland v. The Queen*, [1953] 2 S.C.R. 95 in which the court overturned an administrative decision which denied certifying a union because its secretary-treasurer was communist.

21 West Coast LEAF letter, February 5, 2013.

further study and entrance requirements”²². This is presumably because such opponents believe that the Covenant will “impair the development of critical thought and legal analytical skill”²³ or the TWU students will not “remain independent and appropriately value-oriented”²⁴.

We have already noted how deeply offensive this reasoning is to lawyers and law students holding religious beliefs similar to those embodied in the Covenant. It suggests that persons holding such beliefs, or wishing to be educated in an environment that respects and encourages them, require some form of contrary educational experience in order that they be competent to practice law.

There is a serious logical flaw in the argument. It is clear from the submissions sent to the Federation that existing law schools have: (1) students currently enrolled who hold religious beliefs similar to those on which TWU is founded; and (2) have produced lawyers who also hold such views. The current law schools have apparently not undermined these students’ and lawyers’ religious beliefs; and neither should they try to do so. Lawyers are not required to all believe the same way concerning issues of sexual morality. It is only required that their conduct be ethical and professional.

Again, we note that this same point was argued in *TWU v. BCCT*. The College of Teachers said that TWU education students should be required to “complete their fifth year of professional teacher education through an approved program at a public university”²⁵. The Supreme Court of Canada rejected this reasoning:

There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. *Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year.*²⁶
[Emphasis added]

These arguments evidence a presumption about TWU students (and in fact all those holding similar religious beliefs) and stereotypes them as intolerant. As stated by a number of Christian law students across the country in their submission to the Federation: “If commitment to Biblical principles results in the denial of a private institution as capable of

²² National Association of Women and the Law letter, March 8, 2013.

²³ Letter from UBC law students, March 14, 2013.

²⁴ Letters from students at a number of law schools. See for example, letter from UVic law students dated March 12, 2013.

²⁵ B.C. College of Teachers Factum in *TWU v. BCCT*, para. 118.

²⁶ *TWU v. BCCT*, para. 32

teaching law, this implicates our competence as future lawyers also. ... [A]dhering to religious beliefs does not equate to future discriminatory conduct".²⁷ The Supreme Court of Canada agrees with these Christian students:

The evidence in this case is speculative, involving consideration of the potential future beliefs and conduct of graduates from a teacher education program taught exclusively at TWU.²⁸

...

TWU's Community Standards, which are limited to prescribing conduct of members while at TWU, are not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools.²⁹

...

In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. ... Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society.³⁰

...

Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.³¹

The Supreme Court of Canada equated this type of argument with a failure to accommodate religious belief and a denial of full participation in Canada. This should be conclusive in your deliberations as well.

(c) TWU v. BCCT is Binding Law

The opponents of TWU argue that *TWU v. BCCT* is not determinative. This argument takes a number of forms.

Some TWU opponents suggest that acknowledging TWU's freedom of religion and association rights to maintain the Covenant would involve a "race to the bottom"³² since 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 "limited to BC law" and is simply a finding that TWU is in "compliance with B.C. legislation"³³. It has been argued that human rights provisions recognizing religious associational rights are not applicable (despite the Supreme Court of Canada's

²⁷ Letter from "Christian law students across Canada" dated March 10, 2013.

²⁸ *TWU v. BCCT*, para. 19

²⁹ *TWU v. BCCT*, para. 33

³⁰ *TWU v. BCCT*, para. 35

³¹ *TWU v. BCCT*, para. 36

³² Letter from Ruby Shiller Chan Hassan dated February 28, 2013

³³ For example, see SOGIC letter, dated March 18, 2013, pages 2 and 4.

ruling in *TWU v. BCCT*) and that refusing TWU's application because of the Covenant would not violate freedom of religion or freedom of association. In particular, SOGIC draws on American jurisprudence, where there is no constitutional equality guarantee such as s.15 of the *Charter*, to argue that it is acceptable to allow TWU to exist, but also deny it approval of its programs. This is a surprisingly impoverished view of Canadian equality rights.

As already noted, many of the arguments advanced by the opponents of TWU's Proposal were also made by the B.C. College of Teachers and expressly rejected by the Supreme Court of Canada. It should be clear that 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. We will address a number of the specific legal arguments made by opponents in their attempt to distinguish *TWU v. BCCT*.

(i) *Section 41 of the B.C. Human Rights Code (and similar provisions)*

In *TWU v. BCCT*, the Court made reference to section 41 of the *Human Rights Code* in acknowledging that the B.C. legislature recognized the right of TWU to be a religious institution³⁴. These were passing references, but the Court's analysis was much broader, based on preserving human rights and *Charter* values in acknowledging TWU's right to a teacher education program. This is conveniently summarized by the following quotes:

Consideration of human rights values in these circumstances encompasses consideration of the place of private institutions in our society and the reconciling of competing rights and values. Freedom of religion, conscience and association coexist with the right to be free of discrimination based on sexual orientation...

...It cannot be reasonably concluded that private institutions are protected but that their graduates are de facto considered unworthy of fully participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a "natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it". ... Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society.³⁵

This is consistent with the broad interpretation that courts have afforded provisions such as section 41. They are treated as rights-granting provisions deserving of an expansive interpretation, and not as narrow exemptions. In *Caldwell v. Stuart*³⁶, the Supreme Court of Canada wrote that the predecessor of section 41 "confers and protects rights" and "permits the promotion of religion"³⁷. In *Brossard (Town) v. Quebec (Commission des droits de la*

34 *TWU v. BCCT*, paras.32 and 35.

35 *TWU v. BCCT*, paras. 34-35

36 [1984] 2 S.C.R. 603

37 At 626 (S.C.R.)

personne)³⁸ Beetz J. held that a similar provision promotes “the fundamental rights of individuals to freely associate in groups for the purpose of expressing particular views or engaging in particular pursuits”³⁹. Provisions such as s.41 protect freedom of religion and freedom of association, but also serve an important equality seeking purpose, recognizing that true equality sometimes allows, or even necessitates, treating different people differently in ways that recognize their actual needs.⁴⁰

This approach is consistent with how courts and tribunals protect religious beliefs in the context of all human rights legislation in Canada, not just in B.C..⁴¹ It is trite to point out that all such legislation must be interpreted and applied in a manner consistent with *Charter* rights and freedoms, including the freedom of religion, freedom of association and equality rights of TWU and the members of its community. It is nonsensical to suggest that TWU is permitted to exist as a religious educational community only in British Columbia or possibly a few other jurisdictions within Canada. The *Charter* applies to protect TWU and the members of its community across the country.

We would also note that SOGIC has been under inclusive in listing protections granted to religious groups such as TWU in human rights legislation. For example, no reference is made to sections 4 and 6 of the *Saskatchewan Human Rights Code*, which state:

Right to freedom of conscience

4 Every person and every class of persons shall enjoy the right to freedom of conscience, opinion and belief and freedom of religious association, teaching, practice and worship.

Right to free association

6 Every person and every class of persons shall enjoy the right to peaceable assembly with others and to form with others associations of any character under the law.

SOGIC also argues that s.41 and similar provisions do not protect TWU as, they say, TWU does not promote the interests of individuals as members of an identifiable group nor “exclude individuals who do not share its religious beliefs”⁴². This misinterprets and misapplies the *Human Rights Code*. Specifically, it ignores the decision in *Vancouver Rape Relief Society v. Nixon*⁴³ where the Court of Appeal held that an organization is *not* required

38 [1988] 2 S.C.R. 279

39 At 324 (S.C.R.). See also *St. James Community Service Society v. Johnson*, 2004 B.C.S.C. 1807 and *Sahota and Shergill v. Shri Guru Ravidass Sabha Temple*, 2008 B.C.H.R.T. 269

40 *Gillis v. United Nations Native Society*, [2005] BCHRT 301 at para. 21, *Sahota, supra.* at para. 37

41 See, for example, *Ontario (Human Rights Commission) v. Brockie*, 43 C.H.R.R. D/90 (Ont. Div. Ct.); *Smith v. Knights of Columbus*, 2005 BCHRT 544; *Garrod v. Rhema Christian School* (1992), 15 C.H.R.R. D/477 (Ont. Bd. Inq.); *Kearley v. Pentecostal Assemblies Board of Education*, [1993] N.H.R.B.I.D. no. 1 (Nfld. Bd. Inq.); *Schroen v. Steinbach Bible College* (1999), 35 C.H.R.R. D/1 (Man. Bd. Inq.)

42 SOGIC letter, March 18, 2013, page 5.

43 2005 B.C.C.A. 601 (leave application denied, February 1, 2007, S.C.C. No.31633)

to demonstrate that it exclusively provides services to a group enumerated under s. 41 in order to be protected by that section⁴⁴.

(ii) *Civil Marriage Act*

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. In this regard, the preamble and section 3.1 of the *Civil Marriage Act*⁴⁵ 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 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 religious beliefs that marriage is “the union of a man and woman to the exclusion of all others”. The portion of the Covenant to which TWU’s opponents object indicates nothing beyond such religious beliefs.

(iii) *Hindering Freedom of Religion, Freedom of Association and Equality Rights*

Opponents have argued that denying approval of TWU’s School of Law Proposal because of the Covenant will not impair the constitutional rights of TWU and the individuals comprising its community⁴⁶. They promote a penurious view of these *Charter* rights.

Citing *Saskatchewan (Human Rights Commission) v. Whatcott*⁴⁷, SOGIC argues that denying TWU’s application for a School of Law would not infringe s.2(a) of the *Charter* as it would not threaten religious belief or conduct. This ignores the fact that the Supreme Court of

44 *Nixon, supra.*, para. 58.

45 <http://laws-lois.justice.gc.ca/eng/acts/C-31.5/page-1.html>

46 SOGIC letter, March 18, 2013, pages 5-6

47 2013 SCC 11

Canada in *Whatcott* also relied on the oft-cited words of Dickson J. in *R. v. Big M Drug Mart*⁴⁸ that 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...”⁴⁹ (emphasis added).

In *Alberta v. Hutterian Brethren of Wilson Colony*⁵⁰, it was accepted that Alberta’s mandatory photo requirement for driver’s licensing breached the s.2(a) rights of the Hutterian Brethren because of their 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. This is precisely how the Supreme Court of Canada analyzed the matter in *TWU v. BCCT*:

Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.⁵¹

SOGIC draws on American jurisprudence to suggest that only the *existence* of TWU as a religious community ought to be tolerated, but that its programs need not receive “official imprimatur” or be granted “equal access”⁵². In *TWU v. BCCT*, the College of Teachers made the same argument, relying on similar cases (including *Bob Jones University*), that it was right to withhold the imprimatur that approval of TWU’s program would bring.⁵³ These arguments were clearly rejected by the Supreme Court of Canada.

Further, and surprisingly, SOGIC fails to recognize the importance of the equality right in the Canadian context. Section 15 of the *Charter* prohibits the imposition of burdens or withholding of benefits on account of personal characteristics, including based on religion. The leading definition of discrimination is still as articulated by McIntyre J. in *Andrews v. Law Society of British Columbia*⁵⁴:

... discrimination may be described as a distinction, whether intentional or not but based on grounds relating to personal characteristics of the individual or group, which *has the effect of imposing burdens, obligations, or disadvantages* on such individual or group not imposed upon others, *or which withholds or limits access to opportunities, benefits, and advantages* available to other members of society.

48 [1985] 1 S.C.R. 295

49 At p.336

50 [2009] SCC 37

51 *TWU v. BCCT*, para. 35

52 SOGIC letter, March 18, 2013, page 7.

53 B.C. College of Teachers Factum in *TWU v. BCCT*, paras. 57, 79, 111, 116

54 [1989] 1 S.C.R. 143

Distinctions based on personal characteristics attributed to an individual solely on the basis of association with a group will rarely escape the charge of discrimination, while those based on an individual's merits and capacities will rarely be so classed.⁵⁵ [Emphasis added]

The denial of approval of TWU's School of Law application because of the 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. As evidenced by many of submissions received by the Federation, opponents of TWU's proposal presume that Christians at TWU have "hostility to gay and lesbian people"⁵⁶ and hide "homophobia in Christian values"⁵⁷. There is absolutely no evidence for these statements about TWU or the members of its community. These opponents are guilty of the same type of prejudice and stereotyping about which they say the Federation should be concerned.

All of the opponents of TWU's proposal focus solely on the Covenant. This is, in fact, a focus by them on TWU's sectarian nature⁵⁸. The Federation's creation of the Special Advisory Committee continues this disturbing focus and we strongly encourage both the Special Advisory Committee and the Federation to carefully consider the following words of the majority in *TWU v. BCCT*:

We would add that *the continuing focus of the BCCT on the sectarian nature of TWU is disturbing*. It should be clear that the focus on the sectarian nature of TWU is the same as the original focus on the alleged discriminatory practices. It is not open to the BCCT to consider the sectarian nature of TWU in determining whether its graduates will provide an appropriate learning environment for public school students as long as there is no evidence that the particularities of TWU pose a real risk to the public educational system.⁵⁹ [Emphasis added]

If there are pedagogical or other problems with the education to be provided at TWU's proposed School of Law, they will presumably be detected by the Approval Committee, the Ministry of Advanced Education, or both. As a matter of constitutional and human rights, it is not open for the Federation to focus solely on the sectarian nature of TWU, as communicated by the Covenant, to undermine the normal approval processes. The Federation and its law society members are not permitted to express moral disapprobation of the Christian beliefs on which TWU is founded. Again, we urge that the Special Advisory Committee advise the Federation to discontinue any further consideration of the Covenant and TWU's religious nature as separate from the Approval Committee.

⁵⁵ At pp.174-175. This definition recently reiterated by the S.C.C. in *Withler v. Canada*, [2011] 1 S.C.R. 396 at para. 29 and *Hutterian Brethren*, *supra*, at para. 108

⁵⁶ Letter from Ruby Shiller Chan Hassan dated February 28, 2013

⁵⁷ Letter from UBC law students, dated March 14, 2013

⁵⁸ Which is derided by the lawyers at Ruby Shiller Chan Hassan as a "fundamentalist and narrow interpretation of Christianity"

⁵⁹ *TWU v. BCCT*, para. 42

(d) Diversity in the Legal Profession and Academic Freedom

Some opponents suggest that approval of TWU's program will "diminish diversity in the legal profession"⁶⁰. It is peculiar, to say the least, that these advocates seek to silence a perspective different from their own within the Canadian legal community in name of diversity. While they express a concern that TWU's School of Law will have a "limited tolerance of diversity", their opposition exhibits exactly that trait.

There is nothing inimical to Canadian society contained in the Covenant. Its contents are to be expected in the context of an evangelical Christian university. As noted by a number of others, including uOttawa OUTLaw, the Covenant promotes positive values, expecting community members to "treat all persons with respect" and "cultivate Christian virtues such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice". As we are sure you will agree, the legal profession encourages lawyers to be inculcated in these values. All opponents focus on only one aspect of the Covenant, ignoring the balance of its contents, which are not only unobjectionable but universally laudable.

As stated by Dickson J. in *Big M Drug Mart*, "a truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct"⁶¹. As then noted in *TWU v. BCCT*, "the diversity of Canadian society is partly reflected in the multiple religious organizations that mark the societal landscape and this diversity of views should be respected"⁶². The TWU School of Law would enhance, not undermine, diversity in legal education in Canada.

TWU's proposed School of Law should be assessed on its merits, based on the national requirement. As the only privately funded law school in Canada, it may provide a slightly different perspective, but this should be welcomed. As the Supreme Court of Canada suggested, Canada is enriched by having a diversity of institutions. There is no principled reason that secular, public institutions should have a monopoly on legal education in Canada⁶³.

A few opponents have questioned academic freedom at TWU. While we expect that this issue is outside of what will be considered by the Special Advisory Committee, we would note for your benefit that TWU maintains a strong policy on academic freedom that was

⁶⁰ Letter from UBC law students, dated March 14, 2013

⁶¹ At p.336.

⁶² *TWU v. BCCT*, para. 33.

⁶³ Law students from UBC have written in their letter of March 19, 2013 that, in their experience, their religious beliefs are "often openly derided" in the context of the explicitly secular emphasis at that institution. Not all secular law schools should be judged by this experience, but it does provide context for the opposition made by students at a number of law schools in Canada.

affirmed by British Columbia's Degree Quality Assessment Board in 2004. TWU is a member of the Association of Universities and Colleges of Canada and fully complies with its Statement on Academic Freedom and Institutional Autonomy. TWU has a long history of excellence in research and scholarship. During its almost thirty year history as a university there has not been a single allegation of a lack of academic freedom related to research despite a broad range of scholarship. There will be a full range of academic inquiry and debate within TWU's School of Law.

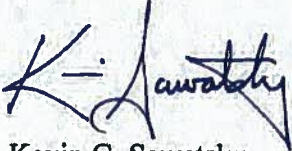
Conclusion

The arguments of opponents to TWU's proposed School of Law relate to the Covenant and TWU's religious character. As set out above, most of these arguments have already had a thorough hearing before, and been rejected by, the Supreme Court of Canada. One opponent, Egale Canada, raised some of the exactly same arguments as an intervenor in *TWU v. BCCT* as it now references in its letter to the Federation. The Supreme Court of Canada decision in that case should be considered determinative for the reasons set out above.

There is no "specific evidence" that TWU graduates will fail to uphold the basic values of non-discrimination⁶⁴. This does not leave a legitimate role for the Special Advisory Committee. We submit that the appropriate course is for the Special Advisory Committee to advise the Federation and its members that there are no relevant additional considerations to be taken into account in determining whether graduates of a TWU School of Law should be eligible to enroll in the admissions program of any Canadian law society.

We believe that we have answered the important points raised by TWU's opponents. If there are other issues on which you would like to receive TWU's position or views, or if there are additional documents that you would like to review that we may be able to provide, please do not hesitate to contact the writer.

Yours truly,



Kevin G. Sawatsky
Vice-Provost (Business) and University Legal Counsel

cc: Gerald R. Tremblay, President
Kuhn LLP

⁶⁴ *TWU v. BCCT* at para.38 . See also paras. 12-13.

MEMORANDUM

PRIVILEGED AND CONFIDENTIAL

To Gérald R. Tremblay, C.M., O.Q., Q.C., **Date** March 21, 2013
 Ad. E.
 President
 Federation of Law Societies of Canada

 Jonathan G. Herman
 Chief Executive Officer
 Federation of Law Societies of Canada

From John B. Laskin

Re Trinity Western University School of Law Proposal –
 Applicability of Supreme Court decision in *Trinity Western University v. British
 Columbia College of Teachers*

Overview

You have asked for my advice on the extent to which the decision of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*,¹ rendered in 2001, applies to consideration of the Trinity Western University School of Law proposal, which TWU has submitted to the Canadian Common Law Program Approval Committee.

Before setting out my advice on this question I will first review in some detail the Supreme Court's decision. Next, I will discuss the stage of the approval process at which the *BCCT* case could come into play. I will then proceed to my conclusion: that if approval of the TWU proposal were refused on the basis of concerns about its discriminatory practices, and that decision were challenged, the *BCCT* decision would govern the result. As discussed below, I base that conclusion on the parallels between the circumstances in *BCCT* and those posited here, the currency of the approach taken in *BCCT* to the balancing the *Charter* values of equality and religious freedom, and the likelihood of an absence of evidence of the type of harm that would justify upholding the decision. I conclude by considering a number of the arguments that have been put forward in support of the view that *BCCT* would not apply.

The Supreme Court decision in *BCCT*

Factual background

The *BCCT* case arose from an application by TWU to the College of Teachers for approval of its program of teacher education for the purpose of certifying its graduates as eligible to teach in the province's public schools. The *BCCT* was authorized by statute to carry out this approval

¹ 2001 SCC 31 ("*BCCT*" or "the *BCCT* case")

function. Its statutory objects included “to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership.” Its policies for approval of teacher education programs for certification purposes set three criteria for approval: context (including depth and breadth of personnel, research and other scholarly activity), selection (including an admission policy that recognized the importance of academic standing, interest in working with young people and suitability for entrance into the teaching profession) and content of the program.

Though there was no evidence that the TWU program would not meet these criteria, the BCCT rejected the request for approval. It did so on the basis that TWU’s proposed program followed discriminatory practices, which were contrary to the public interest and public policy. The focus of the BCCT’s concern was the requirement for students at TWU to sign a “Community Standards” document. This document included an agreement to “refrain from practices that are biblically condemned.” Among the practices specified were “sexual sins including premarital sex, adultery, homosexual behaviour, and viewing of pornography.” Faculty and staff were to sign a similar document. The requirement, in the view of the BCCT, had the effect of excluding persons from TWU on the basis of their sexual orientation.

TWU sought judicial review of the BCCT’s decision. It challenged the BCCT’s jurisdiction to consider the TWU practices that it regarded as discriminatory, and asserted that even if the BCCT had jurisdiction, there was no evidence of discriminatory consequences resulting from these practices.

Jurisdiction to consider alleged discriminatory practices

The Supreme Court first held that it was within the jurisdiction of the BCCT to consider TWU’s discriminatory practices. Since teachers were a medium for the transmission of values, it was important that future teachers understand the diversity of Canadian society. In determining suitability for entrance into the teaching profession, the BCCT was therefore entitled to take into account “all features of the education program at TWU,” and it would not be correct “to limit the scope of [the BCCT’s statutory objects] to a determination of skills and knowledge.” The BCCT’s public interest jurisdiction made it appropriate for it to consider concerns about equality. Though it was not directly applying either the *Charter* or human rights legislation, it was entitled to consider them in determining whether it would be in the public interest to allow public school teachers to be trained at TWU.²

The Court determined, based on the prevailing standard of review jurisprudence and consideration of the nature of the BCCT’s expertise, that the BCCT’s decision should be reviewed on the standard of correctness.³ It went on to consider two questions: first, whether the requirement of adherence to the “Community Standards” document, and the program and practices of TWU, showed that TWU was engaging in discriminatory practices; and second, whether, if so, these discriminatory practices established a risk of discrimination sufficient to conclude that TWU graduates should not be admitted to teach in the public schools.

² *Id.* at paras. 13, 26-27

³ *Id.* at paras. 15-19

Existence of discriminatory practices

In considering the first question, the Court found that a homosexual student would not be likely to apply to TWU. It observed, however, that TWU was “not for everybody” – rather, it was designed to address the needs of people who share certain religious convictions. Its admissions policy, the Court found, was not sufficient to establish discrimination within the meaning of the *Charter*. It went on: “To state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s. 15 [of the *Charter*] would be inconsistent with freedom of conscience and religion, which co-exist [sic] with the right to equality.”⁴ While the BCCT was entitled to consider concerns about equality, it was also required to consider issues of religious freedom.

The Court noted in this connection that British Columbia’s human rights legislation accommodates religious freedom by providing that a religious institution does not breach the legislation when it prefers adherents of its religion, and that the B.C. legislature must not have considered that university education with a Christian philosophy was contrary to the public interest, since it had passed legislation in favour of TWU.⁵ It also referred to the contribution made by religious institutions to the diversity of Canadian society, and the tradition in Canada of religion-based institutions of higher learning.⁶ While homosexuals might be discouraged from attending TWU, that would not prevent them from becoming teachers. On the other hand, the Court stated, the freedom of religion of students at TWU would not be accommodated if they were denied that opportunity.⁷

Sufficient risk of discrimination

The central issue in the case, therefore, was how to reconcile the religious freedom of individuals wishing to attend TWU with the equality concerns of public school students, their parents, and society generally. The Court held that the potential conflict between the two sets of rights and values should be resolved through their proper delineation.⁸

The proper place to draw the line, the Court held, was between belief and conduct. It followed that “[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.”⁹ There was no evidence that graduates of TWU would not treat homosexuals fairly and respectfully, and no evidence of discriminatory conduct by any graduate of the teaching program that TWU had been offering jointly with Simon Fraser University. Absent evidence that training teachers at TWU would “pose a real risk to the public educational system,” the BCCT had been wrong to refuse approval. “In considering the religious precepts of TWU instead of the actual impact of those beliefs on the school environment, the BCCT acted on the basis of irrelevant considerations.”¹⁰ If there were evidence that particular teachers in the public school system actually engaged in discriminatory conduct, discipline proceedings before

⁴ *Id.* at para. 25

⁵ *Id.* at paras. 28, 35

⁶ *Id.* at paras. 33-34

⁷ *Id.* at para. 35

⁸ *Id.* at para. 28

⁹ *Id.* at para. 36

¹⁰ *Id.* at paras. 35, 42-43

the BCCT could be taken.¹¹ But there was no basis in the evidence for concluding that graduates of TWU would engage in conduct of this kind.

Stage of the approval process at which *BCCT* could apply

It is not likely in my view that the *BCCT* decision would be applicable to a decision made by the Approval Committee within the scope of its current mandate. On my understanding of the current mandate of the Approval Committee, it is limited to considering the dimension of the public interest reflected in the national requirement. It may therefore consider the practices of TWU that are alleged to be discriminatory only to the extent of considering whether TWU's mission and perspective would constrain in any respect the teaching of the competencies set out in the national requirement. If the Approval Committee were to conclude that the teaching of the required competencies would be constrained so as to render the TWU School of Law unable to meet the national requirement, that decision would likely not engage the concerns about *Charter* values that underlay the decision in *BCCT*. It would be based not on generalized concerns about discriminatory practices grounded in religious beliefs, but on the conclusion that the TWU program would fail to teach a set of competencies that are required irrespective of religion.¹²

The *BCCT* decision could however come into play if the mandate of the Approval Committee were expanded to include other dimensions of the public interest, and it then decided to refuse approval of the TWU program based on concerns about discriminatory practices. It could also come into play if, despite the conclusion of the Approval Committee that the TWU program should be approved, one or more of the law societies decided, based on concerns about discriminatory practices and its view of the public interest, to refuse to accept completion of the TWU program as meeting the academic requirements for admission to the profession. Like the *BCCT*, law societies have been given a public interest mandate.

A variety of threshold issues could arise depending on precisely how and when in the approval process a challenge based on the *BCCT* decision was brought. These include issues of appropriate procedure and the manner in which *Charter* values may be invoked in relation to a decision of a committee of the Federation. I would be pleased to consider these matters further if you would like me to do so. In this discussion, I will focus on the substantive question whether, if a decision to refuse approval of TWU's program were made based on the practices that are alleged to be discriminatory, *BCCT* would govern the result.

Applicability of *BCCT*

In my view the answer to that question is that it would. I come to this view for three main reasons.

First, if a decision to refuse approval of TWU's program were made based on the practices that are alleged to be discriminatory, there would be a great many parallels between the circumstances that would then prevail and those in *BCCT*. These parallels would include the following.

¹¹ *Id.* at para. 37

¹² In making this point I do not intend to suggest that the Approval Committee would or should come to this conclusion.

- As in *BCCT*, the decision under review would be a decision whether completion of a program offered by TWU would meet the academic requirements for entry into a profession.
- As in *BCCT*, the decision would have been made by a body having a mandate to act in the public interest.
- As in *BCCT*, the concerns on which the decision was based would focus on the requirement that students at TWU sign a document in which they agree to abstain from, among other things, homosexual sexual activity while attending TWU. (The current document, entitled “Community Covenant Agreement,” is cast in somewhat less pointed terms than the document considered in *BCCT*. It no longer speaks of homosexual behavior as a “sexual sin” that is “biblically condemned.” Instead it calls on members of the TWU community, “[i]n keeping with biblical and TWU ideals,” to voluntarily abstain from, among other things, “sexual intimacy that violates the sacredness of marriage between a man and a woman.”)
- As in *BCCT*, TWU remains a private, faith-based university, founded by the Evangelical Free Churches of Canada and America, established as a university by British Columbia statute, and exempted, in part, from the B.C. *Human Rights Code*.

Second, the Supreme Court of Canada continues to apply the balancing approach that it took in *BCCT* where more than one set of *Charter* rights or values – in that case the values associated with equality and freedom of religion – are engaged.

The Supreme Court has consistently rejected a hierarchical approach to rights and values, which places some over others.¹³ It did so yet again in its very recent decision in *Saskatchewan (Human Rights Commission) v. Whatcott*.¹⁴ In that case the Court engaged in a balancing of the same two sets of values (along with freedom of expression) that it considered in *BCCT*, in a manner very analogous to that in *BCCT*. In so doing it reiterated the statement the Court first made in *Big M Drug Mart*, the seminal *Charter* freedom of religion case, that the right to manifest religious belief by teaching is part of “[t]he essence of the concept of freedom of religion.”¹⁵

In *Whatcott*, the Court addressed the constitutional validity of the prohibition of hate speech in Saskatchewan human rights legislation. It was alleged that certain flyers distributed by Whatcott infringed the prohibition by promoting hatred on the basis of sexual orientation; Whatcott maintained that the flyers constituted the exercise of his freedom of expression and freedom of religion. The Court saw the case as requiring it

to balance the fundamental values underlying freedom of expression (and, later, freedom of religion) in the context in which they are invoked, with competing *Charter* rights and other values essential to a free and democratic society, in this case, a commitment to equality and respect for group identity and the inherent dignity owed to all human beings.¹⁶

¹³ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877

¹⁴ 2013 SCC 11

¹⁵ *Id.* at para. 159

¹⁶ *Id.* at para. 66

In striking this balance, which resulted in its severing certain portions of the prohibition but upholding the remainder, and finding the conclusion that there was a contravention of the legislation unreasonable for two of the four flyers in issue and reasonable for the other two, the Court stated that “the protection provided under s. 2(a) [the freedom of religion guarantee] should extend broadly,” and that “[w]hen reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist.”¹⁷ It also referred to the “mistaken propensity to focus on the nature of the ideas expressed, rather than on the likely effects of the expression.”

Just as in *BCCT*, the Supreme Court in *Whatcott* found the proper balance point between equality and freedom of religion values to be the point at which conduct linked to the exercise of freedom of religion resulted in actual harm. Absent evidence of actual harm, it held in both cases, freedom of religion values must be given effect.

This leads to the third reason for concluding that *BCCT* would govern the result in the circumstances posited here: the likely absence of evidence of actual harm. I recognize of course that lawyers in Canada are subject to ethical duties to treat others with respect and avoid discrimination.¹⁸ But in *BCCT*, the Supreme Court was acutely sensitive to the role of teachers as a “medium for the transmission of values.” The Court considered it “obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers.”¹⁹ The Court nonetheless had no difficulty concluding that graduates of TWU would “treat homosexuals fairly and respectfully.”²⁰

If the TWU teachers program could be relied upon to equip its graduates to be respectful of diversity, there appears to be no reason to conclude that its law program cannot do the same. It seems very unlikely that evidence could be mounted that lawyers educated at TWU would actually engage in harmful conduct. Just as the Court observed in *BCCT*, disciplinary processes would be available to deal with individual cases of discriminatory behaviour, whether by TWU or by graduates of other common law programs.

Arguments against the applicability of *BCCT*

Though I conclude for the three reasons just set out that the *BCCT* decision would be dispositive of a challenge to a decision refusing to approve the TWU school of law program based on TWU’s alleged discriminatory practices, I will nonetheless consider further the arguments that have been made to the contrary. A number of these arguments are set out in a paper by Professor Elaine Craig entitled “The Case for the Federation of Law Societies Rejecting Trinity Western University’s Proposed Law Degree Program.”²¹ In her paper Professor Craig argues that the legal

¹⁷ *Id.* at paras. 154, 161

¹⁸ See, for example, rule 5.04 (1) of the Law Society of Upper Canada *Rules of Professional Conduct*, which provides that

[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, record of offences (as defined in the Ontario *Human Rights Code*), marital status, family status, or disability with respect to professional employment of other lawyers, articulated students, or any other person or in professional dealings with other licensees or any other person.

¹⁹ Note 1 above at para. 13

²⁰ *Id.* at para. 35

²¹ *Canadian Journal of Women and the Law*, Vol. 25, No. 1, 2013

context has changed in two respects since *BCCT* was decided, and that the basis for refusing approval to the TWU school of law would be different from the basis on which the BCCT sought to refuse approval of TWU's teaching program. She argues that the courts' treatment of a decision to refuse approval of the TWU school of law proposal would therefore be different from that reflected in the Supreme Court's decision in *BCCT*.²²

The first change in legal context, according to Professor Craig, is the change in the standard of review that the courts would apply to the approval (or non-approval) decision.²³ As indicated above, the Supreme Court applied the correctness standard in considering whether the BCCT's decision was justified.

It is possible that Professor Craig is right in asserting that a court reviewing today a decision like that made by the BCCT would apply the reasonableness standard. In its 2012 decision in *Doré v. Barreau du Québec*,²⁴ the Supreme Court held that in reviewing discretionary decisions of administrative decision-makers that are required to consider *Charter* values, it is appropriate to apply the approach to standard of review generally applied in judicial review proceedings, under which the standard of review is ordinarily reasonableness rather than correctness where the decision-maker has specialized expertise and discretionary power.²⁵ The Court stated that "if, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable."²⁶ Even before *Doré*, the Court had held in a series of decisions that an administrative body interpreting and applying its home statute (as a law society might be regarded as having done in this case if it decided against approval) should normally be accorded deference, through application of the reasonableness standard, on judicial review.²⁷ In its very recent decision in *Whatcott*,²⁸ discussed above, the Supreme Court applied the reasonableness standard in reviewing a decision of a human rights tribunal rendered in a context in which equality values, as well as those associated with freedom of expression and freedom of religion, were engaged.

Despite *Doré* and its antecedents, there also remains in my view a realistic possibility that a reviewing court would apply the correctness standard. The Supreme Court's standard of review case law contemplates that the correctness standard will apply to the determination of at least some constitutional issues, including those in which competing constitutional provisions must be accommodated.²⁹ In *Doré* itself, the Supreme Court implicitly recognized that the correctness standard may be appropriate in this context when it referred to its decision in *BCCT* as an example of the application of "an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values."³⁰ Unlike *Doré* and *Whatcott*, this is not merely a case in which *Charter* values would have to be balanced with

²² *Id.* at 22-26

²³ *Id.* at 22

²⁴ 2012 SCC 12

²⁵ *Id.* at paras. 23, 52-56

²⁶ *Id.* at para. 58

²⁷ *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para. 54; *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 at para. 26; *Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61 at para. 39

²⁸ Note 16 above at para. 168

²⁹ *Dunsmuir v. New Brunswick*, note 28 above at paras. 58, 61

³⁰ Note 25 above at para 32

statutory objectives, but one in which competing *Charter* values must themselves be balanced.³¹ The Supreme Court has laid down a legal rule as to how that balance is to be struck.

Even if a reasonableness standard applied, it does not follow that the decision would be upheld on judicial review. The key factor in the decision in *BCCT* was that there was no evidence of any harm to the public education system arising from the training of teachers at TWU. A finding based on no evidence is not just incorrect; it is unreasonable.³² In *Whatcott*, the Supreme Court set aside two of the human rights tribunal's four determinations on the basis that, having regard to the evidence, the tribunal could not reasonably have reached the result it did by applying the proper legal test.³³ Absent evidence of actual harm, a decision in this case not to approve based on concerns about discriminatory practices would likely be regarded as unreasonable.

The second change in legal context, according to Professor Craig, is that social values have evolved, and that “[t]oday’s decision-makers are expected to be much more protective of gay and lesbian equality than were the decision-makers of ten, fifteen or twenty years ago.”³⁴

Assuming that this is the case, it is doubtful, in my view, that this evolution of social values would lead to a different outcome today from that in *BCCT*. As discussed above, *BCCT* was not simply an equality case. The core of the Supreme Court’s decision in *BCCT* was the appropriate balancing of two sets of *Charter* values, those associated with equality and with freedom of religion.³⁵

The values associated with freedom of religion are at least as deeply embedded today as they were in 2001. I have already discussed the Supreme Court’s very recent decision in *Whatcott*, in which the Court spoke of the right to manifest religious belief by teaching, and stated that the protection of freedom of religion “should extend broadly.” The Supreme Court’s approach to the balancing of values in *Whatcott* in 2013 appears little different from that in *BCCT* in 2001. It is in my view not correct to conclude that changes in social values since the *BCCT* case was decided would lead to a different outcome today.

As already mentioned, Professor Craig also relies, in arguing that the outcome of a challenge to a decision to refuse approval of TWU’s law program would be different from that in *BCCT*, on the proposition that the basis for refusing approval to the TWU school of law would be different from the basis on which the *BCCT* sought to refuse approval of TWU’s teaching program.³⁶ She asserts that a decision not to approve the school of law could, and presumably would, be justified on two grounds. The first is that “it is reasonable to conclude that principles of equality, non-discrimination, and the duty not to discriminate ... cannot competently be taught in a learning environment with discriminatory policies.” The second is that “it is reasonable to conclude that the skill of critical thinking about ethical issues cannot adequately be taught by an institution that violates academic freedom and requires that all teaching be done from the

³¹ *Whatcott* did entail a balancing of constitutional values, but at the first stage of determining the constitutionality of the provision of the human rights legislation was in issue, not at the subsequent stage of reviewing the decision of the human rights tribunal and applying the statute as the Supreme Court had interpreted it. It was only at the second stage that the Court applied the reasonableness standard of review. At the first stage, the standard applied was correctness.

³² *Toronto (City) Board of Education v. O.S.S.T.F., District 15*, [1997] 1 S.C.R. 487 at para. 44

³³ Note 16 above at para. 201

³⁴ Note 23 above at 25

³⁵ *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877

³⁶ Note 23 above at 26

perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making.”

In my view, both of these asserted grounds for refusing approval would be highly questionable. As for the first, as also already mentioned the Supreme Court concluded that graduates of TWU would “treat homosexuals fairly and respectfully.”³⁷ It was implicit in its decision that their education at TWU did not detract from their ability to comply with “principles of equality, non-discrimination, and the duty not to discriminate.” Professor Craig provides no evidence to support the contention that the position would somehow be otherwise for law students.

As for the second, it proceeds from a view of academic freedom that is by no means universally shared.³⁸ Following its logic would lead to the conclusion that no individual lawyer who adheres to a set of religious principles could engage in critical thinking about ethical issues. This conclusion cannot be tenable. The second argument, like the first one, also fails to give any recognition to the positive value of religious diversity that the Supreme Court embraced in *BCCT*.

* * * * *

I hope that this memorandum provides the advice that you require on this aspect of the matter. Please let me know if you have any questions arising from it.

JBL/as

³⁷ At para. 35

³⁸ The TWU policies on academic freedom (available online at <http://www.twu.ca/academics/calendar/2012-2013/academic-information/academic-policies/>) include these statements:

Trinity Western University is committed to academic freedom in teaching and investigation from a stated perspective, i.e., within parameters consistent with the confessional basis of the constituency to which the University is responsible, but practiced in an environment of free inquiry and discussion and of encouragement to integrity in research. Students also have freedom to inquire, right of access to the broad spectrum of representative information in each discipline, and assurance of a reasonable attempt at a fair and balanced presentation and evaluation of all material by their instructors. Truth does not fear honest investigation.