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**BY EMAIL**

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The Law Society of British Columbia
845 Cambie Street
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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?



* DENOTES LAW CORPORATION

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

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 <u>not</u> 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.

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

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

*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

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.

***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 Christan".[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 Quebec*, 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

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 disaccrediting 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.

Yours truly,

Nathanson, Schachter & Thompson LLP

Per: 

GBG:jl