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15 July 2014

BY EMAIL

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The Law Society of British Columbia
845 Cambie Street
Vancouver, B.C.
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Attention: Tim McGee, Q.C.
Chief Executive Officer

Dear Sirs/Mesdames:

**Re: Trinity Western University ('TWU'): Questions
raised at the Benchers' Meeting of June 13, 2014**

You have asked me to consider and address fourteen questions, most of which were raised at the Benchers' meeting on June 13, 2014. The questions, which you have arranged under six headings, are as follows:

Procedural Fairness

1. Does the Law Society owe a duty of administrative fairness to TWU because they have a vested right?
2. If so, what does that duty require on reconsideration?
3. Does it require the Benchers to allow TWU to make submissions?
4. Ought the Benchers to invite additional public submissions?

Effect of Member Vote

5. Has anything changed in the landscape other than the vote and if there has been no change, is there a legal basis for reconsideration?

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6. What role does the member vote have in the Benchers' determination of the public interest in the administration of justice?

Section 13 of the Legal Profession Act

7. What is meant by "statutory duties" in section 13(4)?
8. If the Benchers decide not to reverse their previous decision, does section 13 require that the 12 months be allowed to pass before the Benchers can be required to hold a referendum?
9. Are the provisions of s. 13 constitutional such that a majority of members can determine minority rights?

Prospect of Litigation

10. Can a member bring an action on his or her own? What form would it likely take?

BCCT v TWU

11. What is the relevance of s. 41 of the *Human Rights Code* for the Bencher decision?
12. Where there has been a change in society's views or values, are courts still required to follow cases decided before the change?

Standard of Review

13. What is the standard of review if a judicial review application were brought by TWU upon the Benchers reversing themselves following a referendum?
14. What is the standard of review if a judicial review application were brought by TWU upon the Benchers "voluntarily" reversing themselves in the absence of a referendum?

I will address each question in turn. Where I have already provided you with an opinion on the question posed, I will incorporate or summarize that opinion in this letter for ease of reference.

Procedural Fairness

By virtue of Rule 2-27(4.1) and the approval granted by the Federation of Law Societies, TWU's proposed law program is approved unless the Benchers decide otherwise. The Benchers owed TWU a duty of procedural fairness in connection with the motion to disapprove considered at the

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Benchers' meeting of 11 April 2014. The Benchers satisfied that obligation by giving TWU notice of the proposed motion, making available to TWU all the information and submissions the Benchers received in connection with the motion, and receiving and considering written submissions from TWU. The motion failed. The first four questions address the requirements of procedural fairness in connection with any reconsideration of the Benchers' decision of 11 April 2014.

1. *Does the Law Society owe a duty of administrative fairness to TWU because they have a vested right?*

The Benchers' duty of procedural fairness is a continuing one. It arises because a decision to refuse TWU's proposed law school the accreditation which it presently has would affect TWU's 'rights, privileges or interests': *Cardinal v Kent Institution* [1985] 2 SCR 643 at 653.

Mr Mulligan's petition and the Special General Meeting (SGM) of 10 June 2014 constitute significant further developments since submissions were received from TWU. If the Benchers wish to consider changing their 11 April 2014 decision, fairness requires that TWU be given an opportunity to respond before the decision is made.

2. *If so, what does that duty require on reconsideration?*

In my opinion, as before, the duty requires that TWU be given notice of all the information in the Benchers' possession which might lead them to disapprove the proposed law program and a fair opportunity to respond.

3. *Does it require the Benchers to allow TWU to make submissions?*

As before, TWU should be given the opportunity to make submissions in writing. In my opinion, nothing that has occurred to date elevates this duty to an obligation on the part of the Benchers to hear oral submissions.

4. *Ought the Benchers to invite additional public submissions?*

The public submissions that were solicited prior to the Benchers' meeting of 11 April 2014 were not grounded in a legal duty of fairness owed to opponents of TWU. As I understand it, those submissions were invited for reasons which, while no doubt valid and persuasive, did not involve a question of legal obligation. I express no opinion as to whether those non-legal considerations remain relevant today.

It is possible, however, that the invitation of public submission by the Benchers in connection with the decision of 11 April 2014 has given rise to a legitimate expectation that further public submissions will be received. In *Sunshine Coast Parents for French v Sunshine Coast School District No 46* (1990) 49 BCLR (2d) 252 (SC), Spencer J suggested that the exercise of a legislative power not normally the subject of a duty of administrative fairness may become

subject to such a duty of fairness where the body in question has undertaken by its actions to adhere to procedural rules or requirements in making the legislation. By analogy, an opponent of TWU might argue that a duty of fairness to opponents has arisen in the circumstances of this case. In my opinion, such a duty could amount to no more than an obligation to make public the Benchers' intention to reconsider and signal a willingness to receive further submissions in writing by a given deadline.

As before, any submissions received from members of the public would have to be made available to TWU in order that it would have a reasonable opportunity to respond, and the deadline for public submissions should be fixed accordingly.

Effect of Member Vote

The following questions address the legal significance of the discussion and vote that took place at the SGM. As will be seen, this is a question that depends in large part on the Benchers' reasons for deciding not to disapprove TWU's proposed law program at the meeting on 11 April 2014. The backdrop to that decision was a legal question concerning the status and significance of the decision of the Supreme Court of Canada in *TWU v BCCT* 2001 SCC 31. To the extent that the Benchers' decision was grounded in an answer to that question – that is, to the extent that the Benchers came to the decision they did because they believed that the judgment of the Supreme Court of Canada required it, on the facts of this case – then the discussion and vote of June 10 would only be significant if the members persuade the Benchers that the answer the Benchers had given to the legal question was mistaken. If a majority of the Benchers continue to believe that they came to a decision that is legally required and that their assessment of the law is correct, it could not make a legal difference that a large number of members of the Law Society may be of a different opinion.

5. *Has anything changed in the landscape other than the vote and if there has been no change, is there a legal basis for reconsideration?*

If the Benchers' decision on 11 April 2014 was not grounded in a belief that they were legally bound to come to it then the Benchers could reconsider it. If the Benchers' decision was grounded in a belief that the decision was legally required, but the Benchers are now persuaded that their view of the law was incorrect, they could reconsider it. Generally speaking, as an administrative decision-maker, the Benchers are not required to adhere to a past decision of this kind simply because they made it, if they come to believe that a different decision can and should be made.¹

6. *What role does the member vote have in the Benchers' determination of the public interest in the administration of justice?*

¹ It could be different if the Benchers were acting as an adjudicative tribunal in making the decision, as could occur on a s. 47 review application, for example: Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback, 2006), p. 12-92.

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In my opinion, the Benchers' assessment of the public interest is constrained by law, including the provisions of the *Legal Profession Act* and the equality rights and fundamental freedoms recognized in the *Charter*. In deciding whether it is in the public interest that the proposed TWU law program should be denied approval, the Benchers must have regard to the legal analysis of the Supreme Court of Canada in *TWU v BCCT*. Attempts may be made to distinguish the case, but it cannot be ignored.

Accordingly, the member vote may inform the Benchers' assessment of broad public interest considerations only to the extent that the Benchers' assessment is grounded in such broad public interest considerations. To the extent that the Benchers' assessment is grounded in their view of their duty to apply the law as set out in the *Charter* and the decision in *TWU v. BCCT*, the member vote has less, if any, relevance.

Section 13 of the Legal Profession Act

The following questions address the limits on the authority of the Benchers by s 13 of the *Legal Profession Act*, which provides as follows:

- 13 (1) A resolution of a general meeting of the society is not binding on the benchers except as provided in this section.
- (2) A referendum of all members must be conducted on a resolution if
 - (a) it has not been substantially implemented by the benchers within 12 months following the general meeting at which it was adopted, and
 - (b) the executive director receives a petition signed by at least 5% of members in good standing of the society requesting a referendum on the resolution.
- (3) Subject to subsection (4), the resolution is binding on the benchers if at least
 - (a) 1/3 of all members in good standing of the society vote in the referendum, and
 - (b) 2/3 of those voting vote in favour of the resolution.
- (4) The benchers must not implement a resolution if to do so would constitute a breach of their statutory duties.

Summarizing the scheme, the Benchers are not bound by a resolution of the members except as provided in s 13, the Benchers are bound by a members' resolution if the requirements of

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subsections 13(2) and (3) are satisfied, but, under subsection (4), the Benchers are not bound and indeed must not implement a resolution if to do so would constitute a breach of their statutory duties.

7. *What is meant by “statutory duties” in section 13(4)?*

The term ‘statutory duties’ appears to distinguish duties arising by virtue of a statute from duties (presumably legal duties) arising at common law, for example, by contract; *McVea (Guardian ad litem) v T.B.* 2003 BCSC 958 at [46] (construing the similar term, ‘statutory obligation’).

The reference to ‘statutory duties’ in s 13(4) might be construed broadly as encompassing any legal duties imposed on the Benchers as statutory office holders under the *Legal Profession Act*, such as their duty to obey the rules of natural justice or administrative fairness where appropriate. This is plausible on its face, but the Benchers presumably owe a duty to cause the Law Society to fulfill its statutory duties and the breadth of the duty imposed on the Law Society under s 3 of the Act then makes the exception extremely broad. That section states:

Object and duty of society

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,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articled students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

In my opinion, it is not necessary to go this far to conclude that the Benchers would be justified in refusing to disaccredit TWU, if they believe that this decision is compelled by the judgment in *TWU v BCCT* in the circumstances of this case. I say this for two reasons.

First, I think that obligations imposed on the Law Society by the *Charter* must be considered as imposing statutory duties on the Benchers. The *Charter* is legislation and, by s 52 of the

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Constitution Act 1982, it is part of the supreme law of Canada. The *Legal Profession Act* must be read in light of the *Charter*. In my view, it would not be reasonable to construe the reference to 'statutory duties' as excluding obligations imposed on the Law Society, in whose name and on whose behalf the Benchers act, under the *Charter*.

Second, s 13(4) is clearly intended to relieve the Benchers of an obligation that might otherwise be imposed by a members' resolution pursuant to subsections 13(2) and (3). It cuts down the obligation that would otherwise be imposed. Even if s 13(4) were not there, I don't think that the balance of s 13 could be construed as imposing a legal obligation on the Benchers to implement a resolution that would cause the Law Society to act unlawfully. That would be perverse.

The Benchers are bound by a statutory duty to apply the *Charter* as authoritatively interpreted by the Supreme Court of Canada.

Therefore, a resolution directing the Benchers to reverse a determination which they believe to have been legally required of them by the decision in *TWU v. BCCT* is not a binding resolution, because to pass it would be contrary to the Benchers' statutory duties. Conversely, if the Benchers believe that *TWU v. BCCT* does not apply or is distinguishable, then it would not be contrary to their statutory duties, for them to reverse their decision.

8. *If the Benchers decide not to reverse their previous decision, does section 13 require that the 12 months be allowed to pass before the Benchers can be required to hold a referendum?*

The most obvious construction of s. 13 is that its requirements are mandatory: they contemplate a waiting period of 12 months after the adoption of a member resolution, followed by a referendum of the members. There is no provision for an earlier referendum.

The 12-month time period gives the Benchers time to reflect, decide, and then act. If the Benchers were to determine, prior to the lapse of 12 months, that implementing the resolution would constitute a breach of their statutory duties, then it would seem that no purpose would be served by waiting out the 12 months. Despite this logic, it is quite possible that a court would find that a referendum held before the 12-month period had passed would not fulfill the requirements of s. 13 and would therefore not be binding on the Benchers under that section in any event.

There is however a construction of s. 13(2) which would permit an earlier referendum. This construction is less persuasive. While the language of s. 13(2) is mandatory as to the circumstances in which a referendum "must" be held, it does not expressly prohibit a referendum being held outside these circumstances. The question is whether such a referendum would be "the referendum" under s. 13(3).

The most obvious construction is that "the referendum" only refers to a referendum under s. 13(2). One could argue, however, that read purposively with the rest of the section, and in order

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to avoid the pointlessness of a 12-month wait where it was unnecessary, an earlier referendum which is otherwise lawful ought to be read as qualifying as “the referendum” under s. 13(3). The legislature ought not to be presumed to intend that an illogical delay be mandatory, if this is not clearly stated.

The Benchers may feel that a call for an early referendum is likely to be widely supported and unopposed. It should be considered, however, that if an early referendum does not achieve the 2/3 vote; or if it does but the Benchers then invoke s. 13(4), an objection might be taken at that point as to the timing of the referendum. A person taking such an objection could be expected to argue that the 12-month period is crucial to the scheme set out in s. 13, because it gives the political process time to unfold.

It is our opinion that the Benchers do not lose the protection of s. 13(4) if they hold an earlier referendum. It would not be reasonable to construe the legislation as requiring the Benchers to implement a resolution which they believed to be unlawful. Section 13(4) is drafted in a general way; it refers to “a resolution” not “the resolution” and it is our view that a court would be more likely than not, to find that the Benchers could invoke s. 13(4) in any event.

9. *Are the provisions of section 13 constitutional such that a majority of members can determine minority rights?*

In my opinion, the scheme is constitutional. A majority of members cannot determine anyone’s constitutional rights because the members cannot impose upon the Benchers an obligation to act in a manner that violates anyone’s constitutional rights. This flows from the opinion I have already given above on the effect of s. 13(4). The Benchers are obliged to respect the constitutional rights of persons affected by their actions.

Prospect of Litigation

10. *Can a member bring an action on his or her own? What form would it take?*

In my opinion, a member would have standing to seek judicial review of a refusal by the Benchers to implement a member resolution if the requirements of s 13(2) and (3), including the 12 month waiting period, are satisfied.

There is a scenario under which a member could seek judicial review prior to the expiration of the 12 month waiting period. It would require an affirmative decision or declaration by the Benchers that they would refuse to implement the resolution, even if supported by a referendum. Such a resolution would presumably only be passed with a view to bringing matters to a head and, if it were, it could give rise to an immediate application for judicial review by a member such as Mr. Mulligan. While the court would have a discretion to refuse to hear the application on the ground that the dispute was not yet ripe, I think it is very unlikely that the court would refuse to hear the application in these particular circumstances.

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TWU v BCCT

11. *What is the relevance of s. 41 of the Human Rights Code for the Bencher decision?*

Section 41 of the *Human Rights Code* states as follows:

Exemptions

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.

(2) Nothing in this Code prohibits a distinction on the basis of age if that distinction is permitted or required by any Act or regulation.

TWU relies upon this section to immunize it from a complaint under the *Code*. An argument exists that s. 41 does not apply due to the nature of TWU's religious affiliation which does not single out one particular creed but rather embraces "an underlying philosophy and viewpoint that is Christian".² As I stated in my opinion to Michael Lucas of 8 May 2013:

[W]hile a range of Christian creeds and doctrines may be accommodated within TWU's evangelical Christian perspective, it is nevertheless an organization established for the promotion of the interests and welfare of Christian students as contemplated by the exemption. Following full argument, the court is likely to conclude that, pursuant to the exemption, TWU is not in violation of the prohibition on discrimination contained in the *Human Rights Code*.

There is another way in which s. 41 of the *Human Rights Code* is relevant. At the SGM, several speakers read or referred to paragraph 36 of *TWU v BCCT*, which states:

36 Instead, 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

² See the letter to the FLSC dated March 18, 2013, by the Sexual Orientation and Gender Identity Conference and the Equality Committee of the CBA (<http://www.cba.org/CBA/submissions/pdf/13-18-eng.pdf>).

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.

This passage was cited to support an argument that the court had held that TWU's Covenant is not discriminatory. In my view, read as a whole, the Supreme Court's judgment accepts that the imposition of the covenant at TWU *does* amount to discrimination – otherwise there would be no need to engage in an exercise of rights-balancing. At the heart of the court's reasoning in *BCCT*, is the conclusion that TWU's covenant constitutes lawful discrimination. It is lawful because TWU is a private institution, not bound by the *Charter* in its own practices and operations. The existence of the discrimination and s 15 of the *Charter* are not irrelevant to regulators such as the College of Teachers and the Law Society, but they are required to balance the discrimination against the *Charter's* protection of the religious freedom of TWU students and staff.

12. *Where there has been a change in society's views or values, are courts still required to follow cases decided before the change?*

Societal values have changed since 2001 and are continuing to evolve. The Supreme Court of Canada is likely to note the evolution. However, changing social norms do not necessarily influence Supreme Court judgments in a simple way. The question is whether the social changes that have occurred and are occurring are likely to lead the Supreme Court to abandon the legal analysis adopted in *TWU v BCCT* on very similar facts. I think it is important that *TWU v BCCT* was cited with apparent approval in *Doré v Barreau du Québec* [2012] 1 SCR 395 at [32]-[42] and that an equivalent 'balancing of rights' methodology was affirmed in *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11. I think it unlikely that the Supreme Court of Canada will reverse itself.

In *Canada (Attorney General) v Bedford* 2013 SCC 72, the Supreme Court of Canada addressed the manner and extent to which a decision of the Supreme Court binds a lower court. At [44], McLachlin CJ stated, for the court, that:

... a lower court is not entitled to ignore binding precedent, and the threshold for revisiting a matter is not an easy one to reach. In my view, as discussed above, this threshold is met when a new legal issue is raised, or if there is a significant change in the circumstances or evidence.

The test on reconsideration of *BCCT* by a court other than the Supreme Court of Canada is therefore that the court must consider itself bound except to the extent that new legal issues are

raised by reason of new arguments or developments in the law, or if there are new circumstances or evidence that fundamentally shift the parameters of the debate (*Bedford* at [42]). This is the test that would have to be applied in the British Columbia Supreme Court and Court of Appeal, in a case in which *TWU v BCCT* comes to be considered. In my opinion, it is the test that should be applied by the Benchers. In my opinion, applying this test, *TWU v BCCT* remains good law.

13. *What is the standard of review if a judicial review application were brought by TWU upon the Benchers reversing themselves following a referendum?*

In this question we have assumed that the referendum referred to is a referendum duly called according to the rules set out in s. 13(2) of the LPA: specifically, a referendum after 12 months that would bind the Benchers subject to s. 13(4).

If the Benchers reverse themselves after a s. 13(2) referendum, they will have first determined that to implement the resolution is not contrary to their statutory duties. As stated above, the Benchers' statutory duties include a duty to apply the Charter as authoritatively interpreted by the Courts. On the analysis set forth in *Dunsmuir v. New Brunswick*, 2008 SCC 9 at para 58, constitutional issues are generally subject to review for correctness due to the unique role of s. 96 courts as interpreters of the Constitution. Further, applying the Charter is a question of law of "central importance to the legal system...and outside the ... specialized area of expertise" of the administrative decision maker. This type of question also attracts a correctness standard: *Dunsmuir* at [55] and [60].

In *BCCT v. TWU* the standard of review was correctness. Existing jurisprudence is relevant in identifying the kinds of questions which attract a correctness standard: *Dunsmuir* at [58]. As in *BCCT*, there is no privative clause in the governing statute, and the tribunal here (the Benchers) cannot be viewed as expert on constitutional law relative to the courts, even though it is made up of a majority of lawyers. As in *BCCT*, the Benchers have relied on outside legal opinions from various sources in this matter.

The determination as to whether or not it is contrary to the Benchers' statutory duties to decline to approve TWU's law school does not closely resemble *Doré v. Barreau du Québec*, 2012 SCC 12, where the question was the application of Charter values to a discretionary adjudicative decision by a disciplinary tribunal, squarely within its area of expertise. In that case, a lawyer challenged a decision disciplining him for writing unprofessional letters to a judge contrary to the Quebec Bar's *Code of Ethics*. He did not challenge the constitutionality of the *Code*. Key to the outcome in *Doré* was the proper conceptualization of the decision at issue. Abella J. wrote:

There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court's jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken

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sufficient account of *Charter* values in making a discretionary decision.

Abella J. applied a standard of reasonableness, noting that the tribunal had the necessary expertise and proximity to the facts of the case, to apply the law including Charter values, in making its discretionary decision on lawyer discipline.

A decision of the Benchers – that to implement a resolution discrediting TWU would not be contrary to its statutory duties including a duty to apply the Charter as authoritatively implemented by the SCC – would be a question of law with very little in the way of a factual component. It does not call for an exercise of discretion and ought to be reviewed on a correctness basis. The decision on standard of review in *BCCT v. TWU*, which was cited with apparent favour by the majority in *Doré*, is directly on point and calls for a correctness review.

14. *What is the standard of review if a judicial review application were brought by TWU upon the Benchers "voluntarily" reversing themselves in the absence of a referendum?*

If the question comes before the Benchers on a voluntary reconsideration, or a voluntary reconsideration brought on by a referendum held outside the requirements of s. 13(2), the decision being made is, in theory, subject to a broader set of considerations than under the previous question.

This is because if the reconsideration is voluntary, the Benchers could reverse their decision based on anything they were entitled to consider when making their original decision. In view of the fact, however, that as far as we are aware the determinative consideration was the constitutional issue, on balance we view the distinction as having no effect on the standard of review. The question at issue is still a discernable question of constitutional law (*Dunsmuir* at [58]), which is easily separated from the factual issues (*Dunsmuir* at [55]), and which is of central importance to the legal system as a whole (*Dunsmuir* at [60]). It therefore demands a uniform and consistent treatment, in accordance with the correctness standard.

We have considered an argument that a voluntary decision to reverse ought to attract a standard of reasonableness under the law as set out by Abella J. in *Doré*. Assuming that the determinative consideration has been whether *BCCT v. TWU* applies such that a refusal to approve will be unconstitutional, this question is not one which is subject to discretion within the tribunal's specialized area of expertise. Rather it is an extricable question of general, constitutional law, as it was in *BCCT v. TWU*. Our view is that the court will apply a correctness standard to this question, even under a voluntary reconsideration.

I hope that this has been of assistance.

NATHANSON, SCHACHTER & THOMPSON LLP
BARRISTERS AND SOLICITORS

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Yours truly,

Nathanson, Schachter & Thompson LLP

Per:

A handwritten signature in black ink, appearing to be "Nathan", written over a horizontal line.

GBG:jl

Lance S.G. Finch
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March 17, 2014

The Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Attention: Timothy E. McGee, Q.C., Chief Executive Officer

Dear Sirs:

**Re: Relevant Considerations for the Law Society of British Columbia in Relation to the
Proposed Faculty of Law at Trinity Western University
Our File No. 2737-28**

I. Introduction

1. The Law Society of British Columbia (the "LSBC") has requested assistance in identifying and organizing relevant considerations in the exercise of its discretionary powers in Law Society Rule 2-27(4.1), and in compliance with section 3 of the *Legal Profession Act*, S.B.C. 1998, c. 9 [*Legal Profession Act*], in relation to the proposed faculty of law at Trinity Western University ("TWU").
2. Section 3 of the *Legal Profession Act* provides 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...

3. Law Society Rule 2-27 provides in part:

(1) An applicant for enrolment in the admission program may apply for enrolment at any time.

...

(3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:

...

(b) proof of academic qualification under subrule (4);

...

(4) Each of the following constitutes academic qualification under this Rule:

(a) successful completion of the requirements for a bachelor of laws or the equivalent degree from an approved common law faculty of law in a Canadian university;

...

(4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution declaring that it is not or has ceased to be an approved faculty of law.

4. It is contended that the Benchers should adopt a resolution declaring that TWU's law school is not "an approved faculty of law" for the purposes of the Rule.

II. Background

5. In British Columbia, authority to grant degrees is governed by the *Degree Authorization Act*, S.B.C. 2002, c. 24 [*Act*]. The *Act* provides in section 4 that the "Minister" may, *inter alia*, consent to the granting or conferring of university degrees.

6. TWU has been recognized by the government of British Columbia as a degree-granting institution.

7. TWU's proposed JD law degree qualifies as a Canadian common law degree, equivalent to a bachelor of laws, because it received formal approval from the designated Minister of the Crown under the *Act* in December 2013.

8. In 2010, the Federation of Law Societies of Canada (the "FLSC") adopted a "National Requirement" which will take effect for law school graduates for 2015. The National Requirement specifies the minimum required competencies and skills that law school graduates must have obtained, and the law school academic program and learning resources that law schools must have in place. The National Requirement specifies 19 mandatory courses, including Constitutional Law and "Ethics and Professionalism".
9. In January 2012, the FLSC established an "Approval Committee". Its core function is to determine whether law school programs comply with the National Requirement. In June 2012, TWU submitted a proposal to the Approval Committee for the establishment of a new law school program. In its report of December 2013, the Approval Committee said:
 31. As noted above, the mandate of the Approval Committee is to determine whether existing and proposed law school programs satisfy the national requirement. Except to the extent of considering whether TWU's mission and commitment to teach law from a Christian worldview would constrain the teaching of the required competencies, inquiring into TWU's teaching methods or philosophies, or its admission criteria would go beyond consideration of whether a program meets the national requirement. These questions are thus outside of the mandate of the Approval Committee.
 32. To ensure that the issues falling outside of the mandate of the Approval Committee were given full consideration, the Federation established the Special Advisory Committee on Trinity Western University's Proposed School of Law (the "Special Advisory Committee"). The Special Advisory Committee was tasked with considering whether there are additional public interest issues that should be taken into consideration in determining the eligibility of future graduates of TWU's proposed law school program to enrol in law society admissions programs. The report of the Special Advisory Committee is available at www.flsc.ca.
10. After considering TWU's application, the various objections that were raised against it, and the question of whether the proposed law school would meet the National Requirement, the Approval Committee considered that the proposed program would meet "most" elements of the National Requirement. But it expressed these concerns:
 48. The members of the Approval Committee did, however, identify three *concerns* about the proposal and one matter on which it wished to make a *comment*. The three concerns relate to i. the teaching of Ethics and Professionalism; ii. the teaching of the elements of the Public Law competency relating to the Canadian Charter of Rights and Freedoms and human rights law principles; and iii. the budget for the proposed school. The *comment* relates to the library acquisitions budget.

[Underlining added]

11. It said:

50. Although the course outlines for TWU's proposed Ethics and Professionalism and Constitutional Law courses are consistent with what one would expect for such courses, the members of the Approval Committee see a tension between the proposed teaching of these required competencies and elements of the Community Covenant. In particular, the Approval Committee is concerned that some of the underlying beliefs reflected in the Community Covenant, which members of faculty are required to embrace as a condition of employment, may constrain the appropriate teaching and thus the required understanding of equality rights and the ethical obligation not to discriminate against any person. This tension appears to be reflected in the description of the mandatory Ethics and Professionalism course (LAW 602), which states that the course "challenges students to reconcile their personal and professional beliefs within a framework of service to clients and community while respecting and performing professional obligations and responsibilities.

[Underlining added]

12. It concluded:

56. The Implementation Committee identified only two possible outcomes when considering a proposal for a new law school program: *preliminary approval*, for a program that will meet the national requirement if implemented as proposed, and *not approved*, for a program that will not comply with the national requirement. The Approval Committee has concluded that, subject to the concerns expressed above, TWU's proposed school of law will meet the national requirement if implemented as proposed. The proposed program is given *preliminary approval*.

13. As noted in paragraph 31 of the Approval Committee's report (quoted above), it received submissions that raised issues which the Approval Committee considered to be beyond its mandate. Accordingly, the FLSC established the Special Advisory Committee on Trinity Western's Proposed School of Law (the "Special Advisory Committee"). Its mandate was defined as follows:

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.

14. The Special Advisory Committee considered Provincial Law Society Legislation imposing duties "to protect the public interest" and "to preserve and protect the rights and freedoms of all persons" (see section 3 of the B.C. *Legal Profession Act* quoted above). It also considered the judgment of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 ("*TWU v. BCCT*"), as well as an opinion from John Laskin, Q.C. The Special Advisory Committee identified and discussed the many issues arising from the submissions it received. It concluded:

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 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.
[Underlining added]

15. The objections to FLSC approval and to LSBC approval under Law Society Rule 2-27(4.1) are based on TWU's status as a private Christian university, which requires all of its faculty and students to sign a "Community Covenant Agreement". The agreement requires students and faculty members to "abstain" from "sexual intimacy that violates the sacredness of marriage between a man and a woman".
16. This provision is understood to require abstinence from same-sex activity. Critics assert that this constitutes discrimination on the basis of sexual orientation. Critics further assert that if the LSBC approves TWU's faculty of law, the LSBC will be publicly perceived as endorsing discriminatory practices prohibited by the B.C. *Human Rights Code*, R.S.B.C. 1996, c. 210 and the *Canadian Charter of Rights and Freedoms*, and it will have failed to fulfill its mandate in section 3 of the *Legal Profession Act* to protect the public interest in the administration of justice by "preserving and protecting the rights and freedoms of all persons".
17. In addition to the provisions of the Community Covenant Agreement, critics have also drawn attention to TWU's "handbook" and its "statements of core values". These documents are said to show that TWU's programs are established and implemented according to the principle that biblical scripture must be accepted as the final and ultimate standard of truth, and as the reference point by which every other claim to truthfulness is measured.

III. Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31

18. The law concerning the exercise of discretionary powers by an administrative body, such as the LSBC, was expounded by the Supreme Court of Canada in *TWU v. BCCT*. In that case, the B.C. College of Teachers (the "BCCT") refused to approve TWU's application to assume full responsibility for its teacher education programs. The refusal was based on TWU's community standards, which embodied discrimination against homosexuals.
19. The Supreme Court of Canada held that:
 1. The BCCT had jurisdiction to consider TWU's discriminatory practices: paras. 11-14;
 2. The BCCT had the discretion to determine what was in the "public interest";
 3. The exercise of that discretion was reviewable on a standard of correctness: paras. 15-19;

4. The exercise of that discretion required the BCCT to go beyond determining whether TWU's policy was discriminatory, and in addition required that the BCCT consider the right to religious freedom of those who subscribed to TWU's policy;
5. Neither equality rights nor the right to religious freedom is absolute, but rather these competing rights must be "balanced";
6. In determining the "public interest" under section 4 of the *Teaching Profession Act*, R.S.B.C. 1996, c. 449 [*Teaching Profession Act*], the religious precepts of TWU were irrelevant to the exercise of the BCCT's discretion;
7. What was relevant to the exercise of that discretion, and to the balancing function, was the actual impact of TWU's precepts or beliefs on the public school system;
8. To determine whether discriminatory policies will have an adverse effect either on the students graduating from the program or the learning environment in public schools, there must be "concrete evidence" of such detrimental effects;
9. Restriction of religious freedom must be justified by evidence that the impugned policy will have a detrimental effect on the public school system;
10. In the case before the Court, there was no evidence that TWU's policies created a real risk to the public educational system;
11. In considering only TWU's religious precepts, or discriminatory practice, the BCCT acted on the basis of irrelevant considerations and therefore acted unfairly;
12. What the BCCT should have considered was the actual impact of those beliefs on the school environment, of which there was no evidence.

IV. Matters for the Benchers to Consider

20. The LSBC must decide under Law Society Rule 2-27 (4) and (4.1) whether the faculty of law at TWU is an "approved common law faculty of law", having regard for its duty to protect the public interest in the administration of justice as required by section 3 of the *Legal Profession Act*.

The questions may be phrased:

- (a) How would the "public interest" be affected if TWU's faculty of law was either approved or not approved under Law Society Rule 2-27(4.1)?
- (b) Put another way, why would it be in the "public interest" in the administration of justice to either grant or refuse approval to TWU?

21. In deciding those issues, the considerations that appear to be relevant are:

A. Legal Considerations

1. Is the Supreme Court of Canada decision in *TWU v. BCCT* distinguishable from the circumstances presently before the Benchers?
 - (a) Does the LSBC's mandate in section 3 of the *Legal Profession Act* to "uphold and protect the public interest in the administration of justice" differ in a material way from the "object" of the BCCT "to establish...standards for the education professional responsibility and competence" of teachers, having regard for the public interest?
 - (b) If there is a significant difference in the discretionary powers of the BCCT and the LSBC, does that difference affect the Supreme Court of Canada requirement for evidence of actual harm?
 - (c) If there is no evidence either of actual harm to graduates from TWU's faculty of law as a result of its discriminatory policies or that TWU graduates would engage in harmful or discriminatory conduct, would it be unreasonable in the circumstances to refuse TWU's application on the basis of perceptions alone?
 - (d) In other words, is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the TWU graduates may be prone to discriminate unlawfully and that the LSBC would be seen as sanctioning such conduct by approving TWU's application, thus bringing the administration of justice into disrepute?
 - (e) Have legal and societal values evolved since 2001 so that today's decision-makers are expected to be more protective of gay and lesbian equality than decision-makers at the time of *TWU v. BCCT*?

B. Evidentiary Considerations

2. Is there evidence of actual harm to graduates from TWU's faculty of law as a result of its discriminatory policies?
3. Is there evidence of actual harm to TWU graduates or that TWU graduates would actually engage in harmful or discriminatory conduct?
4. If there is evidence that TWU graduates would engage in harmful or discriminatory conduct, how does that weigh in the balance against the TWU community's right to religious freedoms?
5. Is there evidence as to the "competence" of the TWU law school concerning:
 - (a) whether a university that intentionally discriminates against homosexuals is a competent provider of legal education;

- (b) whether an institution that discriminates in its internal policies can effectively teach Ethics and Professionalism; or
- (c) whether an institution that discriminates in its internal policies can effectively teach constitutional and human rights law?

C. Policy Considerations

- 6. Is the discriminatory effect of the Community Covenant Agreement on TWU's hiring policies for its professors a relevant consideration for the LSBC under the Legal Profession Act and the Law Society Rules?
- 7. Can either teachers or students who acknowledge a faith-based doctrine as the ultimate authority understand or give meaningful effect to the Rule of Law in a Constitutional democracy?
- 8. Does the Community Covenant Agreement violate academic freedom? If so, is this a relevant consideration in the LSBC's exercise of its discretionary power under Law Society Rule 2-27(4.1) to approve TWU as an approved faculty of law?

D. Practical Considerations

- 9. Is there a principled reason for the LSBC to take a different position than the two FLSC Committees (the Approval Committee and the Special Advisory Committee) that the TWU law school program meets the National Requirement, and that there is no "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" (para. 65 of the Special Advisory Committee report)?
- 10. Should the LSBC give any consideration to the possibility that there may be non-uniformity across Canada, as other law societies may decide either to approve or to disapprove TWU graduates' degrees in their jurisdictions?
- 11. If TWU is not approved by the LSBC, are there any implications with respect to foreign students who have attended religious schools in other countries (e.g. Catholic University, BYU, Liberty University, Baylor University) and who wish to apply to practice law in British Columbia?
- 12. Is there merit to the position that approving a faculty of law at TWU would actually enhance diversity in the legal profession, on the basis its policies are minority views?
- 13. If TWU's proposed law school is approved by the LSBC, could PLTC courses be designed to address the concerns relating to the problem of apprehended intolerance?
- 14. Should consideration be given to the LSBC's role as regulator of the legal profession and its capacity to discipline lawyers for discriminatory conduct or otherwise harmful conduct unbecoming a lawyer?

15. Although TWU, as a private institution, is exempted from B.C. human rights legislation, should the LSBC consider whether TWU's policies violate or are otherwise inconsistent with human rights legislation in British Columbia or in other provinces? If so, should the LSBC disassociate itself from a school whose policies may violate or run contrary to this legislation?
22. As requested by the LSBC, references are provided below each consideration. These references illustrate the origin and discussion of the considerations, but are not intended to be exhaustive.
23. Moreover, while particular sources are referenced below, these constitute but a small percentage of the submissions received by the LSBC. The material is voluminous and the references that have been selected are meant only to provide a representative sample of the numerous submissions delivered to the LSBC.
24. Finally, many of the submissions received by the LSBC, whether for or against TWU's proposed law school, address multiple issues. Accordingly, even if a source is listed under several of the considerations, the reader should not assume that that particular source did not address further issues. Any omissions in this regard should not be taken as preferential treatment for one source or another or for one position or another.

A) Legal Considerations

1. **Is the Supreme Court of Canada decision in *TWU v. BCCT* distinguishable from the circumstances presently before the Benchers?**

(i) Professor Elaine Craig published a paper in 2013 entitled, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 C.J.W.L. 148 (the "Craig Paper"). While the Craig Paper directs its arguments against the FLSC's preliminary approval of TWU's proposal, Professor Craig has asked the LSBC to consider her paper in making its determination pursuant to Law Society Rule 2-27(4.1): see letter from Professor Craig to Timothy McGee, Q.C., Executive Director, Law Society of British Columbia, dated March 1, 2014 at p. 1, *infra*. Accordingly, it is assumed that all references to the FLSC in Professor Craig's paper can be substituted with the LSBC.

Professor Craig takes the position that *TWU v. BCCT* is distinguishable, on two primary bases: (1) the standard of review would be different in this case and any decision would be treated with deference by the courts; and (2) both societal and *Charter* values have evolved, such that today's decision-makers are expected to be much more protective of gay and lesbian equality than were the decision-makers when *TWU v. BCCT* was released.

With respect to the first basis relating to the standard of review, she states at pp. 166-167:

In making its decision, the Federation will be required to balance freedom of religion and equality (as was the BCCT). However, unlike in *Trinity Western*, the balance struck by the Federation would be reviewed on a standard of reasonableness. Provided the Federation achieves a reasonable balance between protecting freedom of religion and protecting equality, its decision will be upheld.

... In making its decision, the Federation must ask how to pursue its objectives in away that will best protect the *Charter* values at issue. If the decision is judicially reviewed, the question will be whether “in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing” of the *Charter* rights and values at play. Again, this question will be approached with deference. The Federation’s decision will be unreasonable if, in pursuing its objectives, it disproportionately impairs a *Charter* guarantee – in this case, either freedom of religion or equality.

...

A decision by the Federation not to approve a law degree from TWU would affect the interests of TWU law graduates ... Unlike graduates from other Canadian law schools, TWU law graduates would not be eligible for licensure to practice law in Canada immediately following graduation and completion of a provincial bar exam and articles.

...

The question is whether this impact on freedom of religion is unreasonable in light of the Federation’s mandate. The answer is no. The Federation must take into consideration the impact of its decision on freedom of religion. However, it must do so in a way that balances the impact on freedom of religion with both its mandate to protect the public interest and competing *Charter* values such as equality. A proper balance of the Federation’s mandate with all of the *Charter* rights and values at issue requires that the Federation not approve a law degree from TWU. Not only is it reasonable for the Federation to reject TWU’s application, but it would actually be unreasonably dismissive of equality protections for them to do otherwise.

As for the second basis regarding changing societal values, she argues at pp. 168-169:

As societal values change, what constitutes a reasonable balance between protecting freedom of religion and protecting against discrimination on the basis of sexual orientation also changes. The Court’s evolving jurisprudence on gay and lesbian equality clearly reflects this position. For example, in *R. v. Tran*, [2010 SCC 58 at para. 34] the Court rejected the same gay panic defence it had accepted for decades on the basis that “the ordinary person standard must be informed by contemporary norms of behavior, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*.” In *Canada (Attorney General) v. Hislop*, [2007 SCC 10] the Court explicitly recognized that despite constitutional recognition in 1995, equal protection under the law has been achieved gradually for gays and lesbians as social, legal, and political norms have become more tolerant of sexual minorities.

Today’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. *Trinity Western University* was decided twelve years ago. The majority in that case found that the equality interests of gays and lesbians were not sufficiently jeopardized by a public school system with teachers educated in a university that discriminates on the basis of sexual orientation: “While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers.” Societal values have evolved. The Court in *Trinity Western*

University addressed the inequality towards sexual minorities by concluding that the discriminatory policy was okay because “TWU is not for everybody.” A reasonable balance between freedom of religion and equality for gays and lesbians based on contemporary standards requires ascribing more weight to the equality interest than what is attributed to it by resolving the tension with the conclusion that no one is saying that gays cannot be teachers.

[Citations omitted.]

Professor Craig also argues that the justification for denial relied on by the FLSC would be different than the argument made by the BCCT in *TWU v. BCCT* (i.e., that teachers trained in an institution that discriminates on the basis of sexual orientation might perpetuate discriminatory attitudes in the public school classroom).

In that regard, she first argues that the FLSC’s decision not to approve would be justified because it is reasonable to conclude that principles of equality, non-discrimination and the duty not to discriminate – requirements of the FLSC’s accreditation framework – cannot be taught in an environment with discriminatory policies.

Second, she says that it is reasonable to conclude that critical thinking about ethical issues cannot be taught by an institution which violates academic freedom and which requires that all teaching be done from the perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making. In that regard, she says that this is different from the BCCT’s argument in *TWU v. BCCT*, in that it is not a prediction that TWU law graduates would discriminate. Accordingly, it is not a conclusion that requires empirical evidence of discrimination by TWU law graduates.

(ii) In response to Professor Craig’s paper, in his memorandum to the FLSC, dated March 21, 2013, John Laskin, Q.C. writes that *TWU v. BCCT* is binding in these circumstances (the “Laskin Memorandum”). He provides three reasons: (1) the circumstances currently before the Benchers share many parallels with the circumstances that prevailed in *TWU v. BCCT*; (2) the Supreme Court of Canada has consistently rejected a hierarchical approach to rights and values and instead, as it did recently in *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11 (“*Whatcott*”), has confirmed that courts are required to balance equality and freedom of religion values to the point at which conduct linked to the exercise of freedom of religion results in actual harm; and (3) there appears to be no evidence of actual harm in this case: pp. 4-6.

(iii) Letter from Jonathan S. Raymond, Ph.D., President and Acting Chancellor of Trinity Western University, to the Canadian Common Law Program Approval Committee of the FLSC dated November 29, 2012.

Citing *TWU v. BCCT* at paras. 25, 33 and 35, Mr. Raymond takes the position that the Supreme Court of Canada has “already answered the question as to whether the Community Covenant ‘is inconsistent with federal or provincial law’”: p. 2.

(iv) Letter from the Sexual Orientation and Gender Identity Conference and the Equality Committee of the Canadian Bar Association (“SOGIC”) to the FLSC, dated March 18, 2013, at p. 2.

SOGIC argues that *TWU v. BCCT* can be distinguished from these circumstances, on two bases. First, the BCCT was not directly applying either the *Charter* or the province’s human rights legislation when making its decision, which the LSBC is required to do in this case. SOGIC cites *Doré v. Barreau du Québec*, 2012 SCC 12 at para. 27 (“*Doré*”) in support of this position. Second, recent Supreme Court of Canada jurisprudence “demonstrates a higher degree of deference to administrative decision-makers when dealing with *Charter* and human rights issues”.

(v) Memorandum of Geoffrey Gomery, Q.C. to the FLSC, dated May 8, 2013, at pp. 9-11 (the “Gomery Memorandum”).

Mr. Gomery disagrees with Professor Craig that *TWU v. BCCT* can be distinguished on the basis that societal values have evolved to the extent that “the balance between freedom and religion and equality for gays and lesbians now tilts more to the protection of equality”: p. 9. While he acknowledges that the Supreme Court’s s. 15 analysis has evolved – which evolution he says is demonstrated in *Quebec v. A.*, 2013 SCC 5 – he does not view this evolution as “foreshadowing a different outcome were the issue in *TWU v. BCCT* to arise again”: p. 9. Rather, citing *Whatcott* and *Doré* at paras. 32-42, Mr. Gomery says that the Supreme Court has “reaffirmed its commitment to an analytical approach that balances equality rights against other rights protected under the *Charter*, giving appropriate weight to each”: p. 9.

In addition, while Mr. Gomery agrees that the LSBC’s mandate under the *Legal Profession Act* is broader than was the BCCT’s mandate under the *Teaching Profession Act*, he takes the position that in order to succeed, TWU’s opponents must adduce some evidence that there will be an adverse effect on the educational process, educational outcomes or the students themselves.

(vi) Letter from Kevin G. Sawatsky, Vice-Provost (Business) and University Legal Counsel of Trinity Western University, to the FLSC, dated May 17, 2013, at pp. 8-13 (the “Sawatsky Letter”).

Mr. Sawatsky takes the position that many of the opponents’ arguments “have already had a thorough hearing before, and been rejected by, the Supreme Court of Canada”: p. 15. He provides the following comments:

1. The analysis in *TWU v. BCCT* relating to TWU’s right to equal treatment is not limited to B.C. law, as it was broadly “based on preserving human rights and *Charter* values in acknowledging TWU’s right to a teacher education program”: p. 9. As such, the Court’s approach was “consistent with how courts and tribunals

protect religious beliefs in the context of all human rights legislation in Canada, not just in B.C.”: p. 10. The *Charter* “applies to protect TWU and the members of its community across the country”: p. 10.

2. While the *Civil Marriage Act*, S.C. 2005, c. 33 [*Civil Marriage Act*] reflects societal change, such change has not “undermined the constitutional protection afforded TWU and the members of its community”: p. 11. Rather, the Preamble and s. 3.1 of that Act show that “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’”: p. 11.
 3. There is no evidence that TWU graduates are hostile to gay and lesbian people, that TWU hides homophobia in Christian values, or that TWU graduates will fail to uphold the basic values of non-discrimination: pp. 13, 15.
- (vii) Submissions prepared by a group of UBC students and certain faculty members at the UBC Faculty of Law, delivered to the LSBC on March 2, 2014, at pp. 14-21 (the “UBC Submissions to Disapprove TWU”).

It is argued in the UBC Submissions to Disapprove TWU that *TWU v. BCCT* will not dictate the result in this case, for three primary reasons.

First, it is argued that the Community Covenant Agreement as it reads today differs substantially from the covenant that the Supreme Court reviewed in *TWU v. BCCT*, such that *TWU v. BCCT* can be distinguished from these circumstances. In particular, the authors of the UBC Submissions to Disapprove TWU highlight the fact that the Community Covenant Agreement contains “an explicit disciplinary provision by which TWU reserves the right to ‘discipline, dismiss, or refuse a student’s re-admission to the University’”: p. 16. It is argued that in considering the disciplinary provision, a court would come to a different conclusion in this case:

Having identified that LGBTQ students would be unlikely to apply to TWU, the majority in *Trinity Western University v BC College of Teachers* defined the residual question as being whether “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”. Justices Iacobucci and Bastarache held that reaching this conclusion would be contrary to freedom of conscience and religion. However, this passage of the majority decision does not engage with the possibility that a TWU student (including a Christian TWU student) may hold different religious beliefs from those articulated in a document such as the Community Covenant Agreement. Under TWU’s present rules, for the duration of his or her studies at TWU, such a student is compelled to accept constraints on his or her capacity to act in accordance with personal beliefs to the extent that they are inconsistent with the requirements of the Community Covenant Agreement. Failure to abide by these constraints may lead to disciplinary consequences, including expulsion.

[Citations omitted.]

Secondly, the authors say that “the responsibilities of law schools to teach non-discrimination may be distinguished from the requirements that were imposed on teacher education”: p. 35. At p. 35, they argue:

In her letter to the Nova Scotia Barristers Society, former law professor Dianne Pothier argues that the responsibilities of law schools to teach non-discrimination may be distinguished from the requirements that were imposed on teacher education in 2001:

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

Third, it is argued that subsequent Supreme Court case law has altered the legal landscape and that *TWU v. BCCT* should be read in the context of this more recent case law: p. 19.

The authors first argue that the standard of review in this case would not be correctness, as was applied in *TWU v. BCCT*. Rather, the Court in *Doré* has affirmed that “the appropriate standard of review for discretionary decisions that implicate *Charter* values is ‘reasonableness’, contextually applied”: p. 15. In that regard, the authors argue that the “proportionality test will be satisfied if the measure falls within a ‘range of possible, acceptable outcomes’ and is explained by reasons exhibiting ‘justification, transparency and intelligibility’”: p. 15.

Moreover, although the Court in *Whatcott* was dealing with s. 1 of the *Charter*, the authors say that the Court’s approach in that case “offers a reasonable characterization of the task now presented to the Law Society”:

[66] We are therefore required 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...

Based on the above, the authors say that on a review of the LSBC’s decision, a court will read *Doré* and *Whatcott* together and will ask: “given the nature of the decision and the particular statutory and factual contexts, did the decision-maker properly assess the impact the decision would have on the relevant *Charter* value?": p. 19. If the court answers in the affirmative, the authors say that it “will conclude that the decision-maker proportionately balanced statutory objectives and *Charter* values to arrive at a reasonable outcome”: pp. 19-20.

Next, the authors assert that the Court in *Whatcott*, at para. 124, “roundly rejected the proposition that one could distinguish between disapprobation of acts that are integral to a person’s identity – such as expressions of sexual intimacy – and disapprobation of the person or group who engages in those acts”: p. 20. As a result, TWU can no longer rely on the argument that “one can meaningfully distinguish between the prohibition of certain conduct and discrimination against groups who are defined in part by that conduct”: p. 21.

Finally, the authors take the position that given the Court’s comments in *Whatcott*, evidence of actual harm is no longer required. They state at p. 35:

In *Trinity Western University v BC College of Teachers*, a majority of the Supreme Court of Canada held that there must be actual evidence of discriminatory practices before the freedom of religion of TWU students could be limited by requiring additional education. Those of us who subscribe to the first recommendation submit that the Community Covenant Agreement constitutes actual discrimination in its current form. However, we also note that in *Saskatchewan v Whatcott*, the Court held that evidence of actual harm was not required in order to justify limiting freedom of expression where the purpose of that limitation was to address the harms of systemic discrimination. In this instance and having regard to the research cited above (most of which has been published since 2001), we suggest that waiting for further evidence of actual harm is both unnecessary and improper.

(viii) Submissions to the LSBC from UBC Faculty of Law, student working group on freedom of religion, delivered to the LSBC on March 2, 2014, at pp. 54-59 (the “UBC Submissions to Approve TWU”).¹

The authors of the UBC Submissions to Approve TWU argue that *TWU v. BCCT* is still good law and that it is binding, given the strong correspondence between the factual circumstances in *TWU v. BCCT* and the present situation: p. 58.

In response to Professor Craig’s “case that *TWU v BCCT* is no longer a reliable source of law”, the authors provide the following commentary at pp. 58-59:

The basis of Professor Craig’s contention is twofold. First, it is claimed that the standard of review applied to the assessment of administrative decisions such as those in *TWU v BCCT* is no longer correctness but reasonableness. Second, it is claimed that Canadian social values and attitudes have changed in subsequent years. Recent Canadian history has been marked by a trajectory of growing sensitivity to and intolerance of discrimination against homosexual members of our community. She contends that this social reality is reflected in recent discrimination cases such as *R v Tran*, and can be expected to drive future *Charter* jurisprudence. For the purposes of this memo we will only address Professor Craig’s second claim, since whether or not the standard of review has changed should not have any substantive effect on the current decision before the Law Society of BC.

It can be conceded that Canadian “societal values have evolved” with respect to the legal protection and treatment afforded homosexual individuals. This is a welcome and

¹ Note that this submission was attached behind the UBC Submissions to Disapprove TWU.

positive development. But this fact has no bearing upon the issue of the accreditation of faith-based institutions for the purposes of the professional education of its members. Increased focus upon one deeply held *Charter* value cannot be understood to somehow imply the diminishment of other deeply held *Charter* values. A greater application of Section 15 to orientation-based discrimination, as distinct from other bases for discrimination, should not come at the expense of freedom of religion. This is particularly the case in *TWU v BCCT*. ...

The Supreme Court of Canada has not indicated that its approach to the balancing of rights or the value afforded freedom of religion has changed in substance. In addition to *Multani*, other decisions have affirmed the reasoning in *TWU v BCCT*. Last year, in *Whatcott*, the court unambiguously stated that “the protection provided under s. 2(a) should extend broadly.”

Alternatively, it could be argued that Professor’s Craig’s analysis might work to strengthen the Court’s protection of freedom of religion in cases such as *TWU v BCCT*. The more a religiously-grounded position or opinion represents a minority position within the broader context of Canadian culture, a trend which may continue with respect to traditional Christian views on marriage, the more vulnerable it will be to unconstitutional infringement by the majority. In such cases the court should respond vigilantly to protect freedom of religion.

Fundamentally, it must be recognized that *TWU v BCCT* is the constitutional law in Canada. It cannot be set aside because one hopes that it would be decided differently today. Vague appeals to societal values are an insufficient legal basis to challenge the ruling. It is not a safe course to presume, without clear direction from the SCC, that *TWU v BCCT* has been in any way been substantially modified or invalidated. Respect for the rule of law requires that it be followed unless it can be distinguished on the facts.

[Citations omitted.]

Moreover, the authors address whether the following considerations provide grounds for distinguishing the current circumstances from the facts of *TWU v. BCCT*: (1) whether lawyers play a unique role in society such that religious freedom should be outweighed by a concern for discrimination within the legal profession; (2) whether the changes made to the Community Covenant Agreement after 2011 have a relevant impact on the analysis; and (3) whether there is evidence that public harm would be caused by graduates of TWU’s proposed law program.

With respect to the first consideration, while the authors acknowledge that lawyers have a privileged position in relation to the public, they disagree that “personal beliefs of lawyers should be subjected to greater scrutiny than those held by teachers, nurses, and graduates of every other program TWU currently offers”: p. 55. They argue at pp. 55-56:

Teachers are responsible for the learning and development of children and their ability to influence the beliefs and values of students is potentially significant. Still, the 2001 judgment saw no public harm that had resulted from the personal beliefs held by teachers from TWU. In the private legal market, the public has the freedom to choose its legal representation and avoid the potential for conflict where religious opinions are of concern. Lawyers employed in the public sector, like many government employees, are screened for personal conflicts of interest during the hiring process. Further, the *Code of Professional Conduct in BC* prohibits discrimination of clients and defines the duties

owed by lawyers to their clients, the state and the courts. Thus if any discrimination does occur as a result of a lawyer's personal beliefs, he or she is subject to discipline under the *Code* regardless of the law school he or she attended. Given these factors, the ability for lawyers to discriminate based on their personal beliefs in a manner that is harmful to the public seems, if anything, more limited than that of teachers.

As for the second consideration, the authors argue that even though the disciplinary provision is an addition to the original covenant, it "does not alter the weight or significance of the covenant", for two reasons: p. 56. First, they assert that TWU's power to discipline a breach under the old covenant was implied in its assertion that if a student could not commit to such standards, he or she should consider enrolling elsewhere. Second, they say that this cannot be a legally significant distinction, given that "the Court's analysis in *TWU v BCCT* proceeded on the basis that even, given the older *Community Standards*, a homosexual student would not have been interested in applying for admission": p. 57.

Lastly, with respect to public harm, the authors argue as follows at p. 57:

In *TWU v BCCT* the court found no evidence that public harm had been caused by graduates of TWU's teaching program. No such evidence has been suggested in the present case. To hypothesize that law graduates with certain beliefs would cause public harm is pure conjecture, and the assumption that lawyers with particular religious views will necessarily discriminate against their clients is unfounded speculation. "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." Decision-makers may only weigh competing *Charter* rights using actual evidence, not concerns about the reasonableness or objective validity of those religious convictions. As noted above, if individual TWU law graduates behave unethically, the Law Society will be right to respond.

The assumption that religious institutions are incapable of training students to think critically and fairly is unfounded and based entirely on stereotype. Many Christian law students and lawyers across Canada hold beliefs that are routinely challenged in the course of their education, practice and personal lives. These challenges, if anything, refine their critical faculties by requiring them to actively engage with and consider how their beliefs inform their conduct as legal professionals. To argue that the religious perspective taught at TWU is harmful overlooks the value of diversity in the legal profession and is premised on the implicit assumption that lawyers cannot practice ethically if they hold religious beliefs. Such arguments privilege a non-religious worldview above all others and seek to preclude religious freedoms from protection in spheres of public influence. Canadian law requires a balancing of these competing values and rights, not a hierarchy.

(ix) Amy Sakalauskas and Ronald MacDonald, Q.C. provided their written submissions to the Nova Scotia Barristers' Society for the LSBC to consider (the "Sakalauskas/MacDonald Submissions").

At p. 13, they argue that even if *TWU v. BCCT* continued to be good law, it would not apply in these circumstances:

The issue in BCCT was whether teachers who graduated from TWU would discriminate. That is not the issue before the Society. The issue here is whether it is contrary to the public interest for a law society to accredit a school that discriminates against those who are able to enter their law school on the basis of sexual orientation. Moreover, and as was eloquently argued by Rev Dr Yates in her submission to council on behalf of the United Church, law schools and legal profession regulators bear a special and unique responsibility for protecting human rights and equality.

This case is different. The Supreme Court of Canada recently demonstrated that they will change law based on a different argument, even when considering the same Criminal Code section. For example, in *Reference re ss. 193 & 195.1(1)(c) of Criminal Code (Canada)*, the Supreme Court upheld Criminal Code prostitution provisions against a Charter challenge that they violated a person's freedom of expression. However, that law has now changed: in *Canada (Attorney General) v. Bedford* the Court struck down the prostitution provisions, which on this occasion were argued on the basis the several provisions breached the accused's rights to security of the person under s. 7 of the Charter.

No one should decide this case based on BCCT. It is not binding on these facts and it is not clear that the BCCT reasoning remains good law.

[Original emphasis.]

(x) Professor Craig entered a submission to the LSBC, dated March 1, 2014, that responds to the various criticisms of the Craig Paper in the Special Advisory Committee's *Final Report* (December 2013) and the Laskin Memorandum (the "Craig Reply Submissions").

In the Craig Reply Submissions, Professor Craig repeats her above contention that no evidence is required. However, she clarifies that the grounds that she advanced for rejecting TWU are "not based on the assumption or suggestion that hypothetical TWU law graduates would discriminate": p. 9. Rather, TWU's proposed law school should be rejected "based on the fact this university *does* discriminate" (original emphasis): p. 9.

She further states that the reasoning in *Whatcott* – while not definitive, given that the Court was considering the constitutionality of hate speech – indicates "the Court **now recognizes** the inherent difficulty of proving the harmful effects of discriminatory practices and will take this into account when balancing competing *Charter* values" (original emphasis): p. 10.

Finally, at pp. 10-11, Professor Craig invites the LSBC to consider the legal opinion offered by constitutional law and equality scholar Dianne Pothier on the applicability of *TWU v. BCCT* in these circumstances. Professor Pothier argues, in part:

The Simon Fraser teacher training curriculum [considered in *TWU v. BCCT*] did not have any anti-discrimination component. In contrast, Law Schools are mandated to teach legal principles of equality, in the constitutional and statutory context. Furthermore, while public school teachers carry only the obligation of all members of the community not to discriminate in the provision of public services, lawyers have an extra level of responsibility. Lawyers are potentially involved in the administration of constitutional and statutory equality and anti-discrimination provisions. Thus there is good reason to

impose a higher bar than in *BCCT v. TWU*, i.e. good reason for going beyond looking for specific evidence that TWU Law School graduates will, as a group, engage in discriminatory conduct.

... Law Societies are in a position to address [the issues of discrimination raised by the TWU Community Covenant] by adding an extra step to the bar admission process. If a law degree from TWU were treated as in the same category as those from foreign law schools, the National Committee on Accreditation requirements, or some provincial counterpart, could be used to fill the gap in requirements for admission to a Canadian bar.

- (xi) In a letter to the FLSC dated March 3, 2014, at p. 2, West Coast Legal Education and Action Fund (“LEAF”) submits that the LSBC should not see itself as bound by *TWU v. BCCT*:

In our view, there is a strong argument that the Court would consider the issue differently today. Much has changed regarding the social, political, and legal considerations at play; as Professor Elaine Craig argues, social values have evolved, and “[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.” Legal protections not available to Canada’s LGBTQ communities when the Teachers College case was decided, including recognition of same-sex marriage, rights of same-sex common law couples to the benefits of provincial family law legislation, and the addition of gender identity and expression as prohibited grounds of discrimination in some jurisdictions, have changed the legal landscape for LGBTQ people in Canada.

Furthermore, at p. 3, LEAF argues that the facts in this case are distinguishable from those in *TWU v. BCCT*. Namely, it says that “a discriminatory law school has particular implications that distinguish it from other faculties” (original emphasis).

- (xii) As noted above, the Supreme Court of Canada in *Whatcott* at para. 66, confirmed that courts are required to balance equality and freedom of religion values to the point at which conduct linked to the exercise of freedom of religion results in actual harm:

[66] We are therefore required 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...

[Citations omitted.]

- (a) Does the LSBC’s mandate in section 3 of the Legal Profession Act to “uphold and protect the public interest in the administration of justice” differ in a material way from the “object” of the BCCT “to establish...standards for the education professional responsibility and competence” of teachers, having regard for the public interest?
- (i) As at the time *TWU v. BCCT* was litigated, s. 4 of the *Teaching Profession Act* read as follows:

Object

4 It is the object of the college 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 and, consistent with that object, to encourage the professional interest of its members in those matters.

- (ii) Section 3 of the *Legal Profession Act* currently provides:

Object and duty of society

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,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articulated students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

- (iii) In *TWU v. BCCT* at paras. 13, 17, 19, 26-28, the Court addressed BCCT's mandate to establish standards provided for in the Act, in light of the statute's general purpose to ensure that "the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence". It stated

[13] Our Court accepted in *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825, that teachers are a medium for the transmission of values. It is obvious that the pluralistic nature of society and the extent of diversity in Canada are important elements that must be understood by future teachers because they are the fabric of the society within which teachers operate and the reason why there is a need to respect and promote minority rights. The suitability for entrance into the profession of teaching must therefore take into account all features of the education program at TWU. We agree with Rowles J.A. that "[i]t is clear from the terms 'professional responsibility and competence of its members' that the College can consider the effect of public school teacher education programs on the competence and professional responsibility of their graduates" (para. 197). The power to establish standards provided for in s. 4 of the Act must be interpreted in light of the general purpose of the statute and in particular, the need to ensure that "the fulfilment of public functions is undertaken in a manner that does not undermine public trust and confidence" (*Ross, supra*, at para. 84). Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct, in this context, to limit the scope of s. 4 to a determination of skills and knowledge.

...

[17] ... In the present instance, we are also dealing with the discretion of an administrative body to determine the public interest. The present context is, however, very different. We have already mentioned that s. 171(1) of the *School Act* states that the Minister of Education must appoint an education advisory council to "advise the minister on policy matters respecting education". Section 11 of the *School Regulation* expands upon the role of the education advisory council and provides that it may advise the minister on "overall policies of the education system including, without limitation, the following areas: ... (b) the teaching profession". Even if bylaws on discriminatory

practices were adopted by the BCCT by virtue of the s. 4 public interest provision, pursuant to s. 24 of the *Teaching Profession Act*, these bylaws would have to be filed with the minister within 10 days and would be subject to disavowal. Therefore, the BCCT is not the only government actor entrusted with policy development. Furthermore, its expertise does not qualify it to interpret the scope of human rights nor to reconcile competing rights. It cannot be seriously argued that the determination of good character, which is an individual matter, is sufficient to expand the jurisdiction of the BCCT to the evaluation of religious belief, freedom of association and the right to equality generally. As mentioned in *Pushpanathan*, the expertise of the tribunal must be evaluated in relation to the issue and the relative expertise of the court itself. The BCCT asked for a legal opinion before its last denial of the TWU application; it relied on someone else's expertise with regard to the issue before us. It has set standards for teachers, but this has never included the interpretation of human rights codes. The absence of a privative clause, the expertise of the BCCT, the nature of the decision and the statutory context all favour a correctness standard.

...

[19] The perception of the public regarding the religious beliefs of TWU graduates and the inference that those beliefs will produce an unhealthy school environment have, in our view, very little to do, if anything, with the particular expertise of the members of the BCCT. We believe it is particularly important to note here that we are not in a situation where the Council is dealing with discriminatory conduct by a teacher, as in *Ross*. 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. By contrast, in *Ross* the actual conduct of the teacher had, on the evidence, poisoned the atmosphere of the school (*Ross, supra*, at paras. 38-40 and 101). More importantly, the Council is not particularly well equipped to determine the scope of freedom of religion and conscience and to weigh these rights against the right to equality in the context of a pluralistic society. The public dimension of religious freedom and the right to determine one's moral conduct have been recognized long before the advent of the *Charter* (see *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299, at p. 329) and have been considered to be legal issues. The accommodation of beliefs is a legal question discussed in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295, and *Ross*. Perceptions were a concern in *Ross*, but they were founded on conduct, not simply beliefs. The respondent in this case argued that the refusal of accreditation would create the perception that the BCCT does not value freedom of religion and conscience and endorses stereotypical attributes with regard to TWU graduates. All this to say that even if it was open to the BCCT to base its decision on perception rather than evidence of actual discrimination or of a real risk of discrimination, there is no reason to give any deference to that decision.

...

[26] This is not to say that the BCCT erred in considering equality concerns pursuant to its public interest jurisdiction. As we have already stated, concerns about equality were appropriately considered by the BCCT under the public interest component of s. 4 of the *Teaching Profession Act*. The importance of equality in Canadian society was discussed by Cory J. for the majority of this Court in *Friend v. Alberta*, [1998] 1 S.C.R. 493, at para. 67:

The rights enshrined in s. 15(1) of the *Charter* are fundamental to Canada. They reflect the fondest dreams, the highest hopes and finest aspirations of Canadian society. When universal suffrage was granted it recognized to some extent the importance of the individual. Canada by

the broad scope and fundamental fairness of the provisions of s. 15(1) has taken a further step in the recognition of the fundamental importance and the innate dignity of the individual. That it has done so is not only praiseworthy but essential to achieving the magnificent goal of equal dignity for all. It is the means of giving Canadians a sense of pride. In order to achieve equality the intrinsic worthiness and importance of every individual must be recognized regardless of the age, sex, colour, origins, or other characteristics of the person. This in turn should lead to a sense of dignity and worthiness for every Canadian and the greatest possible pride and appreciation in being a part of a great nation.

[27] The equality guarantees in the *Charter* and in B.C.'s human rights legislation include protection against discrimination based on sexual orientation. In *Egan v. Canada*, [1995] 2 S.C.R. 513, this Court unanimously affirmed that sexual orientation is an analogous ground to those enumerated in s. 15(1) of the *Charter*. In addition, a majority of this Court explicitly recognized that gays and lesbians, "whether as individuals or couples, form an identifiable minority who have suffered and continue to suffer serious social, political and economic disadvantage" (para. 175, *per* Cory J.; see also para. 89, *per* L'Heureux-Dubé J.). This statement was recently affirmed by a majority of this Court in *M. v. H.*, [1999] 2 S.C.R. 3, at para. 64. See also *Vriend, supra*, and *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, [2000] 2 S.C.R. 1120, 2000 SCC 69. While the BCCT was not directly applying either the *Charter* or the province's human rights legislation when making its decision, it was entitled to look to these instruments to determine whether it would be in the public interest to allow public school teachers to be trained at TWU.

[28] At the same time, however, the BCCT is also required to consider issues of religious freedom. Section 15 of the *Charter* protects equally against "discrimination based on ... religion". Similarly, s. 2(a) of the *Charter* guarantees that "[e]veryone has the following fundamental freedoms: ... freedom of conscience and religion". British Columbia's human rights legislation accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion. The importance of freedom of religion in Canadian society was elegantly stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart, supra*, at pp. 336-37:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect,

within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

It is interesting to note that this passage presages the very situation which has arisen in this appeal, namely, one where the religious freedom of one individual is claimed to interfere with the fundamental rights and freedoms of another. The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally.

(iv) Mr. Gomery addresses the LSBC's mandate under s. 3 of the *Legal Profession Act*: see Gomery Memorandum at pp. 3-5, 10-11. He is of the opinion that the LSBC's statutory mandate is broader than that of the BCCT because the LSBC "is charged with protecting and upholding the public interest in the administration of justice by preserving the rights and freedoms of all persons, and, again unlike the College, the Law Society's mandate extends to program delivery": p. 10. In that regard, he considers that s. 3 may be so broad in scope that the LSBC may concern itself with what occurs in TWU's classrooms in deciding whether its process is a suitable one for training future lawyers. In his view, however, if the LSBC does so, the line of reasoning logically leads to the LSBC addressing what happens in the classrooms in other institutions.

(v) Bill 40, *Legal Profession Amendment Act, 2012*, 4th Sess., 39th Parl., British Columbia, 2012, s. 2 (and associated debates in Hansard). Section 2 of Bill 40 repealed s. 3 of the *Legal Profession Act* and substituted it with the current language.

On its first reading, the Minister of Justice and Attorney General introduced Bill 40, in part, as follows:

I am very pleased to introduce the *Legal Profession Amendment Act, 2012*. The bill will amend the existing *Legal Profession Act* and create a new, modernized act.

These amendments have been requested by the Law Society of British Columbia, which has worked in close partnership with ministry staff in the development of this legislation. The amendments affirm that the protection of the public interest is the paramount purpose and mandate of the Law Society of British Columbia.

...

The Law Society of British Columbia believes that these amendments will make British Columbia a leader in Canada in the regulation of the profession of law.

The Minister of Justice and Attorney General further stated during the Bill's second reading:

This legislation reflects a modernization of the *Legal Profession Act*, and in fact it responds directly to a request from the Law Society of British Columbia. The purpose of the bill is to modernize and improve the tools that the Law Society has to regulate lawyers in British Columbia in the public interest. The objective of the *Legal Profession Act* is to ensure that the Law Society can protect the public and ensure that they are provided with high-quality legal services while at the same time ensuring that lawyers are treated in a manner that is fair and just.

Finally, in committee, the following exchange occurred between the Minister of Justice and Attorney General and another Member of the Legislative Assembly:

L. Krog: Section 2 repeals section 3 and talks about the new objects of the society. I just want to confirm with the minister that this was designed to ensure that the prime object and duty of the Law Society was to uphold and protect the public interest and not simply to give, if you will, an almost inferential equal importance to the society's duty to look out for the interests of the members.

Hon. S. Bond: That's correct. The amendments are to reflect that the Law Society is acting on what is in the public's interest. For example, the Canadian Bar Association would be an advocate for lawyers. The Law Society has a broader interest — that is, to look after the public interest. The focus is reflected through the amendment.

(b) If there is a significant difference in the discretionary powers of the BCCT and the LSBC, does that difference affect the Supreme Court of Canada requirement for evidence of actual harm?

(i) In *TWU v. BCCT* at paras. 32 and 35-38, the Supreme Court discussed the need for actual harm in the following terms:

[32] Therefore, although the BCCT was right to evaluate the impact of TWU's admission policy on the public school environment, it should have considered more. The *Human Rights Code*, R.S.B.C. 1996, c. 210, specifically provides for exceptions in the case of religious institutions, and the legislature gave recognition to TWU as an institution affiliated to a particular Church whose views were well known to it. 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. 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. These are important

considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality.

...

[35] Another part of that context is the *Human Rights Act*, S.B.C. 1984, c. 22, referred to by the Court of Appeal and the respondents (now the *Human Rights Code*), which provides, in s. 19 (now s. 41), that a religious institution is not considered to breach the Act where it prefers adherents of its religious constituency. It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a "natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it". In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. 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. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. 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. 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.

[36] Instead, 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.

[37] Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings. This Court has held, however, that greater tolerance must be shown with respect to off-duty conduct. Yet disciplinary measures can still be taken when discriminatory off-duty conduct poisons the school environment. As La Forest J. stated for a unanimous Court in *Ross*, *supra*, at para. 45:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to

inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a "poisoned" environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

In this way, the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.

[38] For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature. Any concerns should go to risk, not general perceptions. The appellant suggested in argument that it may be that no problem was incurred because of the participation of Simon Fraser University during the fifth year. This is rather difficult to accept. After finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation? Simon Fraser University is supervising eight credit hours taken off the TWU campus. There is no evidence that this instruction is in any way related to the problem of apprehended intolerance or that there has been a change in the mandate of Simon Fraser since the last year of the program was given to it to supervise in 1985. On the evidence, it is clear that the participation of Simon Fraser University never had anything to do with the apprehended intolerance from its inception to the present. The organization of the program in 1985 required assistance because of the need to provide a professional development component for certification of future teachers (see A.R., at pp. 45, 47, 48, 62, 64, 90, 95 and 133). The cooperation was intended to support a small faculty in its start-up stage (A.R., at pp. 128, 132 and 298). There is no basis for the inference that the fifth year corrected any attitudes.

(ii) While Professor Craig does not address the LSBC's mandate in the Craig Paper (as, again, it was directed at the FLSC), she does argue that no empirical evidence of discrimination by TWU graduates is required. As outlined above, she argues it is reasonable to conclude that: (1) principles of equality, non-discrimination and the duty not to discriminate cannot be taught in an environment with discriminatory policies; and (2) critical thinking about ethical issues cannot be taught by an institution which violates academic freedom and which requires that all teaching be done from the perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making.

(iii) At p. 8 of the Laskin Memorandum, Mr. Laskin states that absent evidence of actual harm, a decision in this case not to approve TWU's law school program based on concerns regarding discriminatory practices would likely be regarded as unreasonable:

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.

It must be noted, however, that this conclusion arises within a discussion regarding the FLSC Approval Committee's mandate, not regarding the LSBC's mandate under s. 3 of the *Legal Profession Act*.

(iv) Mr. Gomery, at p. 11 of the Gomery Memorandum, similarly states that he would expect a court to strike down any decision discriminating against TWU graduates unless evidence, rather than assumptions, grounded the decision:

The second point of importance is that the court's decision in *TWU v BCCT* was grounded in an absence of evidence of harm. The court was not willing to presume harm to students coming into contact with teachers educated at TWU, based on the community covenant agreement. I think it very probable that in any future case the court will be unwilling to presume harm to clients, counsel and members of the public coming into contact with lawyers educated at TWU, based on the community covenant agreement. A practice or standard that singles out TWU must be grounded in evidence rather than assumptions as to the effect of the community covenant agreement on the educational process, educational outcomes or the students themselves.

In my opinion, this has implications for Ms Craig's second argument and for any rule that would discriminate against TWU graduates. I don't believe the court would be prepared to presume that critical thinking and ethical conduct cannot be taught at TWU by reason of the community covenant agreement. The court would require evidence to substantiate the argument. If the Law Society thinks there is possibly merit to the argument, and contemplates establishing rules on this basis, an effort should be made to determine whether the factual underpinning of the argument is sound. Otherwise, I would expect a court to reject the argument. Further, I would expect the court to strike down any rule discriminating against TWU graduates unless the justification for the rule was grounded in evidence rather than assumptions.

Unlike Mr. Laskin, Mr. Gomery reached this conclusion in the context of discussing the LSBC's mandate under the *Legal Profession Act*.

(v) In its *Final Report* (December 2013), the Special Advisory Committee took the position that the requirement of evidence of actual harm continues to be the law in Canada, stating at paras. 26-28:

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. 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.

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 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.

c) If there is no evidence either of actual harm to graduates from TWU's faculty of law as a result of its discriminatory policies or that TWU graduates would engage in harmful or discriminatory conduct, would it be unreasonable in the circumstances to refuse TWU's application on the basis of perceptions alone?

(i) As discussed above, Professor Craig takes the position that the decision to disapprove TWU's law school does not require evidence of harm of any kind: Craig Paper at p. 169. See also Craig Reply Submissions at pp. 9-11.

(ii) As above, Mr. Laskin disagrees with Professor Craig. In his view, evidence will be required in this case: Laskin Memorandum at p. 8.

(iii) Again, Mr. Gomery also disagrees with Professor Craig, stating that he "would expect the court to strike down any rule discriminating against TWU graduates unless the justification for the rule was grounded in evidence rather than assumptions": Gomery Memorandum at p. 11.

(iv) It is suggested in the "Motion to University of Victoria Law Faculty Council", passed on February 26, 2014, that the "distinctive nature of law school renders the barriers to access contained in the Covenant particularly problematic":

Our concern is not that graduates of a law school at TWU would themselves discriminate, but that TWU's discriminatory admissions policy is problematic given the symbolic and material role of law schools in society. In this regard the LSBC should pay due attention to the role of law schools in society in their deliberations including the following:

- that symbolically, law schools signal justice and access to justice to the broader society;
- that a commitment to non-discriminatory access to law school is fundamental to a society that values democratic participation and inclusion;
- that law schools are the only route to the judicial branch of government, as well as a common route to public office in legislatures and executive bodies;
- and that lawyers as a group have significant social and political capital, and enjoy many privileges and responsibilities that are public in nature.

- (v) *TWU v. BCCT* at para. 19 (quoted above).
- d) **In other words, is there a real possibility that a reasonable person, properly informed and viewing the circumstances realistically and practically, could conclude that the TWU graduates may be prone to discriminate unlawfully and that the LSBC would be seen as sanctioning such conduct by approving TWU's application, thus bringing the administration of justice into disrepute?**
- (i) Professor Craig, at pp. 168-169 of the Craig Paper, argues "yes".
- (ii) Mr. Laskin, at pp. 8-9 of the Laskin Memorandum, says "no".
- (iii) The authors of the UBC Submissions to Disapprove TWU submit that public perception would be undermined if TWU's proposed law school was approved and that this, in itself, is sufficient reason to disapprove same. The authors argue, in part, at pp. 36-39:

A further concern regarding the Community Covenant Agreement arises from the potential interaction between the duties imposed on TWU staff and faculty by that agreement and associated institutional policies, and the professional responsibilities imposed on lawyers by the *Code of Professional Conduct for BC*. TWU's Community Covenant Agreement is inconsistent with the requirement of non-discrimination imposed upon lawyers who are admitted to practice in BC. The faculty and staff of law schools frequently include individuals who are admitted to practice in the jurisdiction in which the law school is located. It is therefore possible that a practicing lawyer who is employed by TWU and in a position to make employment or disciplinary decisions may be forced to choose between fulfilling their contractual duty to enforce the Community Covenant Agreement and complying with the *Code of Professional Conduct for BC* if a disciplinary issue arises in relation to which the duty of non-discrimination conflicts with the tenets of the Community Covenant Agreement. This possibility sits at the most acute end of a broader concern about the effect of approving the proposed TWU School of Law Program on public confidence in the legal profession.

...

One of the principal means of measuring public confidence in our justice system is considering the perceptions of reasonable persons who are aware of the relevant circumstances. Central to the issue of public confidence is circumstances that give rise to a reasonable perception of improper or unfair conduct. For example, there will be a breach of the principle of judicial independence where a judge is not actually biased, but where there is a reasonable perception of bias in the circumstances. Public confidence is also measured in the context of community values concerning fairness. In interpreting the term "interests of justice" in a statute, the Ontario Court of Appeal held

That phrase is a broad one and includes maintaining public confidence in the civil justice process. That confidence is promoted by orders that are, broadly speaking, in accord with the community's sense of fairness.

Public confidence must also take into account the long-term impact of decisions. In *R. v. Grant*, the Supreme Court of Canada had to interpret section 24(2) of the *Charter of Rights*

and Freedoms, which bases admissibility determinations on their impact on the repute of the administration of justice. ...

Public confidence in the legal profession is an integral part of public confidence in our justice system. In *Consulate Ventures Inc. v. Amico Contracting & Engineering, infra*, Doherty J.A. characterized public confidence as “crucial to the effective and just administration of justice.”

One of the central roles of the Law Society is to preserve public confidence in the profession. The Law Society has recognized confidence as a crucial element in the relationship between the legal profession and public. Commentary provided by the Law Society in section 2.2 on the Duty of Integrity of the B.C. Code of Professional Conduct states “if a client has any doubt about his or her lawyer’s trustworthiness, the essential element in the true lawyer-client relationship will be missing.” It is further noted that “a lawyer’s conduct should reflect favourably on the legal profession, inspire the confidence, respect and trust of clients and of the community, and avoid even the appearance of impropriety.” As per the Code, a key duty of the lawyer is to encourage public confidence and to improve the administration of justice. Eroding this confidence, respect, and trust is harmful to the legal profession and the public it serves. Even conduct in the private sphere may be subject to scrutiny and disciplinary action should it be perceived to adversely affect the integrity of the profession and the administration of justice.

...

The Law Society has made it clear that the proper administration of justice is inextricably tied to continued public confidence in the legal profession: “judicial institutions will not function effectively unless they command the respect of the public.” To command this respect, the public must perceive the legal profession as being reflective of its own diversity. Accordingly, the Law Society has directly involved members of the public in executing its functions under s. 3 of the *Legal Profession Act*. ...

Those of us who subscribe to the first recommendation believe that [*sic*] the approval of a School of Law that is founded on structured discrimination will cause public’s confidence in the legal profession to falter. Approving an institution with explicitly discriminatory practices is out of step with basic public policy and sentiment in relation to the rights of LGBTQ individuals, and regressive in terms of the goal of protecting the rights of those who are already highly vulnerable to discrimination. If the Law Society takes this step, it is possible that the public will draw the conclusion that the equality rights of LGBTQ people and reproductive freedom are regarded by the legal profession as less worthy of protection than the desire of a faith-based community to regulate its own membership while offering a professional education. The legal profession performs crucial public functions - including upholding the rule of law and enforcing all *Charter* rights and freedoms - and it should not be seen to be prioritizing any of these rights and freedoms to the exclusion or detriment of others.

[Citations omitted.]

- e) **Have legal and societal values evolved since 2001 so that today’s decision-makers are expected to be more protective of gay and lesbian equality than decision-makers at the time of *TWU v. BCCT*?**
 - (i) Professor Craig argues that social values have evolved such 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”: Craig Paper at pp. 168-169. Professor Craig’s argument is quoted at length above.

(ii) John Laskin disagrees with Professor Craig. He points out that *TWU v. BCCT* was not simply an equality case, but rather was a case involving a balancing of two sets of *Charter* values – between equality, on the one hand, and freedom of conscience and religion and freedom of association, on the other: Laskin Memorandum at p. 8. He states:

Assuming that [today’s decision-makers are expected to be much more protective of gay and lesbian equality than were the decision-makers at the time of *TWU v. BCCT*], 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.

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.

(iii) In its letter to the FLSC dated March 8, 2013, the National Association of Women and the Law (“NAWL”) argues that equality has come to be recognized as an “overarching value” in Canadian society:

Since the introduction of the *Canadian Charter of Rights and Freedoms*, equality has come to be recognized, not only as a fundamental constitutional right, but as an overarching value in Canadian society. The meaningful realization of this value is something that we continue to struggle to achieve. As the Honourable Justice L’Heureux-Dubé observed close to fifteen years ago: “The task of rooting out inequality and injustice from our society is now advancing to a higher stage ... [which requires] that we understand equality and make it part of our thinking, rather than treading heavily on it with the well-worn shoes of unquestioned, and often stereotypical assumptions”.

(iv) In a letter from the University of Ottawa Faculty of Law OUTlaw Executive dated March 18, 2013, the authors highlight the changes in the legal landscape regarding same-sex relationships since the time *TWU v. BCCT* was decided:

In the twelve years since *TWU v. BCCT* (2001), much has changed in the law surrounding same-sex relationships. Same-sex marriage has been legalized in Canada. Same-sex couples are able to adopt children in many parts of the country, and three-parent families have been recognized in certain court decisions. ...

Regardless of whether it is enforced, the Covenant is a significant symbolic document for the university. The Covenant makes it known to everyone ... that LGBTQ students and families will not be deemed equals. The Covenant not only effectively permits institutionalized discrimination against those members of the TWU community, it promotes such discrimination.

(v) Letter from Jonathan Raymond, Ph.D., President and Acting Chancellor of Trinity Western University, to the FLSC, dated March 21, 2013.

Mr. Raymond argues that while the *Civil Marriage Act* redefined marriage for civil purposes, it also affirmed that religious institutions' definitions of marriage for religious purposes would be respected. In that regard, he points to the preamble of that Act, which states that "it is not against the public interest to hold and publicly express diverse views on marriage". On this basis, he maintains that *TWU v. BCCT* stands as good law and, as such, TWU "has the right to maintain a religiously-based community covenant in the context of a professional program": p. 2.

(vi) As discussed above, Mr. Gomery does not find Professor Craig's argument persuasive. In the Gomery Memorandum at p. 9, he takes the position that the Supreme Court of Canada has "reaffirmed its commitment to an analytical approach that balances equality rights against other rights protected under the *Charter*, giving appropriate weight to each".

(vii) In the Sawatsky Letter at p. 11, citing the preamble and s. 3.1 of the *Civil Marriage Act*, Mr. Sawatsky argues that while 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".

(viii) In the Sakalauskas/MacDonald Submissions at p. 6, the authors argue that the law has significantly changed with respect to the interpretations of equality for gays and lesbians since *TWU v. BCCT*:

In the January, 2011, *Marriage Commissioners Appointed Under The Marriage Act (Re)* case, the Saskatchewan Court of Appeal ruled that provincial marriage commissioners could not refuse to perform same sex marriages on account of their religious beliefs. The Court explained that forcing the couple looking to be married to go to another, willing, commissioner was contrary to fundamental principles of equality in a democratic society. The Court also reasoned that by allowing commissioners to opt out because they did not want to marry people of the same sex, the door was opened to allowing them to opt out because they did not want to marry people from different races.

In this recent example of a balancing of freedom of religion and equality, the Appeal Court decidedly followed the Supreme Court of Canada's holding that religious freedom is not absolute, and wrote, "This is clearly one of those situations where religious freedom must yield to the larger public interest". This is in keeping with the continually growing interpretations of equality for gays and lesbians, including when faced with discrimination purportedly justified by freedom of religion. It is disappointing that the Federation's Special Advisory Committee did not consider the recent case law in its considerations.

In the end, the only real assistance to the Society (in performing a contextual balancing of freedom of religion and equality) offered by the *Civil Marriage Act* is its affirmation of the need to protect the equality interests of gays and lesbians. The *Civil Marriage Act* did not create any new right or freestanding recognition to religious groups, including in relation to their views on marriage.

[Citations omitted.]

- (ix) The preamble and ss. 3.1 and 4 of the *Civil Marriage Act* provide in part:

Preamble

WHEREAS the Parliament of Canada is committed to upholding the Constitution of Canada, and section 15 of the *Canadian Charter of Rights and Freedoms* guarantees that every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination;

WHEREAS the courts in a majority of the provinces and in one territory have recognized that the right to equality without discrimination requires that couples of the same sex and couples of the opposite sex have equal access to marriage for civil purposes;

WHEREAS the Supreme Court of Canada has recognized that many Canadian couples of the same sex have married in reliance on those court decisions;

WHEREAS only equal access to marriage for civil purposes would respect the right of couples of the same sex to equality without discrimination, and civil union, as an institution other than marriage, would not offer them that equal access and would violate their human dignity, in breach of the *Canadian Charter of Rights and Freedoms*;

WHEREAS the Supreme Court of Canada has determined that the Parliament of Canada has legislative jurisdiction over marriage but does not have the jurisdiction to establish an institution other than marriage for couples of the same sex;

WHEREAS everyone has the freedom of conscience and religion under section 2 of the *Canadian Charter of Rights and Freedoms*;

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;

WHEREAS, in light of those considerations, the Parliament of Canada's commitment to uphold the right to equality without discrimination precludes the use of section 33 of the *Canadian Charter of Rights and Freedoms* to deny the right of couples of the same sex to equal access to marriage for civil purposes;

WHEREAS marriage is a fundamental institution in Canadian society and the Parliament of Canada has a responsibility to support that institution because it strengthens commitment in relationships and represents the foundation of family life for many Canadians;

AND WHEREAS, in order to reflect values of tolerance, respect and equality consistent with the *Canadian Charter of Rights and Freedoms*, access to marriage for civil purposes should be extended by legislation to couples of the same sex...

...

Freedom of conscience and religion and expression of beliefs

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.

Marginal note: Marriage not void or voidable

4. For greater certainty, a marriage is not void or voidable by reason only that the spouses are of the same sex.

(x) *Reference re Same-Sex Marriage*, [2004] 3 S.C.R. 698 was a reference question to the Supreme Court of Canada relating to the constitutionality of same-sex marriage. The Court answered both of the following questions in the affirmative:

1. Is section 1 of the proposed legislation, which extends capacity to marry to persons of the same sex, consistent with the *Charter*?
2. Does the freedom of religion guaranteed by s. 2(a) of the *Charter* protect religious officials from being compelled to perform a marriage between two persons of the same sex that is contrary to their religious beliefs?

In coming to its decision, the Court stated in part:

[52] The right to same-sex marriage conferred by the Proposed Act may conflict with the right to freedom of religion if the Act becomes law, as suggested by the hypothetical scenarios presented by several interveners. However, the jurisprudence confirms that many if not all such conflicts will be resolved within the *Charter*, by the delineation of rights prescribed by the cases relating to s. 2(a). Conflicts of rights do not imply conflict with the *Charter*; rather the resolution of such conflicts generally occurs within the ambit of the *Charter* itself by way of internal balancing and delineation.

[53] The protection of freedom of religion afforded by s. 2(a) of the *Charter* is broad and jealously guarded in our *Charter* jurisprudence. We note that should impermissible conflicts occur, the provision at issue will by definition fail the justification test under s. 1 of the *Charter* and will be of no force or effect under s. 52 of the *Constitution Act, 1982*. In this case the conflict will cease to exist.

[54] In summary, the potential for collision of rights raised by s. 1 of the *Proposed Act* has not been shown on this reference to violate the *Charter*. It has not been shown that impermissible conflicts — conflicts incapable of resolution under s. 2(a) — will arise.

(xi) Professor Craig refers to *R. v. Tran*, 2010 SCC 58 as an example of a case which demonstrates a change in societal values. In that case, the Court rejected the gay panic defence, stating at para. 34:

[34] ... It follows that the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*. For example, it would be appropriate to ascribe to the ordinary person relevant racial characteristics if the accused were the recipient of a racial slur, but it would not be appropriate to ascribe to the ordinary person the characteristic of being homophobic if the accused were the recipient of a homosexual advance. Similarly, there can be no place in this objective standard for antiquated beliefs such as “adultery is the highest invasion of property” (*Mawgridge*, at p. 1115), nor indeed for any form of killing based on such inappropriate conceptualizations of “honour”.

(xii) Many, including Professor Craig and the authors of the UBC Submissions to Disapprove TWU, cite *Whatcott* for the proposition that the Court has rejected the argument drawing a distinction between sexual identity and sexual activity (referred to as “love the sinner, hate the sin reasoning”), thus affecting the applicability of *TWU v. BCCT*.

In *Whatcott*, four complaints were filed with the Saskatchewan Human Rights Commission (the “Commission”) concerning four flyers published and distributed by Mr. Whatcott. The complainants alleged that the flyers promoted hatred against individuals on the basis of their sexual orientation. The first two flyers were entitled “Keep Homosexuality out of Saskatoon’s Public Schools!” and “Sodomites in our Public Schools”. The Commission held that these contravened s. 14 of *The Saskatchewan Human Rights Code* (the “Code”) because they exposed persons to hatred and ridicule on the basis of their sexual orientation, and concluded that s. 14 of the Code was a reasonable restriction on Mr. Whatcott’s rights to freedom of religion and expression guaranteed by ss. 2(a) and (b) of the *Charter*. The Court of Queen’s Bench upheld this decision. The Court of Appeal accepted that the provision was constitutional, but held that the flyers did not contravene it.

At the Supreme Court of Canada, in arguing that s. 14(1)(b) of the Code failed to minimally impair his right to freedom of conscience and religion, Mr. Whatcott asserted that the provision overreached because it captured more expression than was necessary to satisfy the legislative objectives. In particular, he argued that the publications at issue were critical of same-sex behaviour, as distinct from sexual orientation, and therefore did not contravene the Code: *Whatcott* at para. 121. He further argued that comment on the sexual behaviour of others has always been allowed as part of free speech and as part of freedom of conscience and religion and that the law must allow diversity of viewpoints on whether sexual matters are moral or immoral: *Whatcott* at para. 121. The Court, at paras. 122-124, rejected these arguments:

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

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

I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the “sexual sin” of “homosexual behaviour” from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. ... The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam Justice Rowles: “Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person” (para. 228). She added that “the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people” (para. 230). This is not to suggest that engaging in homosexual behaviour automatically

defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

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

[124] Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct that is the target of speech is a crucial aspect of the identity of the vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself. If expression targeting certain sexual behaviour is framed in such a way as to expose persons of an identifiable sexual orientation to what is objectively viewed as detestation and vilification, it cannot be said that such speech only targets the behaviour. It quite clearly targets the vulnerable group. Therefore, a prohibition is not overbroad for capturing expression of this nature.

B) Evidentiary Considerations

2. Is there evidence of actual harm to graduates from TWU's faculty of law as a result of its discriminatory policies?

(i) With respect to questions 2 through 4 herein, Professor Craig refers to the Supreme Court of Canada's requirement for evidence that TWU's graduates had acted improperly or had otherwise caused harm in the learning environment in public schools, but she provides no such evidence: Craig Paper at p. 166. As stated above, however, she takes the position that no evidence is required: Craig Paper at p. 169; Craig Reply Submissions at pp. 9-11.

(ii) Undated summary of a Town Hall held at the Schulich School of Law at Dalhousie University on March 5, 2013.

While there was no "obvious consensus" at the Town Hall whether the students should "take a stance on TWU's proposed law school", the authors of the summary, and presumably its signatories, did reach the following conclusion:

But perhaps the most obvious (and most important) thing is this: a Town Hall like the one held on March 5th would never happen at a TWU law school. Gays and lesbians would never sit in a classroom with Christians and Jews and atheists, challenging each other to take on new perspectives while encouraging respect and tolerance for everyone else's, at a TWU law school.

(iii) Letter from a broad coalition of students and alumni from the University of British Columbia Faculty of Law to the FLSC, dated March 14, 2013.

While the coalition of students does not refer to evidence of harm *per se*, it asserts that TWU's policies will create a non-inclusive teaching environment, which will in turn

“diminish diversity of opinion in the legal profession and impair the development of critical thought and legal analytical skill”: pp. 1-2.

(iv) In the UBC Submissions to Disapprove TWU at p. 34, the authors provide the following commentary explaining why TWU students will be harmed by the Community Covenant Agreement:

LGBTQ and feminist students who attend TWU will study in an environment in which their lifestyle, beliefs and values are systematically depicted within the Community Covenant Agreement as improper. Students who engage in behavior that accords with their personal beliefs may be vulnerable to disciplinary procedures or expulsion. This possibility violates every one of the antidotes to prejudice listed above, and will act as a real impediment to full and equal participation in the learning environment.

(v) Janine Benedet, Associate Professor of Law and Faculty Director, Centre for Feminist Legal Studies at the University of British Columbia, argues that the Community Covenant Agreement will have various adverse effects:

Requiring abstinence from all sexual activity outside of heterosexual marriage makes it extremely unlikely that a faculty member who identifies as a lesbian will ever take up a position at TWU. No feminist faculty member will be able to properly conduct research that takes a positive view of same sex or unmarried sexual activity. Students would not have the opportunity of mentorship from faculty members who identify as lesbian or who do not subscribe to the Covenant. In addition, the requirement to affirm that life begins at conception makes it impossible to conduct research on the relationship between forced pregnancy and women's inequality. It also encourages an environment in which women are shamed for deciding to terminate a pregnancy.

This is not simply a question of academic standards. TWU's Community Covenant has the effect of limiting students' opportunities for learning about key issues related to women's equality. Law students must have the opportunity to learn about and to debate these important issues if they are to be able to contribute to the development and application of the law so as to promote the rights and freedoms of all Canadians.

3. Is there evidence of actual harm to TWU graduates or that TWU graduates would actually engage in harmful or discriminatory conduct?

(i) Mr. Laskin, at p. 6 of the Laskin Memorandum, argues it is likely there will be no evidence of actual harm or of a real risk of harm:

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.

(ii) In its *Final Report* (December 2013), at paras. 37 and 45, the Special Advisory Committee made the following comments on the availability of evidence:

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.

...

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. 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.

(iii) Several TWU graduates entered submissions providing accounts of their experiences at TWU and their views as to whether the proposed TWU law school should be approved. The following individuals reporting to be TWU graduates provided their submissions on the following dates:

1. Natalie Hebert on January 30, 2014;
2. Sabrina Ferrari on January 31, 2014;
3. Jill Bishop on February 11, 2014;
4. Rebecca Stanley on February 24, 2014;
5. Aki Lintunen on March 1, 2014;
6. Lauren Witten on March 2, 2014;
7. Mark Witten on March 2, 2014;
8. Tako Van Popta on March 2, 2014; and
9. Jessie Legaree on March 3, 2014.

The Benchers might wish to review these submissions with some caution. They may not necessarily provide evidence of how TWU law graduates would conduct themselves, as they may not constitute a full or accurate cross-section of who would attend the law school. Furthermore, given that all the statements are unsworn, concerns regarding reliability may arise.

4. If there is evidence that TWU graduates would engage in harmful or discriminatory conduct, how does that weigh in the balance against the TWU community's right to religious freedoms?

(i) As quoted above, the Court in *TWU v. BCCT* held that 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: *TWU v. BCCT* at para. 31, citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835 at 877. However, freedom of religion, like any freedom, is not absolute and is inherently limited by the

rights and freedoms of others: *TWU v. BCCT* at para. 29, citing *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 at 182. Accordingly, where there is evidence that the exercise of one right will, in the circumstances, have a detrimental impact on the rights of others, the Court may be justified in restricting that first right: see *TWU v. BCCT* at para. 35.

(ii) Some of those opposed to TWU's proposed law school have conceded that there is currently no evidence that TWU graduates will discriminate against others upon graduating: see, e.g., Craig Reply Submissions at p. 9. It is expected that these same opponents would argue that any evidence that TWU graduates would engage in harmful or discriminatory conduct should weigh against granting approval.

5. Is there evidence as to the "competence" of the TWU law school concerning:

a) whether a university that intentionally discriminates against homosexuals is a competent provider of legal education;

(i) Professor Craig argues that TWU will not be able to competently provide a legal education to its students. She does not refer to any evidence in making her argument: Craig Paper at pp. 159-165, 169.

b) whether an institution that discriminates in its internal policies can effectively teach Ethics and Professionalism; or

(i) Craig Paper at pp. 152, 159-165, 169.

Professor Craig takes the position that the "impact of TWU's requirement that all teaching and research occur from a stated religious perspective jeopardizes its ability to competently deliver a program that teaches critical thinking about ethical issues in law": p. 152.

(ii) In a letter to the FLSC dated February 5, 2013, LEAF submits at p. 3:

One of the ethical and professional duties of Canadian lawyers is the duty not to discriminate. The Federation's Model Code of Conduct states that "A lawyer must not discriminate against any person," and emphasizes that "A lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws." In our submission, a law school with policies that exclude gays and lesbians and, in the words of the Supreme Court of Canada, create "unfavourable differential treatment" on the basis of sexual orientation 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.

(iii) In a letter to Hon. Ralph Sultan, B.C. Minister of Advanced Education, Innovation and Technology, and the FLSC, dated March 10, 2013, the authors (a group of Christian law students from across Canada) argue that "by having a Christian law school, legal education in Canada would be greatly strengthened, not harmed": p. 1.

(iv) In a letter from the University of Ottawa Faculty of Law OUTlaw Executive dated March 18, 2013, the authors take the position that “a law school cannot provide a complete legal education [regarding the rights of same-sex couples] while simultaneously requiring its students, faculty and staff to sign an agreement that denigrates them”: p. 2.

(v) As noted above, Mr. Gomery is of the view that the court would not be prepared “to presume that critical thinking and ethical conduct cannot be taught at TWU by reason of the community covenant agreement”: Gomery Memorandum at p. 11.

(vi) Mr. Sawatsky addresses the argument that TWU cannot effectively teach constitutional law or human rights law or ethics and professionalism: Sawatsky Letter at pp. 3-6.

With respect to the claim that TWU will be unable to effectively teach ethics or professionalism, after noting that first-year students will be introduced to professionalism and ethics and that there will also be a required second-year course on Ethics and Professionalism, Mr. Sawatsky states in part at pp. 4-6:

TWU is committed to fully and appropriately addressing ethics and professionalism and the opponents of the Proposal [*sic*] cannot credibly argue otherwise. ...

...

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”. 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.

...

If the opponents’ line of reasoning prevails, it equates to denying accreditation to individuals on the basis of religious belief. ...

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.

(vii) After canvassing the various arguments and noting that TWU had made “strong representations in response to the suggestion that it cannot and will not teach legal ethics, constitutional and human rights law appropriately”, the Special Advisory Committee concluded in its *Final Report* (December 2013) at paras. 44-45.

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. 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. 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.

[Citations omitted.]

(viii) The FLSC Canadian Common Law Program Approval Committee in its *Report on Trinity Western University's Proposed School of Law Program* (December 2013) provided the following comments and conclusions at paras. 50-52:

50. Although the course outlines for TWU's proposed Ethics and Professionalism and Constitutional Law courses are consistent with what one would expect for such courses, the members of the Approval Committee see a tension between the proposed teaching of these required competencies and elements of the Community Covenant. In particular, the Approval Committee is concerned that some of the underlying beliefs reflected in the Community Covenant, which members of faculty are required to embrace as a condition of employment, may constrain the appropriate teaching and thus the required understanding of equality rights and the ethical obligation not to discriminate against any person. This tension appears to be reflected in the description of the mandatory Ethics and Professionalism course (LAW 602), which states that the course "challenges students to reconcile their personal and professional beliefs within a framework of service to clients and community while respecting and performing professional obligations and responsibilities."

51. The question of TWU's ability to ensure that students acquire these competencies was addressed in the university's May 17, 2013 letter to the Special Advisory Committee (see Appendix "F"). In that correspondence TWU stated that it is committed to "fully and appropriately addressing ethics and professionalism" and further recognized "its duty to teach equality and meet its public obligations with respect to promulgating nondiscriminatory principles in its teaching of substantive law and ethics and professionalism." TWU also stated that "it should be beyond question that TWU acknowledges that human rights laws and Section 15 of the *Canadian Charter of Rights and Freedoms* protect against and prohibit discrimination on the basis of sexual orientation and that "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.

52. Based on the proposed course outlines and TWU's commitments and undertakings noted above, the Approval Committee concluded that the issue of whether students will acquire the necessary competencies in both Ethics and Professionalism, and Public Law is, at this stage, a *concern*, rather than a *deficiency*. ...

(ix) In the UBC Submissions to Disapprove TWU at pp. 34-35, the authors argue that TWU will not be able to properly prepare TWU graduates to fully discharge their responsibilities of non-discrimination as lawyers:

Secondly, LGBTQ and feminist students who attend TWU will study in an environment in which their lifestyle, beliefs and values are systematically depicted within the Community Covenant Agreement as improper. Students who engage in behavior that accords with their personal beliefs may be vulnerable to disciplinary procedures or expulsion. This possibility violates every one of the antidotes to prejudice listed above, and will act as a real impediment to full and equal participation in the learning environment. Discriminatory beliefs expressed by TWU faculty and students, which would elsewhere be subject to contestation and discussion, may well stand unchallenged in a TWU classroom. Accordingly, and based on the leading theories of prejudice and discrimination as well as a *Charter*-influenced commitment to equality, the Community Covenant Agreement may be antithetical to the goal of preparing students to fully discharge a lawyer's responsibility of non-discrimination.

(x) In the Craig Reply Submissions at pp. 12-13, Professor Craig responds to several critiques of her argument that TWU cannot competently deliver a program that teaches critical thinking about ethical issues in law. She provides the following clarifying remarks:

The concern that I raised was with TWU's institutional policies as mandated by its Community Covenant and Statement of Faith. ... TWU's deficiency with respect to the National Requirement on legal ethics stems from a TWU university policy mandating that all faculty members sign a statement of faith ... Academic staff are required to teach students that the Bible is the ultimate, final, and authoritative guide by which all ethical decisions must be made. To teach that ethical issues must be perceived of, assessed with, and resolved by a pre-ordained, prescribed, and singularly authoritative religious doctrine is not to teach the skill of critical thinking about these issues. An institutional policy that requires all faculty to teach from this perspective, and only this perspective, is inconsistent with a requirement that the program teach the skill of critical thinking.

To be as clear as possible, the argument is not that Christian institutions are incapable of providing a legal education worthy of accreditation. The argument is not that those holding a Christian worldview are incapable of upholding their ethical duty not to discriminate. The argument is not that a Christian worldview is antithetical to critical thinking. Rather, the argument is that the **specific institutional policies** of this particular university, as articulated in its Community Covenant and Statement of Faith, are inconsistent with the ethical duty not to and the requirement that a law school teach the skill of critical thinking about ethical issues. ...

It is true that TWU, in its submissions to the Federation, espouses a commitment to critical thinking. However this assertion, easily made in letters to the Federation and the various law societies, is simply inconsistent with the school's institutional policy. The

deficiency in its program on the legal ethics requirement does not flow from the institution's commitment to Christianity or even its mandate to teach law from a Christian perspective. It flows from the wording of its mandatory Statement of Faith and mandatory Community Covenant. I did not suggest that TWU's proposed program deficiencies flow from its Christian worldview or intention to teach from that perspective.

[Original emphasis.]

(xi) The Justice Centre for Constitutional Freedoms (the "JCCF") submitted a paper entitled, "In Defence of the Free Society: A submission to the Law Society of British Columbia on Diversity, Tolerance, and Trinity Western University" (February 25, 2014) (the "JCCF Submission"). In it, the JCCF argues that legal competence in the areas of ethics and professionalism does not require ideological conformity: pp. 3, 8. In this regard, it argues:

To claim that a gay lawyer is incapable of providing excellent legal representation to an Evangelical Christian client would be anti-gay bigotry. And yet, opponents of the TWU law school argue that its graduates, because of their presumed disagreement with same-sex marriage, will discriminate against gay and lesbian clients. This argument, if true, would mean that if a student commits to abstain from illegal drugs and pornography while attending TWU, this commitment will cause the student to discriminate against those who use illegal drugs or pornography. There is no evidence for such causal link. To the contrary, lawyers disprove its existence every day by representing diverse clients whose beliefs and behaviours differ from those of the lawyer.

(xii) In its letter to the LSBC dated March 3, 2014, LEAF questions whether TWU "can impart on prospective lawyers a sufficient understanding of the ethical duty not to discriminate and honour the obligations enumerated in human rights laws": pp. 3-4.

(xiii) Professor Dwight Newman, Professor of Law & Canada Research Chair in Indigenous Rights in Constitutional and International Law at the University of Saskatchewan, published a paper entitled, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const. Forum 1 (the "Newman Paper").

Professor Newman, at p. 4, challenges Professor Craig's above argument on three grounds:

First, there is in fact scholarly literature examining the development of critical thinking skills in those educated in Evangelical Christian environments. Some evidence points toward an equal or possibly even greater acquisition of critical thinking skills than in secular environments. ...

Second, there are many important works on Christian scholarly traditions and different ways in which those traditions may be informed by Scripture as an authoritative guide. Interpreting Scripture is a matter that requires various perspectives — it is not a process of identifying simple propositions. ...

Third, the work of scholarly Evangelicals is entirely consistent with the possibility of engaging with the Bible in a variety of ways within a faith tradition. There is a very different scholarly Evangelical tradition than many might assume, which will generally

not correspond to the stereotype of individuals plucking out random Biblical verses and then applying them all in a literalistic form.

c) whether an institution that discriminates in its internal policies can effectively teach constitutional and human rights law?

(i) Professor Craig takes the position that “it is reasonable to conclude that concepts of justice, equality, non-discrimination, inclusivity, and anti-oppression – foundational tenets of Canada’s legal system – cannot properly be taught, from whatever pedagogical approach, in a learning environment created by an institution with policies that are explicitly (and unapologetically) discriminatory”: Craig Paper at p. 158.

(ii) In a letter to the FLSC dated February 28, 2013, Clayton Ruby, Constance Backhouse, Beth Symes and Angela Chaisson question how a law school explicitly opposed to gay and lesbian people could “teach its students constitutional law and human rights law, both of which expressly prohibit discrimination on the ground of sexual orientation”: p. 2.

(iii) At p. 2 of its letter to the FLSC dated March 8, 2013, NAWL argues that TWU will not be able to effectively teach constitutional and human rights law:

A proposal for a “gay free” law school is clearly discriminatory. It is also antithetical to training the next generation of lawyers to live up to their role as guardians of the public interest, which includes protecting and respecting the equality rights of Canadians. It is not sufficient that lawyers simply know where to locate equality protection in various constitutional and statutory instruments; it is necessary ... that they “understand equality and make it part of [their] thinking.” An educational institution that not only perpetuates discriminatory attitudes towards, but also effectively bans members of an equality-seeking group from attendance, cannot be trusted to promote this constitutionally mandated understanding.

(iv) As noted above, Mr. Sawatsky addresses the argument that TWU cannot effectively teach constitutional law or human rights law or ethics and professionalism: Sawatsky Letter at pp. 3-6.

With respect to the claim that TWU cannot effectively teach constitutional law or human rights law, he states:

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 *Friend v. Alberta*, *Egan v. Canada*, and *Reference re Same-Sex Marriage*. 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.

(v) Special Advisory Committee, *Final Report* (December 2013) at paras. 44-45 (quoted above).

(vi) FLSC Canadian Common Law Program Approval Committee, *Report on Trinity Western University's Proposed School of Law Program* (December 2013) at paras. 50-52 (quoted above).

(vii) In its letter of March 3, 2014, NAWL reiterates its above statements that an educational institution "not only perpetuates discriminatory attitudes towards, but effectively bans, members of an equality-seeking group from attendance cannot be trusted to promote this constitutionally mandated understanding [of equality]".

C) Policy Considerations

6. Is the discriminatory effect of the Community Covenant Agreement on TWU's hiring policies for its professors a relevant consideration for the LSBC under the *Legal Profession Act* and the Law Society Rules?

(i) In the UBC Faculty of Law motion addressed to the Law Society of British Columbia, the voting members of the UBC Faculty of Law Faculty Council raise concerns regarding the discriminatory effect of the Community Covenant Agreement on TWU's hiring policies for its professors:

Whereas faculty and staff of the proposed TWU School of Law are bound by a condition of employment that states that "[s]incerely embracing every part of [the Community] covenant is a requirement for employment" at TWU and TWU presumably reserves the right to enforce this condition by disciplining or potentially dismissing an employee for a breach of this term;

Whereas the *Code of Professional Conduct for BC* states that a "lawyer must not discriminate against any person";

...

the voting members of the UBC Faculty of Law Faculty Council call upon the Law Society of British Columbia to take the following steps prior to deciding whether to accredit TWU's LL.B. or J.D. degree for the purposes of admission to the Bar in British Columbia:

...

4. to have express regard to the impact of effectively excluding GLBTQ people from the community of students, staff and faculty members at the proposed TWU school of law on TWU's capacity to offer a legal education that prepares students to discharge a lawyer's "special" professional responsibility "to comply with the requirements of human rights laws", including the requirement not to "discriminate against any person" when making employment decisions and when offering legal services;

5. to have express regard to the possibility that TWU's Community Covenant Agreement is inconsistent with the requirement of non-discrimination imposed upon lawyers who are admitted to practice in BC, and, specifically, the possibility that any practicing lawyer who is employed by TWU and in a position to make employment or disciplinary decisions may therefore be forced to choose between enforcing the Community Covenant Agreement and complying with the *Code of Professional Conduct for BC*;
 6. to approach the task of balancing individual rights and freedoms in a manner that distinguishes between beliefs and conduct, including by having due regard to the role of the Community Covenant Agreement as an enforceable obligation within the disciplinary, scholarly, and employment structures of the TWU community (and not simply as an expression of personal religious belief).
7. **Can either teachers or students who acknowledge a faith-based doctrine as the ultimate authority understand or give meaningful effect to the Rule of Law in a Constitutional democracy?**
- (i) In its letter to the FLSC dated January 28, 2013, at p. 4, the B.C. Civil Liberties Association (the "BCCLA") argues that there is no basis to argue that those individuals who are "religiously-minded" should be excluded from legal education. It states that any concerns about TWU graduates will logically lead to concerns about all professors, students, lawyers and judges who hold religious views that TWU's opponents say are repugnant.
8. **Does the Community Covenant Agreement violate academic freedom? If so, is this a relevant consideration in the LSBC's exercise of its discretionary power under Law Society Rule 2-27(4.1) to approve TWU as an approved faculty of law?**
- (i) Based in part on the report drafted by the Canadian Association of University Teachers, Professor Craig argues that TWU's policy violates academic freedom: Craig Paper at pp. 151-152, 163-165.
 - (ii) The report that Professor Craig refers to can be found at the following link: William Bruneau & Thomas Friedman, *Report of an Inquiry Regarding Trinity Western University (Langley, British Columbia)* (October 2009), online: Canadian Association of University Teachers <<http://www.caut.ca/docs/reports/report-of-caut-ad-hoc-investigatory-committee-on-twu.pdf?sfvrsn=0>>.
 - (iii) In its letter to the FLSC dated January 28, 2013, at pp. 4-5, the BCCLA argues against this point, as follows:

Positing that academic freedom does not exist in religious educational institutions becomes a front for asserting that the religious perspective simply cannot be taught anywhere. The argument about a lack of freedom in religious educational institutions circles back as a supposed justification for suppression of religious viewpoints. That simply cannot be right.

- (iv) Mr. Laskin once again disagrees with Professor Craig. At p. 9 of the Laskin Memorandum, he states:

As for [Professor Craig's argument 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 perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making], it proceeds from a view of academic freedom that is by no means universally shared. 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.

- (v) With respect to academic freedom, Mr. Gomery takes the position that supporting evidence would be required to show that "critical thinking and ethical conduct cannot be taught at TWU by reason of the community covenant agreement": Gomery Memorandum at p. 11.

- (vi) Academic freedom is discussed in the Sawatsky Letter at pp. 14-15 in the following terms:

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 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.

- (vii) In its *Final Report* (December 2013) at paras. 46-51, the Special Advisory Committee concluded that the Community Covenant Agreement does not violate 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." 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."

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. In reaching its finding the *ad hoc* committee also relied on the CAUT Academic Freedom Policy 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, adopted a Statement on Academic Freedom 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.

...

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.

50. The academic freedom policy of TWU, a member of the AUCC, recognizes that it "is an essential ingredient in an effective university program." 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.

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.

D) Practical Considerations

9. **Is there a principled reason for the LSBC to take a different position than the two FLSC Committees (the Approval Committee and the Special Advisory Committee) that the TWU law school program meets the National Requirement, and that there is no "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" (para. 65 of the Special Advisory Committee report)?**

The Craig Paper, Laskin Memorandum and Gomery Memorandum all preceded the two FLSC Committee reports. Nonetheless, the LSBC received numerous submissions arguing on both sides whether there are principled reasons for the LSBC to take a different position than the two FLSC Committees.

On the one hand, many of TWU's opponents are of the view that there simply should be no discrimination in legal education. This point of view is reflected in Resolution 14-04-M regarding "Non-Discrimination in Legal Education", which was recently passed by the national Council of the Canadian Bar Association. It calls for absolute non-discrimination in legal education:

BE IT RESOLVED THAT the Canadian Bar Association urge the Federation of Law Societies of Canada and the provincial and territorial law societies to require all legal education programs recognized by the law societies for admission to the bar to provide equal opportunity without discrimination on the basis of race, national or ethnic origin, colour, religion, sex, sexual orientation, gender expression, gender identity, age or mental or physical disability, or conduct that is integral to and inseparable from identity for all persons involved in legal education – including faculty, administrators and employees (in hiring, continuation, promotion and continuing faculty status), applicants for admission, enrolled students and graduates of those educational programs

On the other hand, proponents of approving TWU's law school take the view that disapproval would be discriminatory and would send a negative message to those individuals in the legal community who hold similar religious convictions. See, for example, the letter to the LSBC dated March 2, 2014 from the members of an unincorporated association of Catholic lawyers.

(i) In the UBC Submissions to Disapprove TWU, it is argued that not enough attention has been devoted to the other groups that the Community Covenant Agreement discriminates against, including: (1) female students and staff; (2) unmarried individuals of all sexual orientations; and (3) trans people.

With respect to discrimination against female students and staff, it is argued at pp. 30-31:

The Community Covenant Agreement requires members of the TWU community to "treat all persons with respect and dignity, and uphold their God-given worth from conception to death." The implication of this passage is that life begins at conception. The passage indicates an expectation that female students and staff will abstain from seeking abortion services while attending or working at TWU. It also requires staff and faculty of TWU to "sincerely embrac[e]" the pro-life position that life begins at conception. Abortion in Canada is lawful. The 1988 decision *R v Morgentaler* held that criminal provisions against abortion constituted an unjustified violation of women's rights to life, liberty and security of the person. Since that time, Canadian courts have repeatedly and vehemently rejected the proposition that fetuses have personhood.

A woman who works or studies at TWU will find herself in breach of contract if she accesses abortion services. This places a disparate burden on the reproductive freedom of women who work or study at TWU, relative to their female peers elsewhere and relative to the reproductive freedom of men who work or study at TWU. The inclusion of a provision regarding reproductive rights raises the spectre that TWU may take disciplinary action, including possible expulsion, against a woman at one of the more vulnerable moments in her life. Those of us who endorse the first recommendation take the view that this possibility cannot be consistent with equality rights of women nor with women's right to life, liberty and security of the person. The question of how faculty who are contractually obliged to teach from the perspective articulated within the Community Covenant Agreement and sincerely embrace its tenets can adequately teach the Canadian legal position of fetal personhood has not, to the best of our knowledge, been addressed by TWU.

[Citations omitted.]

As for discrimination against unmarried individuals, the authors say the following at p. 31:

The *Family Law Act* SBC 2011, c. 25 recognizes legal rights and responsibilities in relation to both married and unmarried spouses. Same sex partners may, of course, legally marry pursuant to the *Civil Marriage Act* SC 2005, c. 33. The Community Covenant Agreement discriminates against unmarried individuals of all sexual orientations, and thereby has a negative impact on the equality rights of those individuals based on the prohibited ground of family status. Family status was recognized as an analogous ground by the Supreme Court of Canada in *Quebec v A*. This decision also accepts that unmarried *de facto* couples are a historically disadvantaged group. The analysis of how this group's equality is negatively impacted by the Community Covenant

Agreement would proceed along similar lines to the analysis offered above in respect of lesbian, gay and bisexual individuals.

[Citations omitted.]

Lastly, with respect to trans people, the authors take the following position at pp. 31-32:

According to the OHRC, the term Trans “is an umbrella term that is used to describe individuals who, to varying degrees, do not conform to what society usually defines as a man or a woman”. This term often includes Transgender and Transsexual individuals and will sometimes also be used to describe individuals who are Intersexed and those who crossdress. According to the OHRC these terms can be defined as follows:

- **Transgender:** People whose life experience includes existing in more than one gender. This may include people who identify as transsexual, and people who describe themselves as being on a “gender spectrum” or as living outside the categories of “man” or “woman.”
- **Transsexual:** People who were identified at birth as one sex, but who identify themselves differently. They may seek or undergo one or more medical treatments to align their bodies with their internally felt identity, such as hormone therapy, sex-reassignment surgery or other procedures.
- **Intersex:** People who are not easily classified as “male” or “female,” based on their physical characteristics at birth or after puberty. This word replaces the inappropriate term “hermaphrodite.”
- **Crossdresser:** A person who, for emotional and psychological well-being, dresses in clothing usually associated with the “opposite” sex.

The Community Covenant Agreement limits marriage to that which takes place between one man and one woman. People who live outside of these binary gender categories and those whose sex is not reflective of their gender identity may not fit into this Covenant if they are sexually involved. Acceptance under the Community Covenant Agreement will depend on how these individuals are identified and not necessarily on how they identify themselves. Many Trans individuals would therefore be effectively excluded from TWU, and their equality rights will correspondingly be negatively impacted.

(ii) In the UBC Submissions to Approve TWU at pp. 59-60, the authors warn that a decision not to recognize TWU law school accreditation would raise several adverse implications:

The Law Society should carefully consider the significance of a decision to scrutinize the personal beliefs and practices of lawyers outside of their professional obligations. ... The Law Society itself would also have to consider whether it is prepared to evaluate and adjudicate the qualifications of all law students, lawyers and judges on this basis. This raises important questions about jurisdiction, criteria and consequences:

- Should currently practicing lawyers with undergraduate credentials from TWU be investigated?
- What about graduates of law, undergraduate and other educational programs from religious backgrounds (Protestant, Catholic, Muslim, Jewish, Mormon), or from schools overseas with different cultural worldviews?
- Will each provincial law society carry out these assessments, and based on what criteria?
- What should be the consequences of such investigations?

- Is each provincial law society equipped with the resources and expertise to determine which personal beliefs are acceptable to the profession and which should be deemed discriminatory?

If the Law Society of BC decides to take on the responsibility of investigating the religious and cultural perspectives of educational institutions, it should be prepared to address these questions.

(iii) The Craig Reply Submissions conclude that the LSBC should not give weight to the Special Advisory Committee's *Final Report* (December 2013), for four reasons:

- (1) The Special Advisory Committee mischaracterized the Court's conclusion in *TWU v. BCCT* regarding whether TWU discriminates on the basis of sexual orientation;
- (2) In concluding that TWU does not ban LGBT individuals, the Special Advisory Committee improperly relied on a distinction between sexual identity and sexual activity that has been rejected by the Supreme Court of Canada;
- (3) The Special Advisory Committee report does not adequately respond to the argument that the legal context has changed since 2001; and
- (4) The Special Advisory Committee wrongly concluded that opposition to TWU is premised on the assertion that Christian universities are incompetent to deliver an accredited legal education.

It appears several of these arguments and the comments made thereunder can be categorized under this consideration.

First, at pp. 5-6, Professor Craig says that TWU's proposed law program should be disapproved because TWU discriminates based on sexual orientation and is resistant to equality protections. Approval by the LSBC in these circumstances would justify the establishment of further law schools that discriminate on other analogous grounds:

The LSBC should consider whether it would approve TWU's law degree if the policy prohibited sexual intimacy except that which occurs within the sanctity of marriage between a man and woman of the same race. In other words, would the LSBC give the stamp of approval to a law school that prohibited inter-racial couples?

The analogy is direct and apt. There are examples of American schools, such as Bob Jones University, that have done precisely this and have done so on the basis of religious belief. The Internal Revenue Service had the courage to revoke Bob Jones University's tax-exempt status on the basis that such a policy was contrary to public interest – a decision that was upheld by the Supreme Court of the United States. Bob Jones University attempted (unsuccessfully) to justify its prohibition of interracial sex on many of the same grounds that TWU justifies its prohibition on gay sex: we are a private university; we have the right to our religious beliefs; we permit racialized students to attend, we just require that they comply with a code of conduct consistent with our religious beliefs. There is no principled basis upon which you could say yes to a covenant that says no gay sex but no to a covenant that says no interracial sex.

If you, as benchers of the LSBC, approve this law school you will have to accept that you would either also approve a law school with an anti-miscegenation policy or accept that you do not consider gays and lesbians entitled to the same degree of respect, dignity and equality that you would grant to others.

Second, she argues that the Special Advisory Committee fell into error when it concluded that TWU does not limit or ban LGBT individuals, because its reasoning (described above as “love the sinner, hate the sin reasoning”) was rejected by the Court in *Whatcott*: pp. 6-8.

Third, she says that the Special Advisory Committee and Mr. Laskin both misunderstood her argument that the legal and social context has changed since 2001. She provides the following comments at p. 9:

While the values of freedom of religion continue to be recognized today, just as they were in 2001, the point is that recognition (both social *and* legal) of the value of equality for gays and lesbians has increased since 2001. An increased legal understanding of what constitutes equality on the basis of sexual orientation is likely to produce different conclusions regarding what constitutes a reasonable balance between equality for gays and lesbians and freedom of religion. In 2001 the Court concluded that an appropriate balance was struck because gays and lesbians could go elsewhere to become teachers (an argument Mr. Laskin also makes today regarding prospective gay law students). In 2014 it would likely not be sufficiently cognizant of gay and lesbian equality simply to say “TWU is not for everybody” and in the interests of religious liberty the gays can go elsewhere to become lawyers.

In my paper I noted several cases in which the Supreme Court of Canada has increased the degree of protection against discrimination on the basis of sexual orientation recognized under the *Charter*. *Whatcott*, which was released after the paper was published, offers an additional example. As noted above, *Whatcott*’s reliance on Justice L’Heureux-Dube’s dissent in *BCCT* established that when balancing freedom of religion with the impact on equality interests perpetuated by TWU’s covenant, the fact that the Covenant bans gay sex rather than gay individuals is not relevant. This is a notable shift from the majority’s approach in *BCCT*. In characterizing the implications of TWU’s covenant in *BCCT* the majority, unlike L’Heureux-Dube J in dissent, appear to note some significance regarding the distinction between condemning sexual practices and condemning gay individuals. This reasoning is no longer good law. In *Whatcott* the Court clearly rejected the majority position in *BCCT* and adopted Justice L’Heureux-Dubé’s approach on this issue.

(iv) The JCCF argues that “[d]enying TWU the right to start and operate a law school on the basis of its belief about marriage would effectively repudiate a long-standing principle that lawyers need not agree with all laws in order to be competent lawyers”: JCCF Submission at p. 9.

(v) The BCCLA, in a letter to the LSBC dated March 2, 2014, at pp. 7-8, argues that it would be unprincipled and discriminatory against the members of the TWU community to deny TWU approval:

The BCCLA believes that any private religious institution must have the right to its conditions for membership in accordance with the religious beliefs held by that membership. Individual members of a religious faith are similarly free to observe or to reject these conditions, and to make decisions about whether they wish to belong to these institutions accordingly. These freedoms are essential to the ability of any religious group to carry on its existence. People who are not members of a particular religion (and even those who are) may not approve of or be comfortable with the beliefs of that faith.

However, BCCLA's position – in accordance with the decision of the Supreme Court of Canada in *Trinity Western University* - is that the repugnance of a certain set of beliefs even to a majority of Canadians cannot be the basis to deny a public good, such as entry to a profession, to members of that faith.

In this case, the public good is accreditation for the purpose of admission to the bar by students graduating from TWU's proposed law school. The denial of that public good to graduates of TWU's law school would infringe the freedom of religion, of association and of expression of the members of the TWU community. We are unaware of any sufficient rationale being offered that would justify that infringement. Permitting graduates of TWU to enter the legal profession does not send the message from the state to LGBTQ Canadians that they are less worthy of respect than others nor does it deny them any rights or freedoms to which they would otherwise be entitled. All it does is respect the freedom of those who wish to govern their own conduct in accordance with the religious tenets encompassed within the Community Covenant.

(vi) The authors of the Sakalauskas/MacDonald Submissions, at pp. 14-15, argue that it would not be in the public interest to approve TWU's proposed law program for the following reasons:

By accrediting a school, the NSBS gives its stamp of approval to a law school, and effectively says we accept you as part of our process in ensuring the qualification of new lawyers. This process must consider more than just academic knowledge. Section 4 of our Act ... says we must govern in the public interest, a much broader concept.

Our processes must not be seen to adopt and thus encourage a discriminatory organization. For example, it is impossible to imagine that we would ever accredit an institution that prohibited Blacks, or Jews, or women. Nor should we accredit, as part of our admission process, a school that prohibits gays and lesbians. If the NSBS were to accredit TWU, the following is unavoidable:

- Some religious groups believe that woman should not be educated. Should they form a private law school in Canada and wish to be accredited, there would be no principled basis for the NSBS to deny accreditation.
- The Bible has been interpreted to suggest that inter-racial marriage is wrong. Should a private law school in Canada prohibit inter-racially married persons, again there would be no principled basis for the NSBS to deny accreditation.

Accrediting TWU sends a message to the public that discrimination on the basis of sexual orientation is okay, and accepted. There can be nothing more fundamentally destructive to the interest of the public than that.

(vii) In its letter dated March 3, 2014, LEAF argues that approving a law school "with policies that would violate human rights law if implemented by any of Canada's other law schools does not advance the rule of law, and would be incompatible with the Law Society's mandate to protect the public interest": p. 4.

(viii) In a letter to the LSBC dated February 24, 2014, OUTlaws Canada argues that "[a]t the most basic level, it is unjust to open a law school that openly discriminates against a vulnerable segment of the Canadian public".

(ix) In a letter to the LSBC dated February 28, 2014, the Christian Legal Fellowship argues that disapproval of TWU's proposed law program would have adverse

implications for Christian lawyers across Canada and, without any evidence of actual harm, would amount to a violation of independence, diversity, and natural justice:

The thrust of the opposition to the TWU proposal would prohibit lawyers, judges and law professors from articulating or endorsing, either in the public square, the academy, or the marketplace, a religious understanding of marriage and sexuality which differs from what is defined by the civil law for secular purposes. TWU is not training its students to accept an erroneous understanding of the civil law or provide inaccurate legal advice about the legal impact of the *Civil Marriage Act* – if so, the LSBC would have every right to be concerned. To the contrary, Christian lawyers, like all lawyers, understand the difference between providing accurate, sound legal advice in their professional practices, and formulating personal comprehensive belief systems which may differ from the state's official position.

The implications of refusing TWU accreditation on these grounds will be felt by Christian lawyers – indeed lawyers of all faiths and those of no faith who hold similar conscientious views – throughout Canada. Law deans, law firm diversity committees, corporate counsel initiatives, law student councils, and others with power over lawyers and law students will take from such a refusal a mandate not to tolerate any dissent from their view on matters of sexual morality or marriage.

...

The legal profession is one that has always promoted independence from the state, diversity of opinion, and freedom from mental and religious coercion. Its existence is predicated on the ability of its members to maintain that independence, and that starts with respecting their freedom to form their own beliefs. Law societies exist to regulate professional conduct and competence, not to police the personal beliefs and convictions of its members. To impose a blanket prohibition on all TWU graduates would be to preemptively judge a candidate as unworthy of the profession simply because he or she adheres to certain religious beliefs. Such a ban would violate the very principles of independence, diversity, and natural justice that the profession exists to protect, and would be egregious in the absence of any evidence that the individual candidate would actually engage in unlawful discrimination in his or her practice.

(x) In a submission to the LSBC, Professor Mary Anne Waldron, Q.C. argues that there is no principled reason for the LSBC to disapprove TWU's proposed law school, as the LSBC "is not in the position of a moral and religious arbiter of our society": p. 5. She states at pp. 4-5:

What you, as benchers of the Law Society are being asked to do by those who would have you deny access to the profession to properly trained graduates of Trinity Western University is to deny those students their freedom to be trained in an institution that reflects their religious beliefs and their right to associate with one another in the expression and pursuit of those beliefs. You are not, in this case, being asked to strike a balance between the rights of two groups. The GLBTQ community has, in fact, no legal right that TWUs community covenant violates. The covenant is not discriminatory under the law. ...

You are, in fact, being asked to set aside the freedom of conscience and religion and the freedom of association of staff and students at TWU and to impose upon them one side of a contested moral issue: the morality of same-sex relationships. That is not the business of the Law Society of British Columbia, whatever the personal positions of the Benchers on the issue might be. Rather, the business of the Law Society is to have regard to the

broader interests of the public. Under the Charter, the public interest includes the defense of the fundamental freedoms, even if fundamental freedoms may be used to promote ideas or positions with which one may personally disagree. ...

...

... Only by recognizing all our freedoms – those of the traditionally religious and those of the secular – can we find a peaceful solution. We must accept and respect difference to be truly free and, in this case, it is clear that respect for difference means that it is in the public interest to recognize graduates of TWU as qualified for admission to the bar.

In my opinion, the Law Society would be acting illegally were it to refuse to accredit TWU's graduates. It would be impairing the freedom of religion and of association of TWU students and staff. Moreover, the impairment cannot be justified under the *Oakes* test. It cannot be justifiable as a limit imposed by law in a free and democratic society because there is no law prohibiting the community covenant of TWU in the context of a private university. Further, imposing a moral position not required by law upon a religious group cannot be in the public interest. The Law Society is not in the position of a moral and religious arbiter of our society; rather, it is to uphold the best traditions of a diverse profession in defense of our constitutional rights. ...

10. Should the LSBC give any consideration to the possibility that there may be non-uniformity across Canada, as other law societies may decide either to approve or to disapprove TWU graduates' degrees in their jurisdictions?

(i) The JCCF, among several others, argues that the potential for non-uniformity across Canada should be considered. In its paper, the JCCF says "[t]he establishment of a philosophical or ideological standard for the creation of new law schools would effectively repudiate the hard work carried out in the past decade by the Benchers and Council Members of Canada's law societies": JCCF Submission at p. 4.

(ii) FLSC, *National Mobility Agreement, 2013* (signed October 17, 2013) at ss. 33-34:

Permanent Mobility of Lawyers

33. A signatory governing body will require no further qualifications for a member of another governing body to be eligible for membership than the following:

- (a) entitlement to practise law in the lawyer's home jurisdiction;
- (b) good character and fitness to be a lawyer, on the standard ordinarily applied to applicants for membership; and
- (c) any other qualifications that ordinarily apply for lawyers to be entitled to practise law in its jurisdiction.

34. Before admitting as a member a lawyer qualified under clauses 33 to 40, a governing body will not require the lawyer to pass a transfer examination or other examination, but may require the lawyer to do all of the following:

- (a) provide certificates of standing from all Canadian and foreign governing bodies of which the lawyer is or has been a member;
- (b) disclose criminal and disciplinary records in any jurisdiction;

(c) consent to access by the governing body to the lawyer's regulatory files of all governing bodies of which the lawyer is a member, whether in Canada or elsewhere; and

(d) certify that he or she has reviewed all of the materials reasonably required by the governing body.

11. **If TWU is not approved by the LSBC, are there any implications with respect to foreign students who have attended religious schools in other countries (e.g. Catholic University, BYU, Liberty University, Baylor University) and who wish to apply to practice law in British Columbia?**

Several submissions were made that it would be inconsistent to accept foreign lawyers who signed covenants similar to the Community Covenant Agreement while attending non-Canadian law schools prior to transferring into Canada, while at the same time denying that right to students who wish to do so at a Canadian law school.

12. **Is there merit to the position that approving a faculty of law at TWU would actually enhance diversity in the legal profession, on the basis its policies are minority views?**

(i) The Supreme Court of Canada in *TWU v. BCCT* noted the importance of religious freedom and of nurturing a society which accepts and accommodates a diverse range of tastes, pursuits, customs and codes of conduct:

[28] ... The importance of freedom of religion in Canadian society was elegantly stated by Dickson J., as he then was, writing for the majority in *Big M Drug Mart, supra*, at pp. 336-37:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be founded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

...

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority".

...

[33] ... 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. The BCCT did not weigh the various rights involved in its assessment of the

alleged discriminatory practices of TWU by not taking into account the impact of its decision on the right to freedom of religion of the members of TWU. Accordingly, this Court must.

- (ii) In a letter to the FLSC dated January 20, 2013, Walter W. Kubitz, Q.C. raises the following point:

The Federation has welcomed and indeed celebrated the law school at Lakehead University, which focuses on aboriginal law and an understanding of aboriginal issues ... I urge the Federation to likewise support the Trinity Western University Law School proposal, which in an analogous fashion would focus on a Christian perspective of law and society.

- (iii) In its letter to the FLSC dated January 28, 2013, the BCCLA takes the position that existing law schools should not be allowed to “monopolize legal education in Canada so as to exclude religious or conscience-based universities”: p. 1. It states the following at p. 2:

With regard to our first concern, we note that Canada is a country founded upon diversity and tolerance. It is thus startling for deans of publicly-funded university law schools to use their position to attempt to thwart the entry of another voice into academe, particularly where that voice is a religious one. We note that the Human Rights Code of British Columbia expressly provides for religious-based groups, among others, to be exempt from certain of its provisions when they grant preferences to members of those groups. Obviously, in order for such groups to survive they must be able to prescribe the conditions of membership of their group and set out their fundamental beliefs.

- (iv) A group of J.D. candidates and graduates at the University of British Columbia, in a letter to the FLSC dated March 19, 2013, argue that approving a faculty of law at TWU would enhance diversity in the profession:

Every law school reflects a set of beliefs. As it stands, law schools have a secular emphasis in which religious views are in the minority, and are, in our experience, often openly derided. There is no reason why the secular world should have a monopoly on legal education. The 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.

- (v) Mr. Laskin takes the position that TWU may benefit the legal profession by enhancing diversity. In that regard, he states that Professor Craig’s argument – that it is reasonable to conclude that critical thinking about ethical issues cannot be taught by an institution which requires that all teaching be done from the perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision-making – “fails to give any recognition to the positive value of religious diversity that the Supreme Court embraced in *BCCT*”: Laskin Memorandum at p. 9.

- (vi) The Sawatsky Letter argues that TWU’s proposed law school would enhance diversity, stating at p. 14:

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 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". 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". The TWU School of Law would enhance, not undermine, diversity in legal education in Canada.

[Citations omitted.]

(vii) The JCCF argues that Canadian law students stand to benefit from more choice in the law faculties available to them, stating at p. 11 of the JCCF Submission:

In a free society, institutional diversity within academia is a public good, not a threat, to society as a whole. The creation of a law school which differs from others should be welcomed by those who are truly tolerant and cherish authentic diversity.

(viii) Professor Newman argues in the Newman Paper that religiously oriented schools bring diversity to legal education, which in turn produces three main benefits: (1) these schools "have the potential to increase the accessibility of legal education to students who may not be well served by existing, secular law schools" (p. 2); they open the possibility of "new forms of legal scholarship" (pp. 2-3); and (3) "Christian legal scholarship brings a distinctive values-based engagement with legal thought that is often sorely lacking" (p. 3).

13. If TWU's proposed law school is approved by the LSBC, could PLTC courses be designed to address the concerns relating to the problem of apprehended intolerance?

(i) The Court in *TWU v. BCCT* addressed the issue whether the TWU graduates' attitudes could have been "corrected" during the fifth year of the degree spent at Simon Fraser University. It ultimately rejected this argument on the evidence, stating at para. 38:

[38] ... The appellant suggested in argument that it may be that no problem was incurred because of the participation of Simon Fraser University during the fifth year. This is rather difficult to accept. After finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation? Simon Fraser University is supervising eight credit hours taken off the TWU campus. There is no evidence that this instruction is in any way related to the problem of apprehended intolerance or that there has been a change in the mandate of Simon Fraser since the last year of the program was given to it to supervise in 1985. On the evidence, it is clear that the participation of Simon Fraser University never had anything to do with the apprehended intolerance from its inception to the present. The organization of the program in 1985 required assistance because of the need to provide a professional development component for certification of future teachers (see A.R., at pp. 45, 47, 48, 62, 64, 90, 95 and 133). The cooperation was intended to support a small faculty in its start-up stage (A.R., at pp. 128, 132 and 298). There is no basis for the inference that the fifth year corrected any attitudes.

(ii) In its letter to the FLSC dated February 5, 2013, LEAF argues that in the event TWU is accredited to confer law degrees, the FLSC should at the very least “require TWU graduates to undertake additional study and meet entrance requirements set by the Federation’s National Committee on Accreditation, similar to the process for foreign trained lawyers”: p. 1. Further, it asserts that the study and entrance requirements “must be rigorous, substantive and comprehensive in order to compensate for the shortcomings of a law program offered by an institution that unapologetically discriminates against gays and lesbians”: pp. 1-2.

(iii) In its letter to the FLSC dated March 8, 2013, NAWL supports LEAF’s position that the FLSC “should not permit graduates to become licensed to practice law without further study and entrance requirements”: p. 2.

(iv) In answer to LEAF and NAWL’s arguments above, Mr. Sawatsky states as follows at pp. 7-8:

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.

...

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

14. Should consideration be given to the LSBC’s role as regulator of the legal profession and its capacity to discipline lawyers for discriminatory conduct or otherwise harmful conduct unbecoming a lawyer?

(i) A similar argument was raised in *TWU v. BCCT*. At para. 37, the Court concluded that in the event of actual discriminatory conduct, disciplinary proceedings would circumscribe and thereby reconcile the scope of the competing rights (i.e. freedom of religion and equality rights):

[37] Acting on those beliefs, however, is a very different matter. If a teacher in the public school system engages in discriminatory conduct, that teacher can be subject to disciplinary proceedings before the BCCT. Discriminatory conduct by a public school teacher when on duty should always be subject to disciplinary proceedings. This Court has held, however, that greater tolerance must be shown with respect to off-duty conduct. Yet disciplinary measures can still be taken when discriminatory off-duty

conduct poisons the school environment. As La Forest J. stated for a unanimous Court in *Ross, supra*, at para. 45:

It is on the basis of the position of trust and influence that we hold the teacher to high standards both on and off duty, and it is an erosion of these standards that may lead to a loss in the community of confidence in the public school system. I do not wish to be understood as advocating an approach that subjects the entire lives of teachers to inordinate scrutiny on the basis of more onerous moral standards of behaviour. This could lead to a substantial invasion of the privacy rights and fundamental freedoms of teachers. However, where a “poisoned” environment within the school system is traceable to the off-duty conduct of a teacher that is likely to produce a corresponding loss of confidence in the teacher and the system as a whole, then the off-duty conduct of the teacher is relevant.

In this way, the scope of the freedom of religion and equality rights that have come into conflict in this appeal can be circumscribed and thereby reconciled.

(ii) As noted at p. 6 of the Laskin Memorandum, just as the Court observed in *TWU v. BCCT*, the various law societies across Canada have disciplinary processes available “to deal with individual cases of discriminatory behavior, whether by TWU or by graduates of other common law programs”.

(iii) The Special Advisory Committee, in its *Final Report* (December 2013) at para. 44, also noted that TWU graduates will be subject to supervision of the law societies in any event:

[44] ... 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.

(iv) The BCCLA similarly argues in its letter to the LSBC dated March 2, 2014 that if any TWU graduate does discriminate in the future legal practice, “their conduct can and will be addressed by the Law Society, and the *Human Rights Code*”: p. 10.

15. Although TWU, as a private institution, is exempted from B.C. human rights legislation, should the LSBC consider whether TWU’s policies violate or are otherwise inconsistent with human rights legislation in British Columbia or in other provinces? If so, should the LSBC disassociate itself from a school whose policies may violate or run contrary to this legislation?

(i) At p. 156 of the Craig Paper, Professor Craig argues that TWU’s policies may violate the human rights legislation in Alberta, Saskatchewan, Manitoba and Nova Scotia. As such, Professor Craig argues as follows:

[I]t would be ill-advised for the Federation to assume that TWU’s discriminatory policies are exempted under legislation such as the *Alberta Human Rights Act*, the *Saskatchewan Human Rights Code*, or the *Nova Scotia Human Rights Act*. Presumably, none of these

law societies would accept a Federation decision to approve a law degree from an institution whose policies would be unlawful if it were situated in any of their provinces.

- (ii) LEAF makes the following submission in its letter to the FLSC dated February 5, 2013, at p. 3:

In West Coast LEAF's submission, it is not in the public interest to train future lawyers in an institution governed by policies that discriminate on the basis of sexual orientation. To approve a law school with policies that would violate human rights law if implemented by any of Canada's other law schools does not advance the Federation's mission of "promoting the cause of justice and the Rule of Law". In our view, it would be incompatible with the Federation's mandate to act in the public interest and pursue the highest standards of professionalism and ethics for it to approve a TWU law degree.

- (iii) SOGIC, in its letter to the FLSC dated March 18, 2013, similarly argues that the analysis of these issues cannot be limited to TWU's compliance with B.C. legislation. It states at p. 4:

Given the national scope of the Federation's mandate and the increased mobility of lawyers between Canadian jurisdictions, any analysis of these issues cannot be limited to Trinity Western's compliance with B.C. legislation. Since the Federation's recommendation will be applied in every Canadian common law jurisdiction, consideration must be given to the Covenant's compatibility with other provincial and territorial human rights laws.

Provisions analogous to s. 41(1) of the *BCHRC* are found in 10 of 13 provincial and territorial human rights statutes, with great variations in language and scope. ... [T]here appears to be no legal justification for Trinity Western's discriminatory rules and practices in at least eight out of thirteen Canadian jurisdictions.

- (iv) The Special Advisory Committee considered this issue in its *Final Report* (December 2013) at paras. 38-39, and concluded that such a consideration is irrelevant:

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.

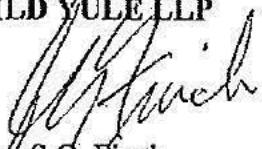
V. CONCLUSION

We trust this analysis and summary may be of some assistance to the LSBC in its deliberations on this issue.


Yours truly,

GUILD YULE LLP

Per:


Lance S.G. Finch
LSGF:cs

Per:


Jordan A. Bank
JAB:cs

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.

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May 8, 2013

BY EMAIL

The Law Society of British Columbia
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**Attention: Michael D. Lucas,
Manager, Policy and Legal
Services**

Dear Sirs/Mesdames:

Re: Academic Qualifications Opinion

You have requested my opinion concerning s 21(1)(b) of the *Legal Profession Act* and the Law Society Rules passed under the authority of that section, having regard to the pending application by Trinity Western University ('TWU') for accreditation to grant a Juris Doctor degree.

In my opinion, as requested, I address the following specific questions:

- (1) What is the scope of the "requirements" referred to in ss 20(1)(a) and 21(1)(b) of the *Legal Profession Act* and, in particular, can the requirements contemplated extend beyond academic criteria? If so, what might they include?
- (2) Can the Benchers, on the authority of ss 20 and 21, create a rule that imposes particular standards (either individually or institutionally) on the type of "requirements" or "academic requirements" necessary for qualification?
- (3) What is the legal effect of approval or disapproval of an academic program by the Approval Committee established by the Federation of Law Societies of Canada (the 'FLSC')?
- (4) To what extent is it open to the Law Society to rely upon the FLSC or the Approval Committee in the fulfilment of its responsibilities under ss 19(1), 20(1)(a) and 21(1)(b) of the *Legal Profession Act*?

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- (5) Given that the current Rule 2-27(4) establishes academic qualification as “successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university,” what limits, if any, do the rules of natural justice or administrative fairness impose on the Benchers when considering any changes to the current rule while an institution is seeking approval from the appropriate authorities to grant a law degree?

Overview of opinion

For the reasons that follow, my answers to the specific questions are as follows.

- (1) Having regard to the broad responsibilities imposed on the Law Society under ss 3 and 19(1) of the *Legal Profession Act* and the wording of ss 20(1)(a) and 21(1)(b), the “requirements” the Law Society may establish are not limited to academic requirements.
- (2) It is open to the Benchers to establish individual or institutional requirements, though the Benchers are constrained by the constitutional requirement under s 15 of the *Charter* that the requirements not be discriminatory. In *Trinity Western University v British Columbia College of Teachers* 2001 SCC 31, it was held that a refusal by the College of Teachers to approve a teacher education program offered by TWU was discriminatory. I discuss some of the implications of that judgment below.
- (3) Although the FLSC has established and is engaged in implementing a national requirement for entry to law society admission programs and the Benchers have approved and adopted the relevant FLSC reports (on March 5, 2010 and December 2, 2011), the intended national approval system is not consistent with the Law Society Rule 2-27(4). As matters stand, approval or disapproval of an academic program by the Approval Committee of the FLSC has no legal effect in British Columbia. A rule change is required.
- (4) The Law Society’s rule making power is not unfettered. The Law Society cannot make rules that would delegate to the FLSC or Approval Committee ‘non-delegable’ responsibilities. The following responsibilities are non-delegable: the requirement under s 19(1) that the benchers be satisfied that a candidate for admission is of good character and repute and is fit to become a lawyer; and the obligation to establish requirements under ss 20(1)(a) and 21(1)(b). This does not forestall consultation with the FLSC in the fulfilment by the Law Society of its statutory responsibilities. Nor does it prevent the Law Society from adopting as its own academic requirements or other requirements developed by the FLSC. Nor does it prevent the Law Society from making a rule that establishes criteria to be administered by the Approval Committee.
- (5) The rules of natural justice or administrative fairness do not constrain the Law Society from amending its rules. There is the possibility of a challenge if the Law Society makes public and then fails to honour a process or practice of consultation in rule-making.

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To a significant extent, the questions addressed in this opinion are questions of statutory interpretation. For ease of exposition and reference in what follows, the relevant legislation is set out in Appendix 'A' and quoted as is necessary in the body of the opinion.

- (1) What is the scope of the “requirements” referred to in ss 20(1)(a) and 21(1)(b) of the *Legal Profession Act* and, in particular, can the requirements contemplated extend beyond academic criteria? If so, what might they include?**

The question involves the Benchers' authority to make rules establishing requirements pertaining to enrolment as an articulated student and admission as a lawyer. Sections 20(1)(a) and 21(1)(b) provide as follows:

Articled Students

20 (1) The benchers may make rules to do any of the following:

(a) establish requirements, including academic requirements, and procedures for enrollment of articulated students; ...

Admission, reinstatement and requalification

21 (1) The benchers may make rules to do any of the following:

...

(b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court; ...

On the face of these provisions, the Benchers' authority to make rules establishing such requirements is not limited to the establishment of academic requirements.

To understand the scope of the Benchers' authority to establish requirements generally, it is necessary to have regard to ss 3, 11 and 19 of the statute. They provide, in part:

Object and duty of society

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,

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

...

Law Society rules

11 (1) The benchers may make rules for the governing of the society, lawyers, law firms, articulated students and applicants, and for the carrying out of this Act.

(2) Subsection (1) is not limited by any specific power or requirement to make rules given to the benchers by this Act.

...

Applications for enrollment, call and admission, or reinstatement

19 (1) No person may be enrolled as an articulated student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

...

By virtue of these provisions, the Law Society is responsible for 'the independence, integrity, honour and competence of lawyers' (s 3(b)) and has a correspondingly broad authority to determine how and by whom lawyers will be educated and trained. It may undertake the training itself by establishing its own educational programs (s 3(c)), or insist upon stipulated academic and other qualifications. It is not limited to a narrow, credential-based, view of what is required. The object of the exercise is that the Benchers are satisfied that candidates are 'of good character and repute and ... fit to become a barrister and a solicitor of the Supreme Court' (s 19(1)).

To the extent that the Law Society chooses to rely on credentials as qualifications, it is permitted to consider the appropriateness of the programs through which credentials are conferred. In my opinion, this follows from the fact that the Law Society's mandate is not simply to ensure that lawyers possess technical qualifications or abilities. Rather, it is concerned with independence, integrity, honour, professional responsibility, and the rights and freedoms of all persons, all with a view to upholding the public interest in the administration of justice.

It is in this statutory context that ss 20(1) and 21(1) authorize the Law Society to make rules for the exercise of its authority. In my opinion, the requirements and procedures contemplated in these provisions are plainly not limited to academic requirements. They extend to requirements

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and procedures to be applied by the Benchers in their assessment of character, repute and fitness generally.

(2) Can the Benchers, on the authority of ss 20 and 21, create a rule that imposes particular standards (either individually or institutionally) on the type of “requirements” or “academic requirements” necessary for qualification?

The short answer is that, subject to constitutional constraints, the Benchers can impose the standards they in good faith consider necessary to fulfill their statutory mandate. It is open to the Benchers to require that candidates have taken certain courses, or courses taught in certain ways, or courses taught by providers committed to certain pedagogical approaches. The Benchers need not approach the matter from the perspective of courses taken. They can also require that candidates have manifested their fitness for the practice of law in other ways.

To put this in perspective, it is worth keeping in mind that, historically, legal professional training was weighted more heavily to an apprenticeship model (articling) than to an academic curriculum, and that the Law Society of Upper Canada administered its own academic program, in place of university coursework, into the 1950s. Both articling and the completion of the Professional Legal Training Course remain requirements of the Law Society today, with the statutory authority for both ultimately resting on s 21(1)(b). So far as the statute is concerned, the Benchers could revert to the older model, if they thought it necessary to fulfill their mandate.

Alternatively, still maintaining the requirement that candidates have completed a course of academic study at a Canadian university, the Benchers could make it a further requirement that the academic course of study have been taught in certain ways, or from certain perspectives. For example, they could require clinical training within the course of study, or that the course of study incorporate certain academic or intellectual perspectives thought integral to legal reasoning and scholarship.

You have asked me to have regard to TWU’s pending application for accreditation of a common law degree program. The particular feature that sets TWU’s proposed program apart is that TWU is a private, Christian, university which requires all of its faculty and students to sign a ‘community covenant agreement’. It states that:

The University’s mission, core values, curriculum and community life are formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible. ...

The University’s acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life is foundational to its affirmation that people flourish and most fully reach their potential when they delight in seeking God’s purposes, and when they renounce and resist the things that stand in the way of those purposes being fulfilled. ...

The TWU community covenant involves a commitment on the part of all members to embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive. Members of the TWU community, therefore, commit themselves to:

...

- treat all persons with respect and dignity, and uphold their God-given worth from conception to death

...

- observe modesty, purity and appropriate intimacy in all relationships, reserve sexual expressions of intimacy for marriage, and with marriage take every reasonable step to resolve conflict and avoid divorce

...

In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions:

...

- sexual intimacy that violates the sacredness of marriage between a man and a woman

...

[A]ccording to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation.

TWU's application for accreditation is controversial. Critics have focused on the community covenant agreement. They have observed that, by limiting acceptable sexual activity to that taking place in marriage between a man and a woman, the community covenant agreement discriminates on the basis of sexual orientation. Critics also maintain that, through the community covenant agreement, TWU violates academic freedom and that its proposed law school will not provide an appropriate environment for the development of critical thinking and ethical lawyering.¹

¹ These criticisms are comprehensively set out by Elaine Craig in her forthcoming article, 'The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program', *Canadian Journal of Women and the Law* (2013), available on-line at SSRN id2202408.pdf.

TWU and its supporters respond that it is a private institution not governed by the *Human Rights Code* (by virtue of s 41) or the *Canadian Charter of Rights and Freedoms* (by virtue of s 32), and that the imposition by public bodies of standards that would have the effect of treating law graduates of TWU differently than law graduates of other Canadian universities would be religious discrimination contrary to s 15 of the *Charter*. Such a challenge succeeded in *Trinity Western University v British Columbia College of Teachers* 2001 SCC 31 (*TWU v BCCT*).

TWU v BCCT concerned the academic qualifications for certification as a teacher. The College of Teachers refused to accept an education degree proposed to be granted by TWU as sufficient qualification. The College came to this decision out of concerns, stemming from an earlier version of the community covenant agreement, that TWU promoted discriminatory practices. This was the only ground of refusal, as the College had already determined that TWU's teacher training curriculum was otherwise acceptable.

It bears mentioning that the earlier version of the community covenant agreement considered by the Supreme Court of Canada was more forcefully worded than the current version. It listed 'sexual sins' including 'homosexual behaviour' as 'PRACTICES WHICH ARE BIBLICALLY CONDEMNED'.

TWU succeeded in an application for judicial review of the refusal and the College was ordered to accept TWU graduates as qualified. In the Supreme Court of Canada, the decision rested on s 15 of the *Charter*.

The court accepted that the case required the reconciliation of competing rights protected by the *Charter*. Giving judgment for the majority, Iacobucci and Bastarache JJ stated, at [28]-[29]:

The issue at the heart of this appeal is how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.'s public school system, concerns that may be shared with their parents and society generally.

29 In our opinion, this is a case where any potential conflict should be resolved through the proper delineation of the rights and values involved. In essence, properly defining the scope of the rights avoids a conflict in this case. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.

The majority concluded that, on the one hand, weight had to be given to the religious freedom of willing signatories of the community covenant agreement and, on the other hand, there was no evidence that graduates of the TWU teacher training program would probably be intolerant teachers. Iacobucci and Bastarache JJ stated:

35 ... In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. 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. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. 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. 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.

36 Instead, 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.

37 Acting on those beliefs, however, is a very different matter.
...

38 For the BCCT to have properly denied accreditation to TWU, it should have based its concerns on specific evidence. It could have asked for reports on student teachers, or opinions of school principals and superintendents. It could have examined discipline files involving TWU graduates and other teachers affiliated with a

Christian school of that nature. Any concerns should go to risk, not general perceptions.

Elaine Craig of Dalhousie University has argued that the decision in *TWU v BCCT* is no longer good law, in light of more recent decisions of the Supreme Court of Canada, because societal values have evolved and the balance between freedom of religion and equality for gays and lesbians now tilts more to the protection of equality.² I do not find this persuasive and expect that a court would not accept this argument. It is true that the Supreme Court's analysis of s 15 complaints has evolved, in particular by requiring separate treatment of the questions of discrimination under s 15 and justification under s 1 of the *Charter*; the evolution is demonstrated by the court's most recent s 15 decision in *Quebec v A* 2013 SCC 5. I do not see this evolution as foreshadowing a different outcome were the issue in *TWU v BCCT* to arise again. To the contrary, in *Saskatchewan Human Rights Commission v Whatcott* 2013 SCC 11, the Supreme Court reaffirmed its commitment to an analytical approach that balances equality rights against other rights protected under the *Charter*, giving appropriate weight to each. This is similar to the balancing that occurred in *TWU v BCCT*. In another recent case, *Doré v Barreau du Québec* [2012] 1 SCR 395 at [32]-[42], the court endorsed *TWU v BCCT* as one of a number of decisions applying 'an administrative law/judicial review analysis in assessing whether the decision maker took sufficient account of *Charter* values'. *TWU v BCCT* remains good law.

Other critics have argued that TWU's community covenant agreement violates the prohibition on discrimination contained in the *Human Rights Code*.³ In *TWU v BCCT*, it was assumed without argument that TWU was protected by the exemption contained in s 41 of the *Code* protecting 'a ... religious organization ... that is not operated for profit [and] has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by ... religion'. In *Caldwell v St Thomas Aquinas High School* [1984] 2 SCR 603, the exemption was held to protect a Catholic denominational school from a complaint of discrimination by a Catholic teacher who was fired for marrying a divorced man, contrary to the tenets of her Church. It is suggested that, because TWU is not committed to any particular creed, but only to 'an underlying philosophy and viewpoint that is Christian', it does not qualify to claim the exemption. In my opinion, while a range of Christian creeds and doctrines may be accommodated within TWU's evangelical Christian perspective, it is nevertheless an organization established for the promotion of the interests and welfare of Christian students as contemplated by the exemption. Following full argument, the court is likely to conclude that, pursuant to the exemption, TWU is not in violation of the prohibition on discrimination contained in the *Human Rights Code*.

Ms Craig has further argued 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 perspective that the Bible is the sole, ultimate, and authoritative

² Craig, note 1, pp 25-16.

³ Letter to the FLSC dated March 18, 2013, by the Sexual Orientation and Gender Identity Conference and the Equality Committee of the CBA (<http://www.cba.org/CBA/submissions/pdf/13-18-eng.pdf>).

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source of truth for all ethical decision making'.⁴ She says that this is not an argument that was addressed in *TWU v BCCT*. I agree that Ms Craig's second argument raises distinct considerations. In my opinion, there are two points of importance to be taken from the judgment in *TWU v BCCT* in this regard.

The first is that the Law Society's statutory mandate is broader than that of the College of Teachers. The College's object was stated in s 4 of the *Teaching Profession Act* RSBC 1996, 449:

It is the object of the college 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 and, consistent with that object, to encourage the professional interest of its members in those matters.

The relevant rule-making authority was to make by-laws:⁵

- (d) respecting the training and qualifications of teachers and establishing standards, policies and procedures with respect to the training and qualifications including, but not limited to, professional, academic and specialist standards, policies and procedures;
- (e) respecting the issue of certificates of qualification ...
- (f) respecting the standards of fitness for the admission of persons as members of the college; ...

While there are obvious parallels to ss 3, 19 and 21 of the *Legal Profession Act*, there are also important differences. Unlike the College of Teachers, the Law Society is charged with protecting and upholding the public interest in the administration of justice by preserving the rights and freedoms of all persons, and, again unlike the College, the Law Society's mandate extends to program delivery. By virtue of these provisions, the Law Society may concern itself with what occurs in TWU's classrooms in deciding whether its process is a suitable one for training future lawyers, if it considers that necessary to fulfilling its statutory mandate.⁶ To this point, I think that Craig's second argument may be well founded.

⁴ *Ibid* p 26.

⁵ *TWU v BCCT* at [21].

⁶ The College of Teachers may address matters such as class size in deciding whether to recognize a university degree as qualifying its graduates for certification as teachers; *University of British Columbia v The British Columbia College of Teachers* 2002 BCCA 310 at [38]. The Law Society's mandate to consider the educational process within the university program is even clearer.

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It should be noted that adopting this line of reasoning would necessarily engage the Law Society in addressing what happens in classrooms in other institutions.

The second point of importance is that the court's decision in *TWU v BCCT* was grounded in an absence of evidence of harm. The court was not willing to presume harm to students coming into contact with teachers educated at TWU, based on the community covenant agreement. I think it very probable that in any future case the court will be unwilling to presume harm to clients, counsel and members of the public coming into contact with lawyers educated at TWU, based on the community covenant agreement. A practice or standard that singles out TWU must be grounded in evidence rather than assumptions as to the effect of the community covenant agreement on the educational process, educational outcomes or the students themselves.

In my opinion, this has implications for Ms Craig's second argument and for any rule that would discriminate against TWU graduates. I don't believe the court would be prepared to presume that critical thinking and ethical conduct cannot be taught at TWU by reason of the community covenant agreement. The court would require evidence to substantiate the argument. If the Law Society thinks there is possibly merit to the argument, and contemplates establishing rules on this basis, an effort should be made to determine whether the factual underpinning of the argument is sound. Otherwise, I would expect a court to reject the argument. Further, I would expect the court to strike down any rule discriminating against TWU graduates unless the justification for the rule was grounded in evidence rather than assumptions.

(3) What is the legal effect of approval or disapproval of an academic program by the Approval Committee established by the Federation of Law Societies of Canada (the 'FLSC')?

The FLSC established a Task Force on Accreditation of the Canadian Common Law Degree and the Task Force issued its final report in October 2009. The Task Force recommended the establishment of a uniform national requirement for entry to law society admission programs in Canadian common law jurisdictions. The Benchers approved the final report on March 5, 2010.

A Common Law Degree Implementation Committee of the FLSC was established. It produced its final report in August 2011. The report set out 20 recommendations addressing the competency requirements to be satisfied by a graduate of a Canadian law degree program meeting the national requirement, and the procedures for evaluating whether completion of present and proposed Canadian law degree programs will fulfill those requirements. It recommended the establishment of a Canadian Common Law Program Approval Committee. The Benchers adopted the recommendations on October 21, 2011.

Under the recommendations, existing law degree programs will be subject to periodic review by the Approval Committee beginning in 2015 and proposed new programs must be approved by the Approval Committee before they will be accepted by the member law societies of the FLSC. Accordingly, TWU has applied to the Approval Committee for approval of its proposed degree program.

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Law Society Rule 2-27 contemplates only a limited role for the FLSC. Under Rule 2-27(4)(b), the Law Society may accept a certificate issued by the FLSC as establishing that individual candidates possess the academic qualifications required for enrolment in the admission program. However, under Rule 2-27(4)(a), a graduate with a bachelor of laws or equivalent degree from a common law faculty in a Canadian university has the requisite academic qualifications and need not obtain a certificate of qualification from the FLSC. TWU's proposed JD law degree will qualify as a Canadian law degree equivalent to a bachelor of laws when it receives formal approval from the designated minister of the Crown under the *Degree Authorization Act* SBC 2002, c 24, whether or not it is approved by the FLSC's Approval Committee.

The national approval process contemplated in these FLSC reports of October 2009 and August 2011 is not consistent with Rule 2-27. Whether or not the Approval Committee approves a Canadian common law degree program, under Rule 2-27(4)(a), the Law Society is constrained to accept the degree. Approval or the refusal of approval has no legal effect under the Rules as they stand. It is a legal irrelevance.

In order to give effect to the Benchers' adoption of the FLSC national approval process, a change in the Rules is required. There is a further issue as to whether the Benchers' rule making authority under the *Legal Profession Act* extends to making rules to give effect to the FLSC national approval process. I address that issue below.

(4) To what extent is it open to the Law Society to rely upon the FLSC or the Approval Committee in the fulfilment of its responsibility under ss 19(1), 20(1)(a) and 21(1)(b) of the *Legal Profession Act*?

In a letter dated March 18, 2013, from the President of the Canadian Bar Association ('CBA') to the President of the FLSC, the CBA stated:

In our view, the Federation and the Committee charged with approving new Canadian law degree programs must strike a balance between freedom of religion and equality, *and give full consideration to its public interest mandate* and to the values embodied in Canadian human rights laws.

Based on the delegations of power from its constituent law societies, the Federation has a duty to go beyond a strict determination of a proposed law school's compliance with national standards. It must assess whether the institution and its program complies with Canadian law, including the protections afforded by the *Canadian Charter of Rights and Freedoms* and the human rights legislation in BC, and in every province and territory where a proposed law degree may be recognized by the law societies for admission to bar.

(emphasis added)

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As indicated above, the Rules as they stand do not support the underlying premise of these passages. The Rules do not delegate to the FLSC and its Approval Committee responsibility for the fulfilment of any part of the statutory mandate of the Law Society, except for such delegation as may be entailed by the recognition of certificates of academic qualification issued by the FLSC under Rule 2-27(4)(b). To what extent is such delegation permissible, having regard to the *Legal Profession Act*?

The non-delegation rule

Some statutory authorities to legislate or to decide cannot be delegated. The governing principle is summarized in a Latin maxim: *delegatus non potest delegare* or 'a delegate cannot delegate'. The idea is that statutory authority to decide or to legislate that has been conferred upon an authority must be exercised by that authority. By itself, this is misleading. Many statutory authorities can be delegated. Whether any particular statutory authority can be delegated involves a question of statutory interpretation. In *Peralta v Ontario* (1985) 49 OR (2d) 705 (CA), affirmed 66 OR (2d) 543 (SCC), MacKinnon CJO explained:

"There is no rule or presumption for or against subdelegation": Driedger, "Subordinate Legislation", 38 Can. Bar Rev. 1 (1960), at p. 22. The language of the statute must be interpreted in light of what the statute is seeking to achieve. As Professor Willis pointed out, the maxim *delegatus non potest delegare* "does not state a rule of law; it is 'at most a rule of construction' and in applying it to a statute 'there, of course, must be a consideration of the language of the whole enactment and of its purposes and objects' ": Willis, "*Delegatus Non Potest Delegare*", 21 Can. Bar Rev. 257 (1943), at p. 257.

...

Looking at the nature and purpose of the statute, and the use of the word "respecting" ("concernant"), I am persuaded that subdelegation was intended by necessary implication, and the prima facie rule of construction *delegatus non potest delegare* gives way to the intent of the legislation.

... the courts will readily mould the literal words of a statute to such a construction as will best achieve its object; because they will, recognizing the facts of modern government, readily imply in an authority such powers as it would normally be expected to possess; because the presumption of deliberate selection, strong when applied to the case of a principal who appoints an agent or a testator who selects a trustee, wears thin when applied to a statute which authorizes some governmental authority, sometimes

with a fictitious name such as "Governor-in-Council" or "Minister of Justice", to exercise a discretion which everyone, even the legislature, knows will in fact be exercised by an unknown underling in the employ of the authority, the prima facie rule of *delegatus non potest delegare* will readily give way, like the principles on which it rests, to slight indications of a contrary intent.

(Willis, *op cit.*, at p. 260.)

Branigan v Yukon Medical Council (1986) 21 Admin LR 149 (YTSC) offers an example of impermissible delegation, in the context of professional regulation. The Council, responsible for the regulation of medical practitioners in the Yukon, ordered an inquiry into whether Dr Branigan's licence to practice should be cancelled. When he objected to the composition of the inquiry committee on the ground of an apprehension of bias, the Council sought and obtained a consent order that the inquiry committee be appointed by the Alberta College of Physicians and Surgeons. This order was later set aside on the ground that there was no jurisdiction to make it because the statutory power to conduct an inquiry could not be delegated. It was 'central to the Council's statutory responsibility to govern the medical profession'.

The powers and responsibilities conferred on the Law Society under ss 19, 20(1)(a) and 21(1)(b)

The responsibility conferred on the Law Society under s 19(1) to determine whether a 'person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court' is expressly conferred on 'the benchers' and is central to the fulfilment of the Law Society's object and duty under s 3. In my opinion, this is a prime example of a responsibility that cannot be delegated.

The Law Society's rule-making power under ss 20(1)(a) and 21(1)(b) is to 'establish' requirements and procedures for the enrolment of articulated students and call to the bar of candidates. In my opinion, this is likewise a power that cannot be delegated, for two reasons. First, this power is closely related to the Society's central object and duty, under s 3(c), to 'establish standards and programs for the education, professional responsibility and competence of lawyers and of applicants for call and admission'. Second, the word 'establish' connotes a non-delegable power. This appears from *Peralta, supra*, where MacKinnon ACJO adopted the following passage from Driedger, *The Composition of Legislation*, 2nd ed. (1976), at p. 193, describing 'specific powers' that cannot be delegated:

For example, if a Minister had powers to make regulations respecting tariffs and tolls he could authorize some other person to fix a tariff or toll; such a regulation would clearly be one respecting tariffs and tolls. But *if the Minister's authority is to make regulations prescribing tariffs and tolls then the Minister must himself prescribe, and cannot delegate that authority to another. Expressions commonly used to introduce specific powers*

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are prescribing, fixing, determining, prohibiting, requiring,
establishing.

(emphasis added)

The limits of the non-delegation rule

Having regard to these substantive limits on the Law Society's ability to fashion a rule that would delegate its responsibilities to the FLSC or the Approval Committee, it is possible to outline, in broad terms, the role that might be assigned to the FLSC by Law Society through appropriately drafted amendments to the Rules. Three limits on the non-delegation rule may be noted.

First, the non-delegation rule does not prevent an authority from relying on the expertise of another; *Imperial Oil Ltd v McAfee* 2005 BCSC 387 at [89]-[93], applying *Figol v Edmonton (City)* (1969) 8 DLR (3d) 1 (Alta SCAD). The current Rule 2-27(4)(a) and (b) which permit the Law Society to rely upon completion of a Canadian common law degree program or receipt of a certificate of qualification issued by the FLSC as constituting academic qualification are valid on this basis. The Law Society is permitted to rely upon other institutions to determine whether candidates have satisfied given criteria, rather than testing the candidates itself.

Second, by extension, while the Law Society is required by ss 20(1)(a) and 21(1)(b) to establish criteria and procedures, the non-delegation rule does not prevent the Law Society from delegating the administration of those criteria and procedures to third parties, such as the FLSC. In *Forget v Quebec (Attorney General)*, [1988] 2 SCR 90 at [33]-[38], the court rejected a challenge to regulations established by the Office de la langue française for the assessment of French language competence of professionals. The preparation and administration of the tests was lawfully delegated to a committee because the examination criteria were fixed by the Office and all that was delegated was the administration.

Third, the non-delegation rule does not prevent the Law Society from establishing criteria in consultation with the FLSC or on the advice of the FLSC, so long as the consultation process does not prevent the Law Society from exercising independent judgment and the Law Society does not surrender its autonomy; *Moresby Explorers Ltd v Canada (Attorney General)* 2001 FCT 780 at [73]-[85]. In *Morseby Explorers*, a national park Superintendent exercising licensing authority that could not be delegated was not prevented from participating in a management board that operated by consensus, and issuing her decisions on the letterhead of the management board.

There is a parallel here to the process by which the Law Society adopted the Model Code of Professional Conduct developed by the FLSC. The Model Code was adopted by the Benchers in two stages: first, the Non-Conflicts portion (on May 13 2011), and the Conflicts portion subsequently with changes recommended by the Ethics Committee (on December 7, 2012). Consistently with its statutory mandate, the Law Society could have regard to the FLSC's model, but exercised its own judgment.

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Accordingly, in my opinion, it is in principle open to the Law Society to amend Rule 4-27 to properly recognize for the Approval Committee the role contemplated for it in the FLSC reports that have been approved and adopted by the Benchers. On the other hand, it would be difficult or impossible to delegate to the FLSC the broader 'public interest mandate' called for in the CBA's letter of March 18, 2013.

- (5) Given that the current Rule 2-27(4) establishes academic qualification as "successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university," what limits, if any, do the rules of natural justice or administrative fairness impose on the Benchers when considering any changes to the current rule while an institution is seeking approval from the appropriate authorities to grant a law degree?**

The rules of natural justice and administrative fairness do not constrain the exercise of legislative authority. In *Canada v Inuit Tapirisat of Canada* [1980] 2 SCR 735, Estey J adopted the following statement of Megarry J in *Bates v Lord Hailsham* at [1972] 1 WLR 1378:

Let me accept that in the sphere of the so-called quasi-judicial the rules of natural justice run, and that in the administrative or executive field there is a general duty of fairness. Nevertheless, these considerations do not seem to me to affect the process of legislation, whether primary or delegated. Many of those affected by delegated legislation, and affected very substantially, are never consulted in the process of enacting that legislation; and yet they have no remedy ... I do not know of any implied right to be consulted or make objections, or any principle upon which the courts may enjoin the legislative process at the suit of those who contend that insufficient time for consultation and consideration has been given.

The exercise of authority may be legislative in nature even if it is directed at or affects one person in particular; *Wells v Newfoundland* [1999] 3 SCR 199 at [61]; *Gajic v British Columbia* (1996) 19 BCLR (3d) 169 (CA) at [16] & [42]-[43]. In *Office and Professional Employees' International Union, Local 378 v British Columbia (Hydro and Power Authority)* 2004 BCSC 422 at [88]-[89], Neilson J suggested two general and related guidelines for determining whether authority is legislative in nature:

88 The first ... is the element of generality. A government action is more likely to be legislative in nature if it is of general application, and is based on broad considerations of public policy. If the action is directed at the rights or conduct of a specific person or group, it is more likely an administrative function.

89 The second guideline is that, in determining whether the government action is general and policy-based, or particular to

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certain individuals or activities, it is essential to focus on the construction and application of the particular legislative scheme.

I don't think there can be any doubt that the exercise by the Law Society of its rule-making authority under ss 11, 20(1)(a) and 21(1)(b) is legislative in nature.

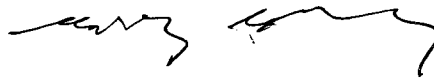
In *Sunshine Coast Parents for French v Sunshine Coast School District No 46* (1990) 49 BCLR (2d) 252 (SC), Spencer J suggested that the exercise of legislative power may become subject to the doctrine of legitimate expectations – an aspect of administrative fairness – where the body in question has undertaken by its actions to adhere to procedural rules or requirements in making legislation. Assuming this is so, an announced process or practice of public consultation in rule-making could form the basis of a challenge if the process or practice were not followed.

It is common sense that the Law Society should follow through on any process or practice of public consultation it has established. Subject to the possibility of a challenge on this basis, in my opinion, rules of natural justice or administrative fairness do not constrain the Law Society from amending Rule 2-27.

Yours truly,

Nathanson, Schachter & Thompson LLP

Per:

Two handwritten signatures in black ink, appearing to be stylized and overlapping.

GBG:

Appendix 'A' -- Relevant statutory provisions

Legal Profession Act SBC 1998, c 9

Object and duty of society

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,
- (d) regulating the practice of law, and
- (e) supporting and assisting lawyers, articulated students and lawyers of other jurisdictions who are permitted to practise law in British Columbia in fulfilling their duties in the practice of law.

Law Society rules

11 (1) The benchers may make rules for the governing of the society, lawyers, law firms, articulated students and applicants, and for the carrying out of this Act.

(2) Subsection (1) is not limited by any specific power or requirement to make rules given to the benchers by this Act.

(3) The rules are binding on the society, lawyers, law firms, the benchers, articulated students, applicants and persons referred to in section 16 (2) (a) or 17 (1) (a).

Applications for enrollment, call and admission, or reinstatement

19 (1) No person may be enrolled as an articulated student, called and admitted or reinstated as a member unless the benchers are satisfied that the person is of good character and repute and is fit to become a barrister and a solicitor of the Supreme Court.

(2) On receiving an application for enrollment, call and admission or reinstatement, the benchers may

- (a) grant the application,
- (b) grant the application subject to any conditions or limitations to which the applicant consents in writing, or
- (c) order a hearing.

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Articled Students

20 (1) The benchers may make rules to do any of the following:

(a) establish requirements, including academic requirements, and procedures for enrollment of articled students; ...

Admission, reinstatement and requalification

21 (1) The benchers may make rules to do any of the following:

(a) establish a credentials committee and delegate any or all authority and responsibility under this Part, other than rule-making authority, to that committee;

(b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court;

(c) set a fee for call and admission;

(d) establish requirements and procedures for the reinstatement of former members of the society;

(e) set a fee for reinstatement;

(f) establish conditions under which a member in good standing of the society who is not permitted to practise law, may apply to become a practising lawyer.

Law Society Rules

2-27 (1) An applicant for enrolment in the admission program may apply for enrolment at any time.

(2) [rescinded]

(3) An applicant may make an application under subrule (1) by delivering to the Executive Director the following:

(a) a completed application for enrolment in a form approved by the Credentials Committee, including a written consent for the release of relevant information to the Society;

(b) proof of academic qualification under subrule (4);

(c) an articling agreement stating a proposed enrolment start date not less than 30 days from the date that the application is received by the Executive Director;

(d) other documents or information that the Credentials Committee may reasonably require;

(e) the application fee specified in Schedule 1.

(4) Each of the following constitutes academic qualification under this Rule:

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- (a) successful completion of the requirements for a bachelor of laws or the equivalent degree from a common law faculty of law in a Canadian university;
 - (b) a Certificate of Qualification issued under the authority of the Federation of Law Societies of Canada;
 - (c) approval by the Credentials Committee of the qualifications of a full-time lecturer at the faculty of law of a university in British Columbia.
- (5) An official transcript of the applicant's grades at each faculty of law at which the applicant studied is proof of academic qualification under subrule (4)(a).
- (6) The Credentials Committee may approve academic qualifications under subrule (4)(c) if the applicant
- (a) has been a full-time lecturer at a common law faculty of law in a Canadian university for at least 5 of the last 8 years, and
 - (b) has been found by the Credentials Committee to have an adequate knowledge of the common law.

Canadian Charter of Rights and Freedoms

1 The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

2 Everyone has the following fundamental freedoms:

- (a) freedom of conscience and religion;
- (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication;
- (c) freedom of peaceful assembly; and
- (d) freedom of association.

...

15 (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

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(2) Subsection (1) does not preclude any law, program or activity that has as its object the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

...

32 (1) This *Charter* applies

(a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and

(b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.

Human Rights Code RSBC 1996, c 210

Exemptions

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.

...

Degree Authorization Act SBC 2002, c 24

Definitions

1 In this Act:

"**consent**" means a written consent given under section 4 (1);

"**degree**" means recognition or implied recognition of academic achievement that

(a) is specified in writing to be an associate, baccalaureate, masters, doctoral or similar degree, and

(b) is not a degree in theology;

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"**minister**" includes a person designated in writing by the minister for the purposes of this Act.

Granting of degrees and use of "university" restricted

3 (1) A person must not directly or indirectly do the following things unless the person is authorized to do so by the minister under section 4:

- (a) grant or confer a degree;
- (b) provide a program leading to a degree to be conferred by a person inside or outside British Columbia;
- (c) advertise a program offered in British Columbia leading to a degree to be conferred by a person inside or outside British Columbia;
- (d) sell, offer for sale, or advertise for sale or provide by agreement for a fee, reward or other remuneration, a diploma, certificate, document or other material that indicates or implies the granting or conferring of a degree.

Consent of minister

4 (1) The minister may give an applicant consent to do things described in section 3 (1) or (2) if the minister is satisfied that the applicant has undergone a quality assessment process and been found to meet the criteria established under subsection (2) of this section.

(2) The minister must establish and publish the criteria that will apply for the purposes of giving or refusing consent, or attaching terms and conditions to consent, under this section.

NATHANSON, SCHACHTER & THOMPSON LLP

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25 February 2014

BY EMAIL

PRIVILEGED & CONFIDENTIAL

The Law Society of British Columbia
845 Cambie Street
Vancouver, B.C.
V6B 4Z9

Attention: **Deborah Armour, Chief
Legal Officer**

Dear Sirs/Mesdames:

**Re: Trinity Western University: application of the
Charter**

At its meeting on 29 January 2014, the Executive Committee requested an opinion from me to supplement that portion of my opinion letter of 8 May 2013 at pages 5 to 11 where I discuss the application of the *Charter* and the decision in *Trinity Western University v BC College of Teachers* 2001 SCC 31 ('*BCCT*'). As I understand the request, it is to comment upon the differing application of the *Charter* to the Law Society and TWU and the significance of that difference. My opinion follows.

Application of the *Charter*

By s 32, the *Charter* applies to legislatures and governments in Canada but not, it has been held, to private actors; Peter Hogg, *The Constitutional Law of Canada*, 5th ed supplemented, (Toronto: Thomson/Carswell, 2013 Rel 1), p 37-29, *McKinney v University of Guelph* [1990] 3 SCR 229 at [23]-[24]. This distinction in application between 'government' and 'private' actors has given rise to an extensive and occasionally difficult jurisprudence.

It is established that professional regulatory bodies exercising statutory authority are to be considered as 'government' for this purpose, at least in respect of regulatory decisions having a public dimension; *Histed v Law Society of Manitoba* 2007 MBCA 150 at [43]; *Pridgen v University of Calgary* 2012 ABCA 139 at [88]-[93]. In my opinion, it is clear that the Law Society is governed by the *Charter* in the exercise of its statutory authority to determine who may practice law in British Columbia.

Page 2

In *BCCT* at [25], Iacobucci and Basterache JJ described TWU as ‘a private institution ... to which the *Charter* does not apply’. This is consistent with past and subsequent jurisprudence describing universities as private actors, even where they are publicly funded; *McKinney, supra*; *Harrison v UBC* [1990] 3 SCR 451 at [17]; *Lobo v Carlton University* 2010 ONSC 254. Exceptionally, where a university or other private actor is responsible for the implementation of a specific governmental program or policy, it may be considered as government and subject to the application of the *Charter* for that purpose; *Eldridge v British Columbia (Attorney General)* [1997] 3 SCR 229 at [42]-[44]. It seems doubtful that the delivery of an accredited law degree program could qualify as implementation of a specific governmental program or policy, any more than the delivery of an accredited educational degree program qualified in *BCCT*. While the law in this area continues to evolve (as discussed in *Pridgen v University of Calgary, supra*), I think it likely that TWU will continue to be viewed as a private actor not subject to the *Charter*.

To summarize, the Law Society is subject to the *Charter* while TWU is not.

Significance of the difference

The differing applicability of the *Charter* to the Law Society and TWU complicates legal analysis. Section 15 of the *Charter* prohibits discrimination. It does not apply to TWU, so the question is not: does TWU discriminate? The focus is on the Law Society and the question becomes: is the Law Society discriminating if it accepts or refuses to accept TWU graduates as qualified?

This helps to explain the approach taken by the Supreme Court of Canada in *BCCT*. Like the Law Society, the College of Teachers was subject to the *Charter*. It was required to consider the rights of gays and lesbians not to suffer discrimination in determining whether it would be in the public interest to permit public school teachers to be trained at TWU (at [27]). It was also required to consider issues of religious freedom and the right of persons attending TWU not to suffer discrimination based on religion (at [28]). The Supreme Court viewed this as a case of competing rights that had to be balanced by the College, based on the expected conduct of TWU graduates following graduation (at [36]). It held that the College’s duty under the *Charter* was to conduct that balancing exercise having regard to specific evidence of risk, not general perceptions (at [38]). As there was no evidence that training teachers at TWU fostered discrimination, the College was ordered to approve TWU’s teacher education program.

In my opinion, the same analytical framework governs the decision now confronted by the Benchers. The Law Society is governed by the *Charter* and the Benchers must therefore consider and balance the equality rights of sexual and religious minorities in their evaluation of whether approving TWU’s proposed law degree is in the public interest pursuant to s 3 of the *Legal Profession Act*. Focusing on the expected conduct of prospective lawyers following graduation, they should consider whether there is evidence, as opposed to assumptions or general perceptions, bearing on whether graduates of TWU will be inadequately qualified. As discussed at pages 10 to 11 of my earlier opinion, having regard to the breadth of the Law Society’s statutory mandate, they may also consider whether legal education, as opposed to teacher education, raises distinct issues as to the manner in which students are taught.

NATHANSON, SCHACHTER & THOMPSON LLP
BARRISTERS AND SOLICITORS

Page 3

I hope that this is of assistance.

Yours truly,

Nathanson, Schachter & Thompson LLP

Per:

A handwritten signature in black ink, appearing to be "Nathan Schachter", written over a horizontal line.

GBG:

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15 March 2014

BY EMAIL

PRIVILEGED & CONFIDENTIAL

The Law Society of British Columbia
845 Cambie Street
Vancouver, B.C.
V6B 4Z9

**Attention: Deborah Armour, Chief
Legal Officer**

Dear Sirs/Mesdames:

**Re: Trinity Western University ('TWU'): scope of
the Law Society's discretion under Rule 2-
27(4.1) and possibility of conditional acceptance**

You have requested my opinion concerning the scope of the discretion afforded the Benchers pursuant to Rule 2-27(4.1) in relation to TWU's proposed law program. Specifically, you have asked:

Would it be open to the Benchers to accept the preliminary approval of the program by the Federation of Law Societies ('FLSC') but make that acceptance conditional upon TWU abandoning the community covenant at some point in the future?

In this letter, I refer to the possible condition described in the question as the 'community covenant condition'.

Preliminary observations

In this opinion, I assume that the reader has read my opinion letter of 8 May 2013 (the 'Academic Qualifications Opinion'). I will not cover ground already canvassed in that opinion, except to the extent necessary to make this opinion intelligible. A significant legal development since that opinion is the Law Society's adoption of Rule 2-27(4.1). The decision now facing the Law Society involves the exercise of a discretion the Law Society conferred upon itself by the enactment of Rule 2-27(4.1) in September 2013. The Academic Qualification Opinion must be read in that light.

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Subject to considerations of procedural fairness, there is no objection in principle to attaching conditions to a decision to approve or not to disapprove, if the condition is a proper one. A decision to impose the community covenant condition, whether immediately or at some point in the future, is equivalent to a decision disapproving the program because of the community covenant. The question is whether this is a proper ground of disapproval under Rule 2-27(4.1).

Summary of opinion

In my opinion, the Law Society's ability to make acceptance of TWU's law program conditional upon TWU abandoning the community covenant is subject to the following constraints:

- (a) the Law Society must consider and balance the equality rights of sexual and religious minorities and would have to identify factual or legal grounds for distinguishing *TWU v BCCT* as discussed in the Academic Qualification Opinion and my supplementary opinion letter dated 25 February 2014;
- (b) under Rule 2-27(4.1), the Law Society is confined to acting on grounds that are related to the academic qualification to be offered by the proposed law program and it is not authorized to impose the community covenant condition on unrelated grounds;
- (c) the Law Society's obligation of procedural fairness to TWU would not prevent it from imposing the community covenant condition.

Overview

In the exercise of its discretion under Rule 2-27(4.1), the Law Society is subject to constraints that may be grouped under three headings:

- (d) substantive legal and constitutional constraints;
- (e) constraints imposed by the terms of Rule 2-27(4.1);
- (f) procedural constraints.

In what follows, I discuss each category in turn.

(a) Substantive legal and constitutional constraints

The Law Society is subject to constitutional constraints, by virtue of ss 2 and 15 of the *Canadian Charter of Rights and Freedoms*. These are discussed in the Academic Qualifications Opinion and my supplementary opinion letter dated 25 February 2014 dealing with the application of the *Charter* to the Law Society, and I will not repeat that discussion. In summary, as in *TWU v BCCT*, the Law Society must consider and balance the equality rights of sexual and religious minorities, and its decision may be subject to constitutional challenge if it fails to strike the correct balance. In *TWU v BCCT*, the court held that the community covenant was not a proper

Page 3

ground to refuse to approve TWU's teacher education program. The question is whether the decision faced by the Law Society is materially different.

The Law Society may be subject to substantive non-constitutional legal constraints pursuant to the *Labour Mobility Act* SBC 2009, c 20 by reason of the acceptance of TWU's degree program by some other law societies. I understand that this is the subject of an opinion you are obtaining from other counsel and refrain from further comment.

I have considered whether the Law Society is also subject to further substantive non-constitutional constraints by reason of its course of conduct and the legitimate expectations of TWU to this point. In my opinion, this is not the case for reasons discussed briefly below under heading (c), 'Procedural constraints'.

(b) Constraints imposed by the terms of Rule 2-27(4.1)

As discussed in the Academic Qualifications Opinion, the Law Society has a very broad authority under the *Legal Profession Act* to determine how and by whom lawyers are trained. It has exercised that authority in making Rule 2-27(4.1). The Law Society's rules bind the Society; *Legal Profession Act*, s 11(3). Rule 2-27(4.1) narrows and focuses the decision to be made by the Law Society. To understand the scope of the discretion conferred on the Benchers under Rule 2-27(4.1), the rule must be read in the context of the legislative scheme in which it appears.

The essential elements of the scheme are as follows:

- (a) In determining whether a person may be admitted as a member, the Benchers must be satisfied the person is of good character and repute and is fit to become a lawyer; *Legal Profession Act*, s 19(1);
- (b) The Benchers are authorized to make rules to establish requirements, specifically including academic requirements, for the enrolment of articulated students and admission of members; *Legal Profession Act*, ss 20(1)(a) and 21(1)(b);
- (c) Rule 2-27(3) requires that an applicant provide proof of academic qualification under subrule (4);
- (d) Rule 2-27(4) defines what constitutes academic qualification for the purpose of Rule 2-27, and includes successful completion of an undergraduate law degree from an approved common law faculty of law in a Canadian university (sub-rule (a)); and
- (e) Rule 2-27(4.1) stipulates when a law faculty is to be considered as approved for the purpose of Rule 2-27(4). It states:
 - (4.1) For the purposes of this Rule, a common law faculty of law is approved if it has been approved by the Federation of Law Societies of Canada unless the Benchers adopt a resolution

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declaring that it is not or has ceased to be an approved faculty of law.

Viewed in context, the focus of Rule 2-27(4.1) is on academic qualification for the practice of law rather than the character, reputation and general fitness of candidates for admission to the legal profession.

Rule 2-27(4.1) obviously permits the Benchers to disapprove a faculty of law that has been approved by the FLSC if the Benchers are not satisfied with the academic program offered by the faculty. For example, the Benchers could decide that lawyers should not be admitted to practice in British Columbia without completing a course in Aboriginal Law, even though that is not a requirement for approval of a faculty of law by the FLSC.

On the other hand, in my opinion, Rule 2-27(4.1) does not contemplate the Benchers disapproving a faculty of law that has been approved by the FLSC on a ground that is unrelated to the question of academic qualification. For example, the Benchers could not exercise their discretion to disapprove a proposed new law program on the ground that there are already too many applicants for admission having regard to the work available for lawyers in British Columbia. While such a ground of decision might well fall within the Benchers' responsibility to have regard to the public interest as set out in s 3 of the *Legal Profession Act*, it would not have anything to do with whether the proposed new law program satisfies the requirement that graduates be academically qualified for the practice of law.

At least some of the arguments against the community covenant are framed as arguments relating to academic qualification. For example, the arguments concerning academic freedom and the teaching of professional ethics concern the nature of the educational experience provided by TWU. There are other arguments in respect of which the connection is not so obvious. To the extent that the argument against TWU are not in substance arguments relating to academic qualification, they should not be relied upon as grounds for disapproval under Rule 2-27(4.1), nor could they be relied upon as grounds for the imposition of the community covenant condition.

If the Benchers were to wish to decide against TWU on a public interest ground other than academic qualification (assuming that the ground passes constitutional muster), the proper course would be to enact another rule giving them a broader discretion.

(c) Procedural constraints

If the Benchers were to wish to enact another rule to broaden their discretion, in the context of this particular decision, it would probably be necessary to give TWU notice and a fair opportunity to address the enactment, despite its legislative character, for the reasons given in the Academic Qualification Opinion at pp 16-17.

If the decision were instead to impose the community covenant condition under Rule 2-27(4.1) – assuming that is possible within the constraints identified above – the question would be whether

Page 5

TWU had a fair opportunity to address the issue. As I think that imposing a conditional disapproval must be considered as equivalent to an outright disapproval based on the community covenant, and TWU has notice of that possibility and (it is safe to assume) of all of the substantive arguments based on the community covenant, I don't consider that the imposition of the community covenant condition is likely to give rise to an issue of procedural fairness. On an application for judicial review, the issue will be whether disapproval was permitted on this ground. If the community covenant condition survives substantive challenge, a separate ground of attack that there was a lack of procedural fairness is unlikely to succeed.

There is a developing body of law in Canada that addresses whether a public authority may be substantively prevented from making a decision it would otherwise be authorized to make by reason of its conduct and the expectations that conduct has given rise to. This is the doctrine of public law estoppel. I am unaware of substantive assurances given by the Law Society to TWU that might found an application of the doctrine. Moreover, the doctrine will not be applied to circumscribe a broad statutory discretion conferred on a high-level decision-maker; *Mount Sinai Hospital Center v Quebec (Minister of Health and Social Services)* 2001 SCC 41 at [48]-[51]. In my opinion, a claim based on public law estoppel would not be available here.

Yours truly,

Nathanson, Schachter & Thompson LLP

Per:

A handwritten signature in black ink, appearing to be "Nathan", written over a horizontal line.

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March 17, 2014

Delivered by email

Privileged and Confidential

The Law Society of British Columbia
845 Cambie Street
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Attention: Deborah Armour, Chief Legal Officer

Dear Sirs/Mesdames:

**Re: Application of *Labour Mobilty Act* and the *Agreement on Internal Trade* in
 Relation to Trinity Western University's proposed Faculty of Law**

This is in response to your letter to us of February 3 wherein you had requested our opinion regarding certain aspects of the consideration by the Law Society of British Columbia ("LSBC") of the above-noted matter.

1. Factual Background

Trinity Western University ("TWU") is in the process of establishing a new School of Law at its campus in Langley. This past December the Canadian Common Law Program Approval Committee of the Federation of Law Societies (the "**Federation**") gave preliminary approval for the new Law School following an extensive review by that Committee and a Special Advisory Committee. Before the Law School can become fully accredited, each Canadian law society must individually confirm the Federation's preliminary approval. The LSBC Benchers are now considering whether to accept or to "disapprove" the Federation's preliminary approval pursuant to LSBC Rule 2-27(4.1). That Rule provides that:

 "...a common law faculty of law is approved if it has been approved by the
 [Federation] unless the Benchers adopt a resolution declaring that it is not or has
 ceased to be an approved faculty of law."

There are strong opinions on both sides of the approval issue and it may come to pass that the Benchers do decide to disapprove of the Federation's preliminary approval. This would mean that TWU law graduates would not be eligible to article in BC. However, should one or more other Canadian law societies choose to approve TWU,¹ but the LSBC does not, TWU graduates

¹ You have informed us that the Law Society of Alberta has already done so.

would still have the ability to practice law in Canada by articling in one of these other approving jurisdictions and subsequently being admitted to the bar there. Should that occur, it would be likely – perhaps inevitable - that at some time in the future a lawyer admitted to the bar of another Canadian jurisdiction on the basis of his or her TWU law degree will apply to the LSBC to transfer to and practice in BC. The LSBC would then be required to consider any such transfer application on its merits.

2. Your Specific Questions and Our Summary Responses

Generally, you have expressed concern that, were the LSBC to disapprove of the TWU Law School now, and then subsequently refuse transfer applications from TWU graduates who have been called to the bar in another Canadian jurisdiction, BC's *Labour Mobility Act*, SBC 2009, c. 20 (the "LMA") may then apply. Below we have rephrased somewhat the specific questions you have posed to us regarding the potential application of the LMA. Our summary responses then follow each question. In Part 3 below we provide a more fulsome discussion of these and certain other related issues.

2.1 What constraints, if any, are imposed on the LSBC by the provisions of the LMA (and through that Act the *Agreement on Internal Trade* (the "AIT"))? In particular, if the LSBC is applying the same requirements to all applicants, are the requirements of the LMA and AIT met? If there are constraints, do they affect the decision making process of the LSBC in this matter?

We define "constraints" here as factors that should be taken into account by LSBC in its decision-making process. Such constraints can be direct or indirect. Direct constraints are legal obligations which are directly applicable to the LSBC, such as those found in the LMA. Indirect constraints are other factors that, while not direct legal obligations, should nevertheless have some influence or effect on the LSBC's decision-making process.

The AIT is an inter-governmental "contract" among the Federal Government and the Provinces and Territories. Because the LSBC is not itself a "Party" to that contract, the AIT is not directly applicable to or binding on the LSBC. However, the AIT is binding on the Province, and, under the AIT, the Province has agreed to ensure that its regulatory bodies, including the LSBC, comply with its obligations concerning labour mobility found in Chapter Seven, and, further, to take such action as may be necessary to ensure such compliance. Taken by themselves, the applicable obligations of the AIT are clearly an indirect constraint on the LSBC here.

More importantly, in the labour mobility area, the Province has chosen to specifically implement into domestic law its obligation to ensure compliance with Chapter Seven by its regulatory bodies. It has done so through the passage of the LMA. There is no doubt that the LMA applies to the LSBC and that it imposes a clear and direct legal obligation on the LSBC to comply with Chapter Seven of the AIT. Thus, as it applies to the LSBC, the legal effect of the LMA is to convert AIT Chapter Seven from an indirect constraint into a direct constraint.

What then is the nature and extent of that constraint? Under subsection 3(1) of the LMA, any worker who holds a certification issued by another Province may apply to the applicable BC regulator for certification in the equivalent BC occupation and practice that occupation after

obtaining certification. It is thereby clear that the primary application of the LMA is to “extra-provincial applications” – that is, transfer applications from workers qualified in other Provinces. The core legal obligation imposed on regulators relating to such applications is found in subsection 3(3), which provides that, if a BC regulator receives any such application, it is obliged to consider that application in a manner consistent with the Province’s obligations under AIT Chapter Seven. Chapter Seven thereby becomes directly applicable to the LSBC. As a result, in order to understand the nature of the constraints imposed by the LMA on LSBC, one must first understand the underlying obligations found in Chapter Seven.

AIT Chapter Seven, in effect, establishes a system of immediate and automatic recognition of the occupational certifications issued by other Provinces. The Chapter’s essential obligation in this regard is found in Article 706(1), which provides that any worker certified for an occupation by a regulatory authority of one Party shall, upon application, be certified for that occupation by each other Party ***without any requirement for material additional training, education, examinations or assessments as part of that certification procedure***. BC regulators, including the LSBC, are thereby required to accept certifications issued by the regulators of other Provinces as being equivalent to their own and generally are not permitted to “look behind” those certifications and to further inquire into, for example, the underlying educational credentials of the worker, or the specific educational institution that the worker may have attended. In basic terms, this requires the LSBC to accept lawyers called to the bar in other Provinces as being fully qualified to practice law in BC without looking behind their existing certifications.

It is important to note that Article 706(1) is not a non-discrimination obligation. It does not impose an “equal treatment” requirement and the obligation cannot be met by simply providing such equal treatment. As a result, the fact that a transfer applicant is being treated the same as an applicant from BC in terms of training, education or examination requirements is not a relevant consideration under the automatic recognition obligation.

While this automatic recognition obligation is expressed in rather categorical terms, the Chapter does provide some limited exceptions. Of importance here, AIT Article 708(1) provides that any measure (that is, any requirement) that is otherwise inconsistent with the basic automatic recognition obligation of Article 706(1) will still be permissible where it can be demonstrated that: (a) the purpose of the measure is to achieve a “legitimate objective” (as defined); (b) the measure is no more restrictive of labour mobility than is necessary to achieve that legitimate objective; and (c) the measure does not create a disguised restriction to labour mobility. Note, however, that for purposes of requirement (b), a mere difference between the certification requirements of one Party relating to academic credentials or education and those of another Party will not, by itself, be sufficient to justify the imposition of additional educational requirements as necessary to achieve a legitimate objective. Rather, a Party wishing to impose any such additional measures must be able to demonstrate that an actual, material deficiency in skills, area of knowledge or ability results from that difference – that is, in order to successfully invoke Article 708, there must be an actual deficiency, it must be material and it must be demonstrable.

Applying these basic direct constraints to this situation, we believe it clear that, if the LSBC were to impose any additional educational requirements on TWU graduates called to the bar in another

Province because of perceived educational deficiencies (a degree from a law school not accredited in BC), such action would be inconsistent with Article 706(1).² It would not be relevant that the LSBC is also imposing that same educational requirement on initial applicants from BC.

Whether Article 708 could then be successfully relied upon to shield that inconsistency would depend on a number of factors. It is clear, however, that, at a minimum, in order to do so, it would be necessary for the LSBC to demonstrate that there is an actual material difference in educational outcomes between the TWU Law School and other accredited law schools, and that an actual, material deficiency in skills, area of knowledge or ability results from that difference. As is explained in greater detail below, while perhaps not impossible, we do believe that it would likely be difficult for the LSBC to meet the requirements of Article 708 in these circumstances.

Assume for discussion that the LSBC is of the view that it has identified an actual material difference in educational outcomes and concludes that this difference does lead to an actual, material deficiency in skills, area of knowledge or ability in TWU graduates. Relying on the exception in Article 708, the LSBC then wishes to refuse automatic recognition of any TWU graduates called to the bar in any other Province and to impose certain additional educational requirements aimed at addressing those perceived deficiencies. Before it is able to do so, the additional obligations of section 2 of the LMA must be met. That section requires that any the regulatory authority wishing to impose any additional requirement for purposes of pursuing a legitimate objective must first seek and obtain ministerial approval for that additional requirement from both the Minister of Jobs, Tourism and Skills Training (who has been assigned responsibility for the LMA), and the Minister responsible for that specific regulatory authority (the Minister of Justice in the LSBC's case).

There is no guarantee that such Ministerial approval could be obtained here, and without such Ministerial approval, no additional requirements could legally be imposed by the LSBC. The views of the Minister of Jobs, Tourism and Skills Training and the Minister of Justice on this issue therefore constitute a further potentially significant indirect constraint on the actions of the LSBC here.

2.2 If the LMA does not impose (direct) constraints on the LSBC, might there nevertheless be legal consequences for the LSBC if the benchers “disapprove” the Federation’s preliminary approval of TWU such as potential action by the BC Government?

As discussed above, we are of the view that the LMA and, through it, the AIT, impose some significant direct and indirect constraints on the LSBC in this situation. The first part of this question is therefore moot. However, in spite of these constraints, it is at least possible that the LSBC may choose a course of action that is not consistent with the requirements of the LMA – for example, it chooses to implement further educational requirements on TWU graduates without

² It must be recognized here that it may not be the LSBC's disapproval of TWU that causes issues here as much as it is the approval of TWU by one or more other Provinces. If a consensus was reached among law societies not to approve of TWU, the potential problems for the LSBC under the LMA relating to TWU law degrees would disappear.

first seeking Ministerial approval, or it unsuccessfully sought Ministerial approval, but chose to adopt the additional requirements notwithstanding that refusal. It is also possible that Ministerial approval for the additional requirements is obtained but one or more applicants that are subject to them, or another AIT Party, disputes their consistency with the LMA and/or AIT Chapter Seven. What potential legal consequences might result under the LMA or the AIT?

The LMA provides two potentially relevant remedies. First, any applicant affected by such additional requirements would have the ability under the LMA to seek judicial review of those requirements to assess their consistency with the LMA and AIT Chapter Seven. Second, the responsible Minister (the Minister of Justice in the LSBC's case) has the ability to effectively direct the LSBC to comply with the LMA and Chapter Seven, and to issue her own legally consistency requirements in the event that the LSBC still refuses to comply with her direction.

In addition, the AIT allows for both other AIT Parties and affected individuals to challenge the additional requirements as being inconsistent with the Province's obligations under Chapter Seven. In the event the Province is determined to be in violation of its obligations under Chapter Seven in a dispute initiated by another Party, and the Province does not then bring itself into compliance within the stipulated time period, it could be ordered pay financial penalties of up to \$5 million. In light of the explicit powers granted to the Province under the LMA, we consider unlikely that the Province would ever allow itself to be put in a position where financial penalties were ordered against it for the continued non-compliance of the LSBC.

3. Discussion

3.1 Background to the LMA and its Application to the LSBC

Before discussing the LMA in detail we believe it is first useful to understand the historical and legal context that led to its introduction.

The AIT entered into force on July 1, 1995. Primarily as a result of the then-recently negotiated *North American Free Trade Agreement*, there was a growing perception that under Canada's international trade agreements some foreigners were entitled to receive better treatment in Canada than that being extended to other Canadians. The AIT was an attempt by the Federal and Provincial governments to address this issue and perceived barriers to the free movement of goods, services, investment and labour within Canada. Chapter Seven of the AIT specifically attempted to address issues relating to labour mobility and to facilitate the intra-Canadian movement of certified workers among Provinces.

The approach initially utilized in AIT Chapter Seven was that of voluntary harmonization through negotiation amongst applicable regulatory authorities. The various bodies that regulate trades and professions within Canada were encouraged to negotiate, on a voluntary basis, the harmonization of their differing occupational standards. Labour mobility was expected to automatically follow once occupational standards were generally the same across Canada. For the most part, this approach proved futile and, after over 15 years of effort, little appreciable progress had been made on the goal of regulatory harmonization for most regulated trades and professions.

Frustrated by the lack of real progress, Canadian Premiers and Territorial leaders finally rejected the voluntary harmonization approach in favour of an entirely different approach based on mandatory, immediate and automatic mutual recognition. Premiers agreed to a complete renegotiation of AIT Chapter Seven, stating that this revised Chapter Seven would be required to:

“...provide that any worker certified for an occupation by a regulatory authority of one province or territory shall be recognized as qualified to practice that occupation by all other provinces and territories. Premiers further directed that any exceptions to full labour market mobility will have to be clearly identified and justified as necessary to meet a legitimate objective such as the protection of public health or safety.

By the 2009 summer meeting of the Council of the Federation, these amendments will result in mutual recognition of occupational credentials between all provinces and territories.”³

As directed, the revised Chapter Seven came into effect on August 11, 2009 through the AIT’s Ninth Protocol of Amendment. The Premiers’ direction regarding the purpose of the revised Chapter was then directly incorporated into the Chapter through its new purposive clause, Article 701, which provides:

“The purpose of this Chapter is to eliminate or reduce measures adopted or maintained by the Parties that restrict or impair labour mobility in Canada and, in particular, to enable any worker certified for an occupation by a regulatory authority of one Party to be recognized as qualified for that occupation in all other Parties.”

The purpose of the new AIT Chapter Seven is one thing; its applicability to the LSBC is another. The AIT is an agreement among the Federal Government, all Provinces and most Territories.⁴ The LSBC has not signed the AIT, it is not a “Party” to it and, strictly speaking, it is not directly “bound” by it. However, under the AIT, the Province has explicitly accepted responsibility for compliance with Chapter Seven by all of BC’s “non-governmental bodies that exercise authority delegated by law”, including the LSBC.⁵ The Province has further agreed to adopt and maintain such measures as may be required in order to ensure such compliance.

³ The Council of the Federation, “Press Release: Successful Fifth Annual Summer Meeting of the Council of the Federation”, July 18, 2008.

⁴ Nunavut has not signed the AIT but holds “observer” status.

⁵ BC’s obligation to ensure compliance with Chapter Seven by regulatory authorities such as the LSBC flows from the combination of AIT Articles 102 and 703. Article 102(1)(c) provides that each Party is responsible for compliance with the Agreement by its non-governmental bodies that exercise authority delegated by law, but only to the extent specifically provided for in the Agreement. Article 703(1)(a) then provides that, for purposes of Article 102, each Party shall, through appropriate measures, ensure compliance with Chapter Seven by those non-governmental bodies that exercise authority delegated by law. For purposes of Chapter Seven, the term “non-governmental body” is defined in Article 711 to include professional regulatory bodies. The phrase “non-governmental body that exercises authority delegated by law” is then further defined to mean any non-governmental body to whom authority has been delegated by statute to set or implement measures related to: (i) occupational standards or certification requirements; (ii) assessment of qualifications; or (iii) official recognition that an individual meets established occupational standards or certification requirements. There appears little doubt that the LSBC is a non-governmental body that, through section 3 of the *Legal Profession Act*, exercises authority delegated to it by

In the labour mobility area the Province has chosen to directly implement its obligations to ensure compliance with Chapter Seven into domestic law through the adoption of the LMA.⁶ In a “Q&A” document that was issued in conjunction with the passage of the LMA, the Province explained the purpose of the LMA as follows:

“Why is legislation necessary? Doesn’t the Agreement on Internal Trade itself grant labour mobility rights?

- While the AIT is an agreement between governments, the Labour Mobility Act imposes the obligation on regulators within the Province to operate in a manner consistent with the Province’s obligations relating to labour mobility under the AIT.
- Without the legislation, the Province would be less able to hold regulators to account for labour mobility. As self-governing entities, it is the regulators who have the power to make decisions regarding certification, and not the Province.”⁷

Thus, it is clear that the Province has adopted the LMA specifically to provide it with the direct legal ability to ensure BC’s occupational regulators operate in a manner consistent with the Province’s obligations under AIT Chapter Seven. Moreover, as is discussed further below, the LMA specifically requires compliance with the obligations of AIT Chapter Seven. Consequently, it is first necessary to understand the obligations of AIT Chapter Seven before one can fully appreciate the effect and application of the LMA to the LSBC. We therefore first discuss the applicable obligations of Chapter Seven before discussing the application of the LMA to the LSBC in these circumstances.

3.2 Does AIT Chapter Seven Apply to LSBC’s Development of Occupational Standards in the First Instance?

Although you have not directly questioned us regarding this issue, in light of its history and the background, one may first query as to whether AIT Chapter Seven applies to the LSBC in its development of occupational standards in the first instance – that is, separate and apart from any subsequent specific decision on a transfer application received from a TWU graduate, does Chapter Seven not apply to the LSBC’s initial decision to approve or disapprove of the proposed TWU Law School?

While there are some obligations in Chapter Seven concerning the initial development of occupational standards by regulatory bodies (which would include the consideration and accreditation of educational institutions), in our view these obligations are largely hortatory in nature and are not of material concern (or a direct constraint) in these circumstances.

Provincial statute to, *inter alia*, establish occupational standards for lawyers and officially recognize that individuals meet those standards. Therefore, we believe it clear that the Province has agreed to ensure that the LSBC complies with AIT Chapter Seven.

⁶ BC is not the only province that has adopted labour mobility legislation to directly implement its obligations under AIT Chapter Seven. Other provinces, including Ontario, Manitoba and PEI, have passed similar legislation.

⁷ Government of British Columbia, “*Labour Mobility Act: Questions and Answers*” (undated), at page 4.

To understand Chapter Seven's obligations relating to the development of occupational standards, some further context is first necessary. One of the AIT's so-called "General Rules" concerns reconciliation. Article 405 states that, in order to provide for free movement of persons, goods, services and investments within Canada, the Parties shall, in accordance with a process established in Annex 405.1, reconcile their standards and standards-related measures by harmonization, mutual recognition or other means. However, this general reconciliation obligation specifically does not apply to measures covered by Chapter Seven generally, or to occupational standards specifically.⁸ Rather, in Chapter Seven the Parties have agreed to a less onerous obligation. Article 707(1) provides that each Party may adopt or maintain any occupational standard and, in doing so, may establish the level of protection that it considers appropriate in the circumstances. In other words, a mandatory reconciliation obligation generally does not apply to occupational standards and, if one Party believes a higher degree of protection is necessary in the circumstances, it remains free to pursue that higher level of protection through a different or more onerous occupational standard. Instead of full reconciliation, Parties have agreed to a cooperative approach, to reconcile differences only "to the extent possible and where practical". Further, Parties have agreed to adopt occupational standards based on common interprovincial standards, also only "to the extent possible and where practical".

In light of the fact that the mandatory reconciliation obligation of Article 405 does not apply, that Parties are specifically accorded the continued freedom to adopt the level of protection that they consider appropriate in the circumstances, and that reconciliation is only required "to the extent possible and where practical", it is reasonable to conclude that there can be no mandatory obligation on the LSBC in the circumstances to harmonization or reconcile its occupational standards, including those relating to approved law schools, with those of other Provinces. The LSBC remains able to chart its own course on its occupational standards if it believes a higher level of protection is justified in the circumstances. While it should remain cooperative and open to discussions with other law societies on the issue, we do not believe that there is anything in Article 707(1) which mandates reconciliation with other Provinces.

Note too that where a Party finds it necessary to make changes to any existing standards, such as increasing the level of protection, that modification *process* is required to occur in a manner conducive to labour mobility, and, under Article 707(5), a Party intending to make such changes is required to notify the other Parties of the modification and afford them an opportunity to comment on it. This notification obligation is intended to contribute to increased transparency and the development of collaborative approaches to occupational standards. In the event that the LSBC did decide to disapprove of the TWU Law School we believe that such action likely constitutes a modification of the LSBC's occupational standards, and the notification obligation would thereby be triggered. However, compliance could be easily achieved here by notifying the other law societies of the LSBC's disapproval decision and providing them with the opportunity to comment on that decision before it becomes final.

Finally, it is also important to understand that this relative freedom regarding the establishment of, or changes to, occupational standards remains consistent with the Premiers' direction on

⁸ An "occupational standard" is defined in Article 711 to mean "...the skills, knowledge and abilities required for an occupation as established by a regulatory authority of a Party and against which the qualifications of an individual in that occupation are assessed."

labour mobility. A Party's ability to chart its own course on occupational standards where considered necessary does not relieve that Party from the much more important and overarching bedrock obligation of Chapter Seven - the mandatory, immediate and automatic recognition of the occupational standards of other Provinces. Thus, the automatic recognition obligation can be seen as imposing a significant indirect constraint on the development and implementation of occupational standards in the first instance. Parties can avoid issues regarding the application of the automatic recognition obligation if they work cooperatively in their development and implementation of occupational standards in the first instance.

In sum, subject to the notification obligation, it is our view that the obligations of Article 707 do not impose any material direct constraints on the LSBC's *initial decision* as to whether it approves or disapproves of TWU's accreditation.⁹ The noted indirect disciplining effects of the automatic recognition obligation are further elaborated upon below.

3.3 The Basic Labour Mobility Obligations of Chapter Seven

As we note, AIT Chapter Seven imposes an "automatic recognition" type system under which worker certifications issued by regulators in one Province are to be automatically recognised in all other Provinces. Mirroring the Premiers' direction in this regard and the Chapter's purposive clause, AIT Article 706(1) provides the specific obligation, stating that:

"...any worker certified for an occupation by a regulatory authority of a Party shall, upon application, be certified for that occupation by each other Party which regulates that occupation without any requirement for material additional training, education, examinations or assessments as part of that certification procedure."

Canada's Labour Ministers have elaborated on this obligation by noting:

"...governments of provinces and territories have agreed to certify a worker who is already certified in the same occupation in another jurisdiction without any requirement for material additional training, experience, examination or assessment. **This obligation exists, for example, even if training or education requirements are different between provinces/territories, or even if**

⁹ Note, the one caveat to this conclusion relates to obligations the Province owes to Alberta and Saskatchewan under another agreement - the *New West Partnership Trade Agreement* ("NWPTA"). Similar to the AIT, the NWPTA is an "internal" trade agreement among only BC, Alberta and Saskatchewan which is intended to build and improve upon the AIT. Much of the new AIT Chapter Seven has effectively been incorporated into and comprises NWPTA's labour mobility obligations. The two agreements are thus substantially similar in many respects in the area of labour mobility. However, the area of occupational standards has been treated somewhat differently under NWPTA. Similar to AIT Article 405, NWPTA Article 5(1) provides that Parties are generally required to "mutually recognize or otherwise reconcile" their existing occupational standards, and are not to establish any new occupational standards that operate to restrict or impair labour mobility. This obligation is then subject to NWPTA's legitimate objectives exception, which is substantially similar to AIT Article 708, discussed below. Thus, there may be a NWPTA obligation on the Province in the circumstances to subsequently work with Alberta and Saskatchewan to mutually recognize or reconcile potentially differing occupational standards as they relate to the TWU law degree, unless the Province is able to successfully invoke NWPTA's legitimate objectives exception. The issues relating to application of that exception in the circumstances are discussed below. Unlike the AIT, the obligations of the LMA are not directly tied to NWPTA and therefore any potential violation of the NWPTA obligation would not give rise to any issues under the LMA.

examination or assessment requirements are different between provinces/territories. Therefore, subject to the application of other provisions of the Chapter, a worker who is certified for an occupation in one province or territory and who wishes to be recognized as qualified for that occupation in any other province or territory shall, upon receipt of a completed application, be certified by that receiving province or territory in a timely manner.”¹⁰ [emphasis added]

As a general proposition it can therefore be stated that, under Article 706(1), BC regulators are required to accept certifications issued by the regulators of other Provinces as being equivalent to their own and are not permitted to “look behind” those certifications and to inquire into, for example, the underlying education of the worker, or the specific educational institution that the worker may have attended.

It is important to note that Article 706(1) is not a non-discrimination obligation – that is, it does not impose an “equal treatment” requirement and the obligation cannot be met by simply providing such equal treatment. While AIT Chapter Seven does also contain such a general non-discrimination obligation, that obligation is in addition to and operates separate and apart from automatic recognition under Article 706(1). As a result, the mere fact that there is no discriminatory treatment and a transfer applicant is being treated the same as an applicant from BC in terms of educational or other requirements is not a relevant consideration in determining whether the automatic recognition obligation is being met.

3.4 The “Legitimate Objectives” Exception

While the automatic recognition obligation is expressed in rather categorical terms, there are some limited exceptions to it.

First, there are a series of exceptions in Article 706 that address potential application requirements that are unrelated to training, education, examinations or assessments. Under Articles 706(3) and (4), these permissible additional requirements include, for example, those relating to “currency of practice”,¹¹ criminal background checks and proof of “good character”.¹² Subject to some disciplines, it therefore remains permissible for regulatory authorities to continue impose additional requirements on extraprovincial applicants unrelated to their training and education. However, we do not consider any of those exceptions to be directly applicable in the circumstances.

¹⁰ Forum of Labour Market Ministers, Labour Mobility Coordinating Group, “Guidelines for Meeting the Obligations of the Labour Mobility Chapter”, July, 2009, at page 14.

¹¹ While these exceptions have not yet been considered by any AIT dispute settlement panel, they have been considered in Ontario under Ontario’s similar labour mobility legislation, the *Ontario Labour Mobility Act, 2009*. In *Hine v. College of Respiratory Therapists of Ontario*, 2011 CanLII 4385 (ON HPARB), the Ontario Health Professions Appeal and Review Board (“OHPARB”) concluded (correctly, in our view) that, under Article 706(4), non-discriminatory requirements related to currency of practice remain permissible notwithstanding the automatic recognition obligation in Article 706(1).

¹² Similar to the Hine case, in *Kathirgamanathan v. College of Physicians and Surgeons of Ontario*, 2013 CanLII 1217 (ON HPARB), the OHPARB concluded (again correctly, in our view), that under Article 706(3), non-discriminatory requirements relating to proof of good character also remain permissible notwithstanding the automatic recognition obligation in Article 706(1).

A second more potentially relevant exception is found in Article 708. Known as the “legitimate objectives” exception, Article 708(1) provides that a measure (that is, any requirement) that is otherwise inconsistent with the basic automatic recognition obligation of Article 706(1) will still be permissible where it can be demonstrated that:

- (a) the purpose of the measure is to achieve a “legitimate objective”;¹³
- (b) the measure is no more restrictive to labour mobility than necessary to achieve that legitimate objective; and
- (c) the measure does not create a disguised restriction to labour mobility.

The application of this exception is further clarified in Article 708(2), which states that, with regard to the applicability of paragraph (b) above, a mere difference between the certification requirements of one Party relating to academic credentials, education, training, experience, examination, or assessment methods and those of another Party is not, by itself, sufficient to justify the imposition of additional education, training, experience, examination, or assessment methods as necessary to achieve a legitimate objective. In the case of any such difference relating to academic credentials, education, training or experience, the Party seeking to impose any additional requirement must be able to further demonstrate that *the difference at issue results in an actual material deficiency in skill, area of knowledge or ability*.

In order to enhance transparency regarding reliance on Article 708(1), Article 708(3) further provides that, where a Party purports to adopt or maintain any measure under the legitimate objectives exception, it must give written notice thereof to Canada’s Forum of Labour Market Ministers.¹⁴ That notice must be in the required form and must include a description of the Party’s justification for the exception and its anticipated duration.¹⁵

¹³ “Legitimate objective” is defined in Article 711 to mean one or more certain specified objectives pursued within the territory of a Party. This list includes, most importantly, the protection of human life or health. While there is no specifically enumerated objective relating to, for example, the protection of human rights or the prevention of discrimination, we consider that the specified objective of protection of human life and health would most likely be interpreted to include such other human-rights-related objectives.

¹⁴ The Forum of Labour Market Ministers is comprised of all of Canada’s labour ministers at the Provincial, Territorial and Federal level and was established in 1983 to promote national discussion and cooperation on labour-related issues. Under Article 709 the Forum is generally responsible for the implementation and administration of Chapter Seven.

¹⁵ For example, under Article 708(3) all common law jurisdictions including BC have each submitted a “Notice of Measure to Achieve a Legitimate Objective” regarding lawyers from Quebec. In BC’s case the Notice states that:

“... additional training and/or examinations are required for lawyers from Quebec (members of the Barreau du Quebec) so as to ensure competency in provincial common law. British Columbia has a common law legal system whereas Quebec has a civil law system. There are significant differences in the foundational principles of the two legal systems and in the way the law is developed and codified. A person trained to practise law under one legal system will not possess the knowledge or expertise to practise in the other system.”

Quebec has submitted a reciprocal Notice regarding lawyers from all common law jurisdictions. To date, a total of only 42 individual Notices have been filed under Article 708(3), with the Notices relating to lawyers accounting for

To date, only one AIT dispute settlement panel¹⁶ has had the opportunity to consider the application of the new Article 708 exception.¹⁷ The dispute involved measures applied by Ontario to out-of-Province Certified General Accountants (“CGAs”). In effect, Ontario had refused to recognize CGAs certified in other Provinces as being qualified to practice public accounting in Ontario. The Panel concluded that Ontario’s refusal to accept the CGA certifications issued by other Provinces was a clear violation of automatic recognition obligation in Article 706(1). Turning to the application of Article 708, the Panel stated that, as an exception, Article 708 must be “narrowly construed and strictly applied” so as to ensure that the integrity of the basic recognition obligation was maintained. It further stated that:

“In this dispute the Respondent asserts that it requires a specific set of standards to protect consumers of public accounting services in Ontario. It claims that the standards for certification of CGA’s in other provinces are inadequate to protect Ontario consumers. However, the other Parties also claim they place an equally high priority on consumer protection in their regulatory regime and that their own standards are sufficient to accomplish that objective...

If the debate on consumer protection is to centre on whose system protects consumer interests better, it is difficult to understand how Chapter Seven can have any meaningful positive impact on labour mobility...

An important issue with respect to Article 708 is onus. It is not sufficient to simply state that a legitimate objective exists. A Party must clearly demonstrate its necessity. The Premiers’ Communique of July 18, 2008 stated that exceptions must be ‘clearly identified and justified as necessary to meet a legitimate objective’.

...

The conclusion the Panel draws is that the onus falls on the Respondent to justify its Notice of Measure. In doing so, it must do more than allege or surmise. It must substantiate that its Notice of Measure is necessary to protect consumers. It falls to the Respondent to demonstrate the failings in the other jurisdictions. The onus is not on the Complainant or the other provinces to prove they have an adequate system in place to protect consumer interests. Nor is the onus on the individual certified in another province to prove to Ontario that he or she has a certain level of skill, area of knowledge or ability.”¹⁸

The Panel did find that there were differences in the educational requirements or “pathways” between Ontario and other Provinces; however, relying on the clarification provided in Article 708(2) regarding the application of the legitimate objectives exception, the Panel further concluded that:

12 of those. The majority of the remaining 30 Notices are in health-related occupations and primarily concern scope-of-practice differences. The only Notice BC has filed is the one quoted from above relating to lawyers from Quebec.

¹⁶ The AIT’s dispute settlement process is briefly outlined below in section 3.7.2.

¹⁷ There have only been two AIT cases in total that have addressed issues arising under the new Chapter Seven. The second case, involving an individual from Quebec who challenged certain Ontario certification requirements relating to crane operators, specifically did not consider the application of Article 708 to the measures at issue. See *Report of the Article 1716 Panel Concerning the Dispute Between Mr. X, a Private Person from Quebec, and Ontario Regarding a Crane Operator Certification*, 23 February 2012.

¹⁸ *Report of Article 1703 Panel Regarding the Dispute between Manitoba and Ontario Concerning Ontario’s Notice of Measure with respect to Public Accountants*, 13 January 2012, at pages 10-11.

“Identifying a difference is not sufficient. The Party imposing the measure must be able to demonstrate that there is an actual, material deficiency in skills, area of knowledge or ability. There must be a deficiency, it must be actual, and it must be material. In this dispute, the Respondent bears the burden of meeting that requirement.

...

In the introduction to this section of the Report, the Panel concluded that the bar to justify exceptions to the objective of labour mobility is a high one... [I]t also concluded that the use of Article 708 should be narrowly construed and strictly applied. On that basis, the Panel has been looking for real factual confirmation that there is an actual material deficiency in skills, area of knowledge or ability of CGAs from Manitoba and the rest of Canada.

The Panel also is of the opinion that focussing only on the education pathway is insufficient to demonstrate an actual material deficiency in skills, area of knowledge or ability. Certification can also involve work experience and training. There is no indication that the Respondent...investigated any of those components of the certification process in other provinces to determine if a perceived shortcoming in the education pathway might have been offset by the work experience and training requirements of the certification process.”¹⁹

It also important to note that, while only one AIT panel has had the opportunity to consider the new Article 708, since the AIT initially came into effect in 1994 a number of dispute settlement Panels have been established to consider disputes between Parties concerning various other AIT obligations. Almost invariably, the application of a substantially similar legitimate objectives exception has been an issue raised by the responding Party in each of these cases. However, to date, in none of these cases has the legitimate objectives exception ever been successfully invoked by the responding Party.

Thus, to summarize with regard to Article 708:

- The bar to utilizing Article 708 is high. As an exception, it will be narrowly construed and strictly applied;
- The Party attempting to rely on the exception bears the burden of “demonstrating” or proving that all of the requirements of the exception are fully satisfied. The onus is not on the worker or the other jurisdiction to demonstrate substantial equivalency;
- The demonstrable purpose of the measure at issue must be to achieve one or more of the specified “legitimate objectives” (such as the protection of human life or health);
- The measure at issue must not be more restrictive of labour mobility than is necessary in the circumstances. This means that identifying a mere difference in occupational standards or certification requirements between jurisdictions will not be sufficient. The Party wishing to impose the additional requirement must be able to further demonstrate that an actual, material deficiency in skills, area of knowledge or ability results from that difference – that is, there must be an actual deficiency, it must be material and it must be demonstrable; and

¹⁹ *Id.*, at 14.

- The measure must not otherwise create a disguised restriction on labour mobility.

3.5 Application of Chapter Seven to the LSBC

For discussion purposes, at this point we assume that the LSBC has chosen to disapprove of TWU's Law School. It is then subsequently presented with an inter-Provincial transfer application from a TWU graduate called to the bar in another Province. Based on its prior disapproval decision, the LSBC rejects that application on the basis that the applicant has not met the LSBC's educational requirements – that is, the applicant has not graduated from an approved law school. Such action would clearly involve the LSBC “looking behind” the applicant's existing certification obtained in another Province so as to directly assess the applicant's education. In our view there is no question that such an individual assessment of the transfer applicant's educational credentials would be inconsistent with Article 706(1). The fact that the underlying educational requirement being applied to the transfer applicant is the same as that which is imposed by the LSBC on initial applicants from BC is not a relevant consideration under Article 706(1).

The question then becomes, would such an otherwise inconsistent action be permissible under the Article 708 legitimate objectives exception? In this regard at least some claims have been made that a TWU legal education will be materially different from that of the other currently accredited publicly-funded law schools, and that such differences will lead to certain deficiencies in educational outcomes. For example, the Federation's Special Advisory Committee had noted that:

“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.”²⁰

If such material differences in educational outcomes do, in fact, exist, and they do, in fact, lead to demonstrable material deficiencies in skills, knowledge or ability, then such educational deficiencies could potentially provide a defensible basis for the LSBC to take some form of action under Article 708 to address those actual demonstrable deficiencies. We caution, however, that, bearing in mind the restrictive nature of the exception and its past application, we do see a number of clear potential issues related to any such reliance on Article 708 in this situation.

First, any alleged deficiencies must be “demonstrated” or proven to exist. Mere conjecture is not sufficient. In this regard, the Special Advisory Committee, after reviewing all of the arguments relating to such alleged deficiencies in educational outcomes, wholly dismissed them. It concluded that:

“...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

²⁰ Special Advisory Committee on Trinity Western's Proposed School of Law, “Final Report”, December, 2013, at page 11.

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. 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.

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. 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.”²¹ [internal footnotes deleted]

Not only do we believe that it will be inherently difficult to demonstrate that such deficiencies in educational outcomes actually exist, but the LSBC may be taking disapproval action now, before operation of the Law School has even commenced and before any graduates (with or without such deficiencies) have been produced, meaning that the LSBC would be making its initial disapproval decision unsupported by any positive evidence that such alleged educational deficiencies actually exist. For purposes of Article 708, this lack of positive evidence will most certainly cloud the application of the disapproval decision to specific transfer cases in the future and complicate its defensibility.

Second, while a demonstrated deficiency could form the basis of some form of permissible action under Article 708, it must be borne in mind that any such action must still be no more restrictive of labour mobility than is necessary to achieve the legitimate objective. The use of the phrase “no more restrictive than necessary” in this context demands a degree of proportionality and direct connectivity between the demonstrated deficiency and the action being taken to address it. To our knowledge, even the harshest critics do not allege that the entire TWU degree would be defective to its core; they allege only that certain aspects of that education will be deficient. This being the case, we consider it highly unlikely that certain demonstrated deficiencies in only some aspects of a TWU legal education could be used successfully to justify a complete rejection of the entire TWU degree. Rather, a more focused approach which specifically identified the demonstrated deficiencies and then prescribed targeted proportional remedies aimed at only

²¹ *Id.*, at page 12.

curing those specific deficiencies would stand a far better chance of being successfully defended under Article 708.

For example, if deficiencies in educational outcomes relating to constitutional law, legal ethics or human rights were demonstrated to actually exist, the LSBC could mandate that applicants undertake remedial education at an accredited law school in only those specific subject areas. (We understand that a similar approach is taken in the case of transfer applicants from other non-Canadian jurisdictions.) With such an approach the LSBC would at least have more reasonable arguments available to it that the measures adopted were no more restrictive than necessary to achieve the legitimate objective at issue.

Third, even if certain deficiencies in educational outcomes are proven to exist, we believe that the LSBC would still be required to undertake a more holistic approach to the assessment of a transfer applicant than simply basing its decision on only the applicant's TWU degree. As was noted by the Panel in the CGA case, focussing only on the educational pathway is insufficient to demonstrate a material deficiency in skills, area of knowledge or ability actually exists. Certification can also involve additional work experience and training, or, perhaps more importantly, any identified deficiencies in educational outcomes may still be overcome through additional training that occurs as part of the articling process or post-call work experience. Does articling sufficiently address those deficiencies? If not, does two, five or ten years of practice? In order to successfully defend any additional educational requirement under Article 708 the LSBC would need to fully consider this issue and determine the extent to which any demonstrated deficiencies in educational outcomes can be or are remedied through work experience.

Finally, in order to fully comply with the obligations of Chapter Seven, in the event that the LSBC did decide to impose any type of additional education requirements on TWU graduates, the Province would be required to post a Notice of Measure to Achieve a Legitimate Objective under Article 708(3) regarding such additional requirements.

3.6 Applicable Provisions of the Labour Mobility Act

Having generally discussed the applicable obligations of AIT Chapter Seven, we now turn to discuss the application of the LMA to the LSBC in the circumstances. As we note, through the LMA, the Province has chosen to directly implement the obligations of Chapter Seven into domestic law so as to ensure compliance with those obligations by its regulatory bodies, including the LSBC.

Under subsection 3(1) of the LMA, any worker who holds a certification issued by another Province in relation to an "extraprovincial occupation"²² may apply to the "applicable BC regulator"²³ for certification in the BC equivalent occupation and practice that occupation after

²² An "extraprovincial occupation" is defined in section 1 to mean an occupation in relation to which a worker holds a certification in a Canadian jurisdiction other than BC. It is clear that this captures lawyers called to the bar in other Provinces.

²³ An "applicable BC regulator" is defined in section 1 to mean, in relation to an occupation, the regulatory authority that is authorized to issue certification in BC in relation to that occupation. When considered in light of the

obtaining certification. The principle obligation imposed by the LMA on BC regulators to then comply with AIT Chapter Seven when processing such applications is found in subsection 3(4), which provides:

“If a regulatory authority that is authorized to issue certification in British Columbia in relation to an occupation is provided with an application in relation to that occupation under subsection (1)(a), the regulatory authority

- (a) ***must consider and determine the application in a manner consistent with the government’s obligations under Chapter Seven of the Agreement,***
- (b) must issue any certification required by Chapter Seven of the Agreement, and
- (c) may impose on any certification issued in response to the application any terms, conditions or requirements that the regulatory authority is authorized to impose on the certification in accordance with one or more of the following:
 - (i) Chapter Seven of the Agreement;
 - (ii) this Act or the governing Act, or any regulation, bylaw, rule, resolution or measure under this Act or the governing Act, to the extent that those terms, conditions or requirements are not inconsistent with the government’s obligations under Chapter Seven of the Agreement.” [emphasis added]

In other words, there is no question that, when the LSBC receives an application for certification from a lawyer certified (called to the bar) in another province, it is, by law, required to process that application and issue certification in accordance with the Province’s obligations under AIT Chapter Seven. Based on our discussion above concerning those obligations, this means that: (1) generally, subject to the specified exceptions, the LSBC must grant the requested certification without requiring any material additional training, education, examinations or assessments as part of that application; and (2) the LSBC may be permitted to impose material additional education or training in those circumstances where it is able to demonstrate that there is an actual, material deficiency in skills, area of knowledge or ability that has resulted from a difference in the educational requirements between the worker’s certifying jurisdiction and those applicable in BC (that is, where the additional educational requirement complies with the Article 708 exception).

As a result of subsection 3(4), our discussion above concerning the application of Chapter Seven to this situation is directly applicable. In order to comply with its obligations under that subsection, in the event that the LSBC decides to disapprove of TWU’s Law School and impose additional educational requirements on TWU graduates called to the bar in other Provinces, it will need to be able to demonstrate that the obligations of the Article 708 legitimate objectives exception are fully met.

3.7 The LMA’s Additional Obligation to Seek Ministerial Consent

Over and above the obligations of subsection 3(4) of the LMA regarding compliance with AIT Chapter Seven, it is important to note that, where any regulatory authority that is ***proposing*** to

concomitant definitions of “regulatory authority” and “occupation” there is little doubt that the LSBC is the “applicable BC regulator” under the LMA for purposes of the occupation of lawyer.

apply any measure that it claims is justified under Article 708(1), the authority must first comply with the additional approval requirements found in section 2 of the LMA. That section provides that:

“An applicable BC regulator *must not propose or apply*, in relation to any occupation or an application for certification in relation to an occupation, a measure that constitutes an inconsistent measure referred to in paragraph 1 of Article 708 of the Agreement, *unless that measure is approved* by both the minister charged with administration of this Act and the minister responsible for the Act under which the occupation is or may be regulated.” [emphasis added]

Before any such measure is proposed or applied the regulatory authority must first seek the approval of both the Minister of Jobs, Tourism and Skills Training (who has been assigned responsibility for the LMA), and the Minister responsible for that specific regulatory authority (the Minister of Justice, in the case of the LSBC).²⁴ This provision is intended to enhance transparency and serve as an “early warning” system for the Province. By requiring regulatory authorities to first seek approval for any such measure, the Province is better positioned to ensure consistency of application, oversee general compliance with Chapter Seven, and avoid potential disputes relating to the inappropriate or unjustified use of such measures.

Thus, in the event that the LSBC decides to disapprove of the TWU Law School, before that decision could be properly implemented through, for example, the imposition of additional educational requirements on TWU graduates called to the bar in other Provinces, the LSBC would first be required to seek and obtain the required Ministerial approval for those additional requirements. There is no guarantee that such approval would be forthcoming.

3.7 Potentially Available Remedies

3.7.1 Remedies Under the LMA

3.7.1.1 Administrative and Judicial Review

Under LMA section 4, if the applicable BC regulator refuses the application of an extraprovincially certified worker, or issues the certification subject to any terms, conditions or requirements, the worker may exercise all rights of administrative review and appeal, if any, available to the worker under the regulator’s governing Act. Under subsection 4(2), any person or body considering any such administrative review or appeal is required to consider that review or appeal in accordance with the obligations imposed on the Province and the regulatory authority under AIT Chapter Seven and the LMA.

Upon exhaustion of all such available administrative reviews or appeals, if the worker still alleges that the decision reached in respect of his or her application is not accordance with AIT Chapter Seven or the LMA, under LMA paragraph 4(2)(b), the worker may then refer the matter to the Supreme Court for judicial review. Such an application is to be made in the form of a stated case that identifies, as a question of law to be determined, whether the decision under review was consistent with the Province’s obligations under AIT Chapter Seven. If the Court determines that

²⁴ These ministerial assignments are made by way of executive order under the *Constitution Act*, RSBC 1996, c. 66.

the decision was not consistent with those obligations it is to refer the application back to the applicable BC regulator for reconsideration of the decision with directions. The regulator must then reconsider the application and make a new decision on the application consistent with any such direction.

3.7.1.2 Ministerial Override

Section 5 of the LMA provides the Minister responsible for a regulatory authority with additional powers to ensure compliance with AIT Chapter Seven and the LMA. This section deals generally with “mobility provisions”, defined broadly to be bylaws, rules, resolutions or measures that are made under the regulatory authority’s authorizing enactment which can affect the ability of an extraprovincially certified worker to practice the equivalent occupation in BC. For example, any measure or requirement of a regulatory authority that was inconsistent with the requirements of AIT Article 706(1) would most likely meet the definition of a “mobility provision”. Subsection 5(2) clarifies that a regulatory authority’s ability under its authorizing enactment to make a mobility provision includes the power to amend or repeal any such provision that does not comply with the LMA or the Agreement. This provision thereby ensures that regulatory authorities themselves have all the power necessary to cure any non-compliance with Chapter Seven, regardless of any limitations or constraints that they may otherwise be subject to under their governing statutes.

More importantly, under subsections 5(3), (4) and (5) the responsible Minister has the ability to “trump” any non-compliant mobility provision that might be adopted or maintained by the authority. The responsible Minister may request that the authority repeal or amend a non-compliant mobility provision and, in doing so, may provide direction to the authority as to how the mobility provision should read or what it should, or should not, contain. If the regulatory authority does not then comply with such a Ministerial request within 60 days, the Minister may then, by order, directly amend or repeal the non-compliant provision. Any mobility provision made by way of such a Ministerial order then prevails over any conflicting bylaw, rule, resolution, measure or other record that may be made by the regulatory authority. Thus, either the regulatory authority voluntarily complies with the Minister’s direction, or compliance can be forced upon it.

These override provisions work hand-in-hand with the Ministerial approval requirements of section 2. In the event that a regulatory authority either fails to seek the required approval under section 2, or seeks such approval but is refused, and proceeds to implement the measure in spite of that refusal, the responsible Minister is able to force compliance with Chapter Seven through subsections 5(3), (4) and (5).

3.7.2 Dispute Settlement Under the AIT

AIT Chapter Seventeen provides the Agreement’s internal dispute settlement processes. In summary terms, the Chapter establishes a type of arbitral process whereby disputes regarding interpretation or application of the AIT are heard by *ad hoc* dispute settlement panels, normally comprised of three members. For the most part, these disputes are Party-to-Party – that is, they are initiated by one Party complaining about an alleged inconsistent measure adopted or maintained by another Party. However, Chapter Seventeen also provides a process through which

private parties are able to initiate challenges on their own behalf in certain circumstances. This process has been utilized by private parties in a few cases to date.

Following an oral hearing the Panel issues a written decision, known as a Panel Report. Included in that Report are necessary findings of fact and a determination as to the consistency of the measure at issue. If the Panel determines that the measure is inconsistent it will commonly recommend that the non-compliant Party bring itself into compliance with the Agreement by amending or revoking the measure. The Panel will normally stipulate a reasonable period of time within which the Party is to bring itself into compliance. For the most part, following the issuance of a Panel Report, the non-compliant Party will then bring itself into compliance by amending or revoking the measure at issue.

Chapter Seventeen does provide a further process in the event that compliance with a Panel Report does not occurred within the stipulated time period. In particular, in the case of a Party-to-Party dispute, the payment of a financial penalty can be ordered for any such failure to comply within the period stipulated by the Panel. In the case of any non-compliance by one of the larger Provinces such as BC, that financial penalty can be up to a maximum of \$5 million. (Financial penalties are currently not available in the case of a person-to-Party dispute.) Financial penalties are due and payable immediately upon issuance of the Panel's order and, in the case of BC, that order is enforceable against the Province in the same manner as an order issued by the Supreme Court against the Crown.²⁵

While compliance with Panel Reports had been an issue in the past, to date, no financial penalty order has yet to be issued because, since the time the penalty provisions came into effect, there has been universal compliance non-compliant Parties. At the very least, the prospect of a \$5 million penalty provides a significant economic incentive for the Province to ensure that its regulatory authorities are complying with Chapter Seven. The provisions of the LMA give the Province the clear legal ability to ensure such compliance occurs.

3.8 Other Considerations – Application of the Charter to the LMA

We note that neither the LMA, nor through it, the AIT, can require the LSBC to do something that would violate the Charter.

For example, if clear evidence of harm was presented, the Benchers may conclude that the Charter would be violated should TWU graduates be permitted to become lawyers (thereby distinguishing this matter from the College of Teachers case²⁶) and, on that basis, they refused to recognize TWU degrees for the purpose of “academic qualification” under Rule 2-27(4.1). If a TWU graduate then applied for admission in another Province that did accept TWU degrees and, after call, sought to transfer to BC, the LSBC would presumably refuse that application. The applicant would then likely either seek judicial review under section 4 of the LMA or a Ministerial order under section 5. The rationale for the Benchers' decision to refuse the TWU

²⁵ Enforcement of such financial penalty orders issued against the Province is specifically provided for under the *Enforcement of Canadian Judgements and Decrees Act*, SBC 2003, c. 29.

²⁶ *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 (CanLII).

degree - that the Charter would be violated if it had been approved - would then be tested. If the rationale were to be rejected, the LSBC would be compelled by operation of the LMA to admit the applicant. If the Benchers' rationale was upheld, the LMA could not be relied upon to compel the LSBC to accept the applicant. The LMA is, in other words, subject to the requirements of the Charter.²⁷

We trust that this provides the advice you had requested. Please contact either writer should you have any questions arising from our response.

Yours truly,

Borden Ladner Gervais LLP

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²⁷ The primacy of the Charter is also at least implicitly recognized in the AIT. Article 300, entitled "Reaffirmation of Constitutional Powers and Responsibilities" provides that nothing in the AIT alters the legislative or other authority of Provincial legislatures or of Provincial governments, or "the rights of any of them with respect to the exercise of their legislative or other authorities under the Constitution of Canada." The "Constitution of Canada" is defined in section 52(2) of the *Constitution Act, 1982* to include the Charter (which appears as the first 35 sections of that Act). While Article 300 is intended primarily to address issues relating to the separation of powers, there is little doubt that the right of Provinces to exercise legislative authority under the Constitution is itself subject to the Charter and therefore Article 300 can be seen as confirming that nothing in the AIT is intended to alter that.



Memo

To: File
From: Deborah Armour
Date: March 17, 2014
Subject: Borden Ladner Gervais Opinion on LMA and AIT

The BLG opinion examines what constraints, if any, are imposed on the Law Society by the *Labour Mobility Act* (LMA) and through the LMA, the Agreement on Internal Trade (AIT). It also addresses what potential legal consequences might result under either the LMA or the AIT. It concludes that neither the LMA nor the AIT can require the Law Society to do something that would violate the Charter.

The BLG opinion does not attempt to answer whether the LMA offends the principle of an independent bar. While an opinion on that issue may be possible to obtain, the law is not settled and therefore any opinion rendered at this point in time would be no more than speculative.