TRINITY WESTERN UNIVERSITY
Office of the President

September 16, 2014

Jan Lindsay Q.C.,
President, Law Society of British Columbia
845 Cambie Street
Vancouver, B.C. V6B 4Z9

Dear President Lindsay:

We write with respect to the three Notices of Motion that will be considered by the Benchers at their September 26, 2014 meeting. Prior to addressing the three Notices of Motion, we will first comment on the decision made by the Benchers at the April 11, 2014 meeting and the subsequent resolution passed at the June 10, 2014 Special General Meeting.

The April 11, 2014 Bencher Meeting

At the April 11, 2014 meeting, the Benchers voted against the following motion:

> *Pursuant to Law Society Rule 2-27(4.1), the Benchers declare that, notwithstanding the preliminary approval granted to Trinity Western University on December 16, 2013 by the Federation of Law Societies' Canadian Common Law Program Approval Committee, the proposed Faculty of Law at Trinity Western is not an approved faculty of law.*

The legal result of this decision is that graduates of TWU's School of Law will be eligible to become articling students and, eventually, lawyers in British Columbia.

In making this decision, the Benchers were exercising a statutory function granted to them as the governing body of the Law Society. Under subsection 4(2) of the *Legal Profession Act*, the Benchers are responsible to "govern and administer the affairs of the society."

The Benchers are statutorily required to make rules for the governing of the society under s.11(1). When made, those rules are binding on the Benchers and on the Law Society (s.11(3)).

Under subsection 20(1)(a) of the *Legal Profession Act*, the Benchers are authorized to make rules to:

> (a) establish requirements, including ***academic requirements***, and procedures for the enrollment of articled students; [emphasis added]

Under subsection 21(1)(b), the Benchers are also authorized to make rules to:

> (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; [emphasis added]

These provisions are consistent with the purpose of the Law Society in s.3(c) of the *Legal Profession Act* to "uphold and protect the public interest … by … (c) ***establishing standards and programs for the education, professional responsibility and competence of lawyers and applicants for call and admission***." [Emphasis added]

The Benchers have established binding rules under these specific statutory provisions. Rule 2-27 concerns "Enrolment in the Admission Program". Under Rule 2-27(3), applicants for enrolment, including any TWU School of Law graduate, will have to deliver certain listed items to the Executive Director, including: (b) ***proof of academic qualification*** under subrule (4)" [emphasis added].

Rule 2-27(4) lists what constitutes "***academic qualification***", which includes the successful completion of a J.D. or LL.B. from an "approved common law faculty of law."

All of these powers are given by statute to the Benchers, and not to the members of the Law Society. This is an important distinction for reasons that are set out in more detail below.

By defeating the motion on April 11, 2014, the Benchers determined that TWU's School of Law will continue to be an "approved common law faculty of law", consistent with the preliminary approval of the Canadian Federation of Law Societies. This allows graduates of TWU's School of Law to become members of the Law Society as articling students and lawyers in British Columbia.

It was clear from the reasons given by a majority of Benchers that their decision was based on, and indeed compelled by, the law. Their considered view was that the Benchers were legally bound to make the decision they did based on the Supreme Court of Canada's decision in *TWU* v. *BCCT* (2001) and the proper application of the *Charter*. Attached as Appendix "A" are quotations from a majority of Benchers on April 11, 2014 that make this clear.

The June 10, 2014 Special General Meeting

Pursuant to Rule 1-9, the Benchers were required to call the Special General Meeting within 60 days of receipt of a written request signed by at least 5% of the members of the LSBC in good standing. They did so.

Pursuant to s.13(1) of the *Legal Profession Act*, the resolution passed at the Special General Meeting is ***not*** binding on the Benchers. It is theoretically possible that the resolution ***could*** be made in the future binding if "it has not been substantially implemented by the Benchers within 12 months", there is a subsequent petition for a referendum and, under s.13(3), 1/3 of all members in good standing vote in "the referendum" and 2/3 of those voting vote in favour of "the resolution". Even if all of these preconditions are met and "the referendum" passed, it would still not be binding on the Benchers if implementing it would breach their statutory duties (s.13(4)). In that circumstance, the Benchers "must not" implement the resolution.

Since the 12 month period referenced in s.13(2)(a) has not expired and there is no petition of members calling for a referendum, the preconditions for "the referendum" referenced in s.13(3) are not met. Any referendum concerning the June 10, 2014 resolution cannot be held now under s.13.

In his opinion of July 15, 2014, Mr. Gomery suggests only a ***possible*** construction of s.13(2) that would allow a referendum to be held prior to the preconditions in that section being met. In our respectful submission, such a construction cannot prevail for a number of reasons, including:

1. Subsection 13(1) is clear that a resolution is not binding "except as provided in [that] section". If the preconditions to a resolution being adopted in a referendum held under section 13(2) are not met, the resolution is not binding based on the plain wording of s.13(1).

2. As suggested by Mr. Gomery, the 12-month provision in s.13(2)(a) is not a mere formality. It is important to the legislative scheme of s.13, which allows time for the political process to unfold. Section 13 is, in many ways a very peculiar provision for a self-regulating profession to have in its constating legislation. It is designed to give members a voice, but that voice can only constrain the Benchers in very specific and narrow circumstances.

   In that respect, s.13 quite clearly establishes a political regime for determining the views of LSBC members and so political considerations are important to

> understanding the scheme. The 12-month period allows for proper reflection and consideration. It avoids the possibility that the Benchers will feel undue pressure to implement a resolution precipitously and without fully considering all of its ramifications.

Mr. Gomery opines that a construction of s.13 that would allow an earlier referendum to become binding on the Benchers is "less persuasive". We agree. Subject to subsection 13(4), a resolution could only be considered binding if the preconditions to a referendum set out in s.13(2) are met. Otherwise, it is not "the referendum" referenced in s.13(3) and does not have the potential binding legal impact contemplated by that subsection.

This is supported by the decision in *Gibbs v. Law Society of British Columbia*,[1] which considered the application of s.13 of the *Legal Profession Act*. At paragraphs 105 and 107, Mr. Justice Taylor stated:

> Section 13 of the Act provides a form of check/balance by its provision that while the Benchers are not bound by resolution passed by the members there is a mechanism that if the Benchers do not act on a resolution passed by the members, a referendum may occur which ***if passed under specific conditions*** would be binding on the Benchers.
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> ...
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> Such a procedure under s.13 is an example of what counsel for the Association described was a "highly democratic process" enshrined within the *Act* by which the relationship of the members and the Benchers may be determined. [Emphasis added]

The Court also noted that "it is important to distinguish between the powers granted to the members of the Society and that granted to its Benchers", noting that "[t]hese powers are disparate" (at para.79).

The power to consider the academic qualifications of TWU graduates is clearly, and solely, within the authority of the Benchers, not the members of the Law Society.

The fact that the Benchers, and not the members, have the authority to determine the membership eligibility of TWU graduates is entirely appropriate in the circumstances. It is trite that matters of fundamental rights and freedoms should not be determined by popular vote. If that were not the case, the *Charter*, which constrains government action, would be less necessary.

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[1] 2003 BCSC 1814.

In many ways, this situation is analogous to the democratically imposed (i.e., statutory) limitation on law society membership that was struck down as unconstitutional in *Andrews v. Law Society of British Columbia*.[2] The recognition of TWU graduates is not properly the subject of the will of a majority vote, particularly since it pertains to their and TWU's constitutional rights.

Statutorily, the principle of Bencher authority in matters assigned to them by statute or under the Rules is varied ***only*** if there is a proper application of s.13 of the *Legal Profession Act* and, even then, ***only*** if implementing the vote would not constitute a breach of the Benchers' statutory duties. In our respectful submission, a decision contrary to the April 11 decision of the Benchers that is motivated or mandated by popular vote would constitute a breach of the Benchers' duties for a variety of reasons, including some intimated by the Court in *Gibbs*. We will address that matter further if necessary if there is a referendum, whether held under s.13 of the *Legal Profession Act* or otherwise.

With that background, we will address each of the three notices of motion before the Benchers at their September 26, 2014 meeting. For the reasons set out below, there is no reason for the Benchers to take any further action at this time. However, if they choose to pass a motion, in our respectful submission, the Benchers should only consider passing Motion 3, as it is the only one that is legally justifiable in all of the circumstances.

Motion 1: Implement the Resolution from the Special General Meeting

As stated by Mr. Gomery at pages 4 and 5 of his opinion:

> … [T]o the extent that the Benchers came to the decision that 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 … ***it could not make a legal difference that a large number of members of the Law Society may be of a different opinion***.
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> …
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> ***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***. [Emphasis added]

[2] [1989] 1 S.C.R. 143.

As evident from the quotations in Appendix A, a majority of the Benchers clearly determined that the proper application of the *Charter* and the judgment of the Supreme Court of Canada mandated that graduates of TWU's School of Law be admitted as articling students and lawyers in British Columbia.

Other than the fact that a significant number of lawyers voting at the Special General Meeting voted to the contrary, nothing has changed. With respect to such votes, there is no assurance that the lawyers voting for the resolution on June 10 had reviewed the relevant materials or even attended the meeting to hear submissions.

The Benchers met their statutory obligations by carefully considering thousands of pages of submissions and legal opinions before making their decision on April 11. No new material facts or arguments have emerged that were not before the Benchers prior to their meeting on April 11.

In the result, there is no legal basis upon which Motion 1 can be passed and we respectfully submit that the Benchers should not do so.

Additionally, and as contemplated by Motion 3, there will be court decisions in the relatively near future from 3 Canadian superior courts with respect to TWU's School of Law. The passage of Motion 1 would necessitate another costly judicial review. Any further guidance that the Benchers may wish to receive from the courts will almost inevitably arise from the existing judicial review proceedings. There is no practical utility in adding one more court proceeding. This alone is a reason to defeat Motion 1 on September 26.

Motion 2: A Binding Referendum be Conducted of All Members

In our respectful submission, passing Motion 2 in its current form would be a breach of the Benchers' statutory duties and obligations. This is because, in part, it would amount to fettering of the Benchers' decision making powers and a wrongful sub-delegation of their statutory power of decision.

Any referendum held pursuant to Motion 2 would be pursuant to Rule 1-37 of the *Law Society Rules*, which permits the Benchers to "direct the Executive Director to conduct a referendum ballot". It would not be a referendum under s.13(2) of the *Legal Profession Act*. As previously noted, a referendum under s.13 is only held when the preconditions of that section are met.

Section 13(1) of the *Legal Profession Act* states that a resolution of members is not binding on the Benchers "***except as provided in this section***." This is supported by the Court's reasoning in *Gibbs*.

A resolution voted upon in a Rule 1-37 referendum is not binding on the Benchers. Section 13(3) of the *Legal Profession Act* is the only statutory provision in the *Legal Profession Act* for a member resolution to become binding on the Benchers. Section 13(3) sets out thresholds for when "***the*** resolution" is passed in "***the*** referendum." "***The***" clearly refers to the preceding s.13(2) procedure with a 12-month waiting period. As stated in Mr. Gomery's opinion, this is "the most obvious construction" of this section (p. 7).

The statutory basis of the referendum is very important in terms of the Benchers' administrative law obligations. A referendum under Rule 1-37 is only binding on the Benchers if they choose it to be. That is presumably why paragraph 2 of Motion 2 expressly sets out the Benchers' intention to be bound by the results of a referendum. However, a decision to be bound by a decision of the members of the Law Society is not a valid exercise of the Benchers' powers and statutory duties.

Mr. Gomery speaks to whether a referendum under s.13 would be binding and provides his opinion that it would not be, based on the reasons given by the Benchers on April 11. Note his words at page 7 of his July 15, 2014 opinion:

> 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.

Even more so, the results of a referendum of members voluntarily called by the Benchers under Rule 1-37 in relation to a matter that is within the statutory purview of the Benchers cannot properly be made binding on them by their own decision.

Treating the results of a referendum initiated under Motion 2 as binding on the Benchers, in the absence of a statutory power or obligation to do so, would amount to an invalid sub-delegation of the Benchers' statutory power of decision, a fettering of the Benchers' discretion, and an improper dictation of the Benchers' statutory authority by the members.

Sub-delegation of the Benchers' authority under the *Legal Profession Act* and Rule 2-27(4.1) is only permitted when authorized by statute, expressly or by implication. In other cases where a statutory decision maker deferred to the results of a non-binding

plebiscite, courts have found invalid sub-delegation of authority.[3] This is consistent with Mr. Gomery's May 8, 2013 opinion, in which he explained the limitations on sub-delegation.

If Motion 2 were passed, the Benchers would be deciding, *a priori*, to blindly follow the vote of the members, without any assurance that those voting would have properly acquainted themselves with all of the relevant law and facts, or that they would be applying criteria or matters relevant to determining whether TWU graduates would have the requisite "academic qualifications." Even if such assurance were possible, this is a matter for the decision of the Benchers, not the members.

A decision by the Benchers to bind themselves to the results of a referendum would also amount to a fettering of their discretion.[4] They would be permitting an otherwise non-binding vote to control their judgment. This is particularly problematic in circumstances, like these, where the Benchers have already exercised their judgment and made the decision to recognize the academic qualifications of TWU graduates.

A decision-maker such as the Benchers cannot permit another to dictate their judgment.[5] As noted, the power under Rule 2-27(4.1) only permits "the Benchers" to make a decision. That decision must be solely exercised by the Benchers and cannot be exercised by anyone else. Motion 2 permits the members to substitute their judgment for that of the Benchers.

With respect, the declaration in paragraph 3 of Motion 2 that "the implementation of the Resolution does not constitute a breach of [the Benchers'] statutory duties" is of no effect. Presumably, this paragraph is intended to communicate a clear intention to delegate the decision to the members of the Law Society. However, whether or not there is a breach of the Benchers' statutory duties is a matter of law, not a matter of prior determination by the Benchers themselves.

In short, the passage of Motion 2, with its clear intention to sub-delegate and be bound by the results of a referendum that would not be binding at law, would itself be outside of the Benchers' jurisdiction, and would be a breach of their statutory duties. Motion 2, if passed, would be subject to judicial review including applications for orders in the nature of *certiorari* and prohibition. This is in addition to remedies available through judicial

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[3] See for example, *Kornelsen* v. *Wood Buffalo*, 1998 ABCA 96 and *Oil Sands Hotel (1975) Ltd.* v. *Alberta*, 1999 ABQB 218.
[4] See *Oil Sands Hotel (1975) Ltd.* v. *Alberta*, *supra.*
[5] See *Roncarelli v. Duplessis*, [1959] SCR 121 at 157-158.

review of any subsequent decision of the Benchers to reverse their April 11 decision for substantive reasons.

Motion 3: Postpone Further Reconsideration

There is no legal need or requirement for the Benchers to pass any motion at their September 26 meeting. The Benchers exercised their judgment and made their decision on April 11, based on the rule of law and the *Charter* rights of TWU and its future graduates.

There are three ongoing judicial reviews in British Columbia, Ontario and Nova Scotia that deal with the same issues, all of which are scheduled to be heard this December. It is very likely that there will be at least one, and perhaps three, superior court decisions before the Benchers can be required to hold a referendum under s.13 of the *Legal Profession Act*.

If, despite that, the Benchers wish to take some action in order to be responsive to the vote at the June 10 SGM, we respectfully submit that the Benchers' are only in a position to pass Motion 3. This motion clearly indicates a willingness to monitor the results of existing, and clearly relevant, judicial review proceedings and reassess their April 11 decision based only on future judicial determinations. This approach would avoid the Benchers acting illegally and would save the costs of a referendum that may never need to be held. It would also avoid the significant cost of yet another judicial review proceeding, which will be unlikely to provide any guidance for the Benchers beyond the matters presently before the courts.

ALL OF WHICH IS RESPECTFULLY SUBMITTED,

Bob Kuhn

Bob Kuhn, J.D.
President

APPENDIX "A"

QUOTATIONS OF BENCHERS' REASONS

April 11, 2014

(all references are to pages and lines in the transcript posted on the LSBC website)

Lynal Doerksen: "Here is my brief, legal analysis. … I believe we are here to apply the law as it is … To refuse Trinity Western's law school accreditation on the basis their exercise of their belief in a traditional marriage is not in the public interest is, in my view, a very shaky legal foundation which will not stand up in court." *(Page 14, lines 4, 5 & 25; page 15, lines 5-8)*

Tony Wilson: "We, as Benchers, must uphold the rule of law with respect to this issue and I believe we are still bound by the Supreme Court of Canada's decision in the *Trinity Western University* v. *BC College of Teachers* decision." *(Page 17, lines 3-6)*

Phil Riddell: "…[W]e have to follow the law. For the reasons stated by Mr. Wilson, I am of the view that the *Trinity Western University* v. *BC College of Teachers* case is the law in Canada and, until we are told otherwise, that is a law that we are bound to follow." *(Page 17, lines 25-28)*

David Mossop, QC: "In my view, the Supreme Court of Canada decision in *Trinity Western University* v. *The BC College of Teachers* is binding on the Law Society." *(Page 20, lines 16-18*)

Miriam Kresivo, QC: "It troubles me, but if I applied my own personal views, I would vote for the motion. I am not here to apply my personal views, as others have said. I am here as a Bencher to apply the law and, as a Bencher, I have to remove my personal feelings and say what is the law. I adopt the comments of Mr. Doerksen and Mr. Wilson that we have very good, very impartial legal opinions which indicate that the Supreme Court of Canada TWU case still applies and is good law, and it is not our discretion to say that we would prefer it to be different." *(Page 22, lines 9-15*)

Claude Richmond: "Whether we agree or not, it is the law of the land." *(Page 23, lines 14-15*)

Dean Lawton: "...I am very alive to the 2001 decision of *Trinity Western University* v. *The British Columbia College of Teachers*. In that case, the Supreme Court of Canada provided pragmatic and clear direction that there is a difference between belief and conduct. In my opinion, there needs to be evidence of harm having occurred or likely to occur as a result of the Trinity Western community covenant agreement being embraced by law students. In this approach, a fellow Bencher has asked for data with respect to any past discipline histories relating to discrimination by Trinity Western University teacher graduates or undergraduates who have gone on to BC law schools. None were reported. While I do not agree with the soundness of Trinity Western University's perspectives on sexual expression or marriage, these are nevertheless a legitimate faith-based catechism." *(Page 24, lines 28-29; page 25, lines 1-9)*

Ben Meisner: "In voting, we have to have an eye on the future, but we must represent the law of the land as it exists today." *(Page 27, lines 16-18)*

Martin Finch, QC: "We're being asked whether the training of students at a lawfully created university law school should be recognized as fit for the purpose of satisfying the requirements of the Law Society in its responsibility to ensure only properly trained students should be granted the privilege of practising law. ... As the Supreme Court of Canada has observed, it may not be for everyone and it may not be to everyone's taste. ... Mind you, it is a mistake, in the absence of compelling evidence, of which I've seen none, to suppose that religious sectarianism will by itself result in a form of legal training that is not objective and broad-ranging in its consideration. In order to understand contemporary Canadian law, students will necessarily need to study significant constitutional cases. Ironically, one of those cases will be the *TWU* v. *BC College of Teachers* case. Trust is an important component in human activity. In the absence of evidence to the contrary, there is no reason, in my view, to suppose the worst for TWU based on stereotypes of intellectual propensities. ... I believe the law, as stated by the Supreme Court of Canada in the *TWU* v. *BC College of Teachers* TWU case, effected the complex task of balancing apparently competing rights. There was great wisdom in the judgment of Mr. Justice Iacobucci, and I believe that opposition to the motion is consonant with that wisdom." *(Page 28, lines 11-18; page 29, lines 2-9 & 20-24)*

Elizabeth Rowbotham: "However, that is our law in Canada and I think that if it's to be challenged, this is not the forum to do so." *(Page 30, lines 27-28*)

Maria Morellato, QC: "Well, the Supreme Court of Canada in 2001 addressed this very question. … That is what the Court found and that is the law that we must follow. … The Law Society of British Columbia must not make the same mistake [as the College of Teachers]" *(Page 35, lines 7-8 & 28-29; page 36, lines 2-3)*

David Crossin, QC: "In my view, the jurisprudence, and you've all had an opportunity to read that, makes it clear the conduct is lawful, and I've heard nothing that persuades me that the analysis of logic of the *Teachers* case many years ago would now be seen as flawed. … For me, the overarching issue that engages the public interest on these facts in the context of the jurisprudence as it now stands is the recognition of the right to assemble and the right to freely and openly practise religious belief. It is a fundamental right in this country that is to be jealously guarded, not on behalf of TWU, but for and on behalf of the public and the citizens of this province. … [T]hat does not justify a response that sidesteps that fundamental Canadian freedom in order to either punish TWU for its value system or force it to replace it. In my view, to do so would risk undermining freedom of religion for all and to do so would be a dangerous over-extension of institutional power." *(Page 37, lines 7-10, 16-20 & 23-26)*

Herman Van Ommen, QC: "I should know better than to follow my good friend Mr. Crossin and so, having listened to him, I really have nothing to add. I simply adopt his comments." *(Page 38, lines10-11*)

Craig Ferris, QC: "…I also, like Mr. Van Ommen, would like to adopt the comments of Mr. Crossin, which I thought were quite eloquent. … I think until that law is changed, we are bound to follow the *TWU* case." *(Page 40, lines 1-3 & 7-8)*

Ken Walker, QC: "I will be voting no to this motion. I therefore will be supporting TWU as a university teaching lawyers. … My vote can be considered a vote in favour of balancing the two *Charter* rights in conflict here. My vote can be taken as a vote supporting diversity and diversity in our profession." *(Page 41,lines 5-6 & 10-12)*

Pinder Cheema, QC: "…[I]t is our obligation above all else to uphold the rule of law. The opinions we have received to date, which support the applicability of *TWU BCCT* today, govern." *(Page 42, lines 5-7)*

Jeevyn Dhaliwal: "I adopt and I support the comments of my colleague Mr. Crossin and others. … I am bound as a decision-maker and a critically thinking lawyer to apply the current law. I cannot distinguish the decision of the Supreme Court of Canada in *TWU* one and therefore I will vote against the motion as tabled." *(Page 42, lines 24-25; page 43, lines 1-4*)

David Corey: "I don't believe that I have anything else to add other than what has already been said. The ground has been covered very sufficiently in my estimation." *(Page 43, lines 8-10)*