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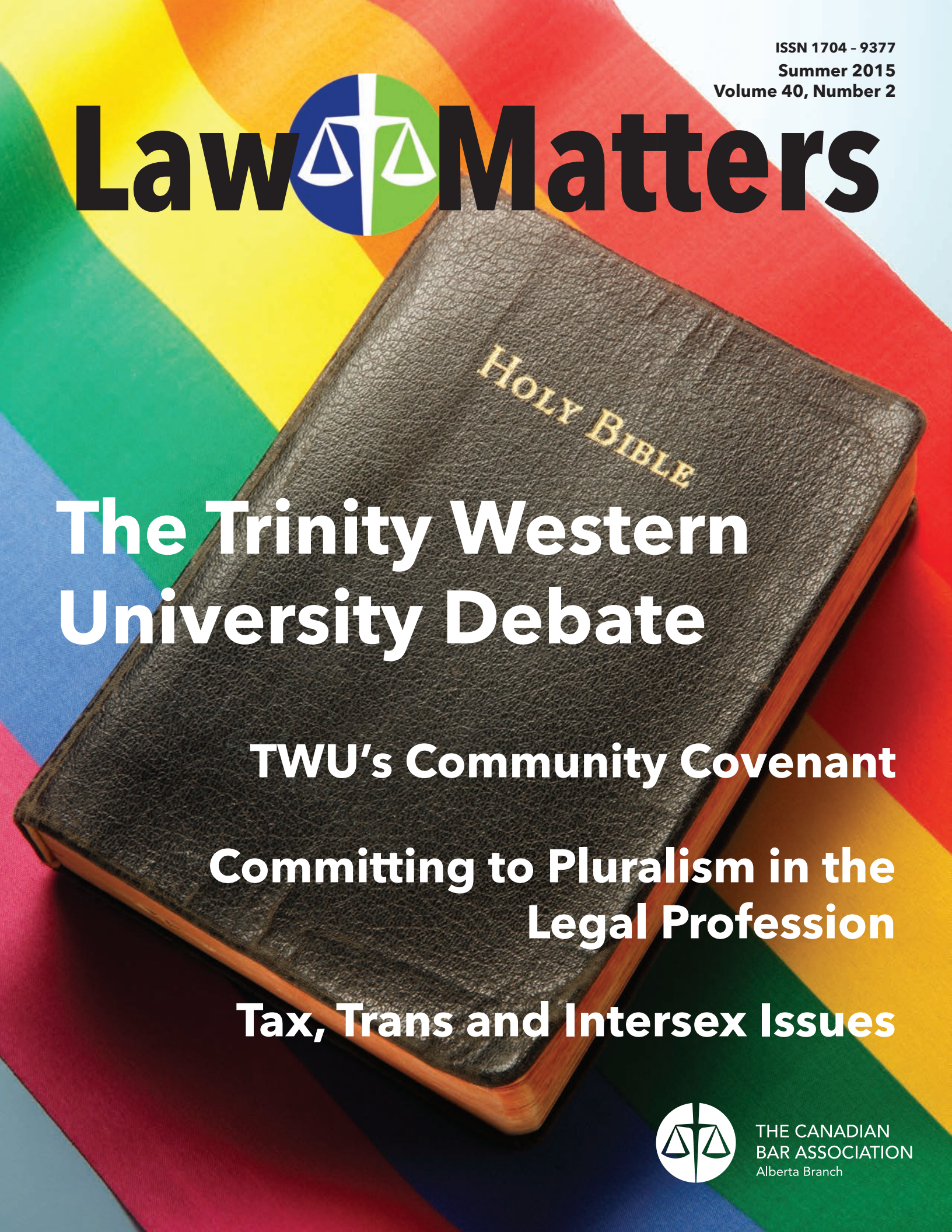
Law Matters



The Trinity Western University Debate

TWU's Community Covenant

Committing to Pluralism in the Legal Profession

Tax, Trans and Intersex Issues

THE CANADIAN BAR ASSOCIATION
Alberta Branch

EDITOR'S NOTE

By Robert Harvie, QC

Law and passion are a dangerous mix – and the issue of sorting out conflicts between religious freedom and freedom from discrimination raises both significant questions of law and significant levels of passion.

As the adage goes, "hard facts make bad law" – so, care need be taken to assure that our passion to counter "bad facts" doesn't lead us down the road of "bad law".

In 2001, the Supreme Court of Canada was asked to rule on the conflict of freedom of religion and freedom from discrimination in the *TWU v. BCCT* case, and, at that time, they ruled that while the precepts of the TWU community standards might offend the *Charter*, religious beliefs are also protected by the *Charter* and by seeking to prohibit offensive "beliefs" as opposed to "conduct", the BCCT acted beyond its authority.

Move forward a decade or so. The competing *Charter* rights are again put in issue - this time in the context of TWU's proposed Law School. Passions arise, and the law is asked again to consider the competing interests.

Until this past year, I was fortunate to be a Bencher with the Law Society of Alberta, and I was privileged to serve during the Presidency of Carsten Jensen and Kevin Feth – both of which urged restraint and due consideration for the broad principals at stake, and a need to resist the easy response of flowing with the wind of popular opinion. The Supreme Court decision in the *BCCT* case still stood. To blithely ignore that in favour of appeasing growing public offense with the TWU community covenant would in fact disrespect the Rule of Law – the foundation of our judicial system.

As the Law Society of Alberta stood down to allow for judicial reconsideration of the issue, it struck me that the level of nuanced and considered discourse being brought to bear on this issue was lacking – not only as one might expect of our media, but within our profession itself, even at the highest levels of some Law Societies.

The issue, in my mind, was too important to limit to "140 character" discussions, so I suggested the creation of this special issue.

Law Matters is proud to be the beneficiary of some incredibly intelligent and articulate work in the pages that follow. Our contributors have gone above and beyond in providing a very broad examination of a very difficult question – and we are indebted to them for their effort.

The work of producing this issue has fallen primarily on Ola Malik - who has gathered this collection of contributors and facilitated this publication – and for that I extend great appreciation as well.

As our readers examine this special issue, I would recommend an open mind to both sides – taking direction from Thomas Jefferson's advice to his nephew on how to approach the study of religion:

> *"Fix reason firmly in her seat, and call to her tribunal every fact, every opinion. Question with boldness even the existence of a God; because, if there be one, he must more approve of the homage of reason, than that of blindfolded fear."*

Robert G. Harvie, Q.C.
July 30, 2015

In This Issue...

Contributing Authors

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PRESIDENT'S REPORT

By Steven N. Mandziuk, QC

Earlier this spring, we welcomed a new government to the Alberta Legislature for the first time in over forty years. Your Executive was pleased to share the Branch's Agenda for Justice with Premier Rachel Notley and Minister of Justice and Solicitor General Kathleen Ganley. The Agenda for Justice outlines the Alberta Branch's priority advocacy issues in relation to our justice system. We look forward to meeting with Minister Ganley in the near future to discuss these and other priorities. We are also regularly adding justice priorities to the Agenda for Justice. Most recently, we have outlined the Branch's comments concerning the increase in court fees that was introduced earlier this year. Members can **view the document** in its entirety on our website.

In June the ReThink project made a stop in Calgary. An invigorating session brought together CBA members, non-CBA members and non-lawyers to discuss the future of our organization. I was extremely pleased to hear the productive and lively discussions and excellent feedback from attendees, and look forward to sharing the results of this and other workshops held across the country, as well as other information gathered for this project, in the coming months.

It is membership renewal time at the CBA again.

The Alberta Branch continues to lead the country in total Portfolio and Portfolio Plus membership package sales. These packages are available for purchase with your annual membership renewal or on their own online. Portfolio packages provide members with a number of additional benefits, including education credits that can be used towards applicable CBA products and services, complimentary materials-level membership to up to 3 sections, up to a 3% rebate on applicable CBA purchases, free access to the CBA Alberta Legal Directory and much more.

If you are a section member, regularly attend any CBA conference (including the Alberta Law Conference), or regularly participate in other CBA professional development opportunities, I strongly urge you to consider purchasing one of these packages. For more information on packages, and to purchase one for yourself, visit **www.cbamembership.org**.

As many of you know, sections are a wonderful CBA offering which provides members with the opportunity to regularly access professional development and engage in timely discussions specific to their areas of practice. Section registration will be available starting in mid-August; we will be contacting members by email once registration is live. Until then, you can visit our website to view the **2015-16 Section Handbook**, which lists the available sections and meeting dates for the upcoming year.

As I write this, the conference team at the CBA national office and the Local Host Committee are putting the final touches on the **2015 CBA Legal Conference**, which will be held August 14 - 16 in Calgary. For those who have not yet signed up - it is not too late! Space is still available to attend this premier event. Not able to attend all three days of the conference? Day passes are also available for purchase.

With changes in format, and a focus on lawyer well-being, this year's conference is already looking to be highly engaging and successful. I want to pass along my thanks to the entire Local Host Committee, led by co-chairs Gillian Marriott, QC, and Ola Malik, for their tireless efforts and diligence over the last year in preparing for this conference. I look forward to seeing the Alberta Branch strongly represented in Calgary, where we will be sure to show off Alberta's hospitality and our Branch to CBA members and other legal professionals from across the country and around the world.

At the conclusion of the CBA Legal Conference, my year as President of the CBA Alberta Branch will come to an end. This has been one of the most rewarding experiences of my career. I am so grateful for the support of our amazing CBA staff, my fellow Executives, all of our volunteers and of course, my family. It has been very gratifying to have had the opportunity to give time and energy to our profession as your Branch President - I have received far more back than what I have given.

I welcome Wayne Barkauskas as he steps into the role of President for the 2015-16 year, and wish him the best in his new position. On behalf of the Executive Committee and the entire Branch, I also pass along my sincerest thanks and best wishes to my dear friend and colleague Past President Marian De Souza, QC, who after dedicating the last five years to the CBA will be completing her tenure on the Executive this August.

Your 2015-16 Executive Committee will consist of incoming Secretary Frank Friesacher, Treasurer Jenny McMordie, Vice-President Jeremiah Kowalchuk, President Wayne Barkauskas, myself as Past President, and Executive Director Maureen Armitage.

WAYNE BARKAUSKAS

CBA Alberta Branch President: 2015 - 2016

By Jeffrey D. Wise, QC

I am honoured to have been asked to introduce Wayne A. Barkauskas as the new President of the Canadian Bar Association, Alberta Branch. You will all quickly realize (if you don't already) that Wayne is one of the most intelligent, stubborn, tenacious, creative, insightful, hardworking lawyers in Alberta. Wayne gives to others without question and without being asked. His representation of clients in difficult family matters is second to none.

I have known Wayne since he articled with the law firm of Uniacke Yanko and Wise in 1991. Wayne and I have been partners at the law firm of Wise Scheible Barkauskas for 20 years. During this time Wayne has practiced exclusively in the area of family law, focusing on matrimonial property and support issues. Wayne is an arbitrator, mediator and parenting coordinator.

Wayne has shown incredible dedication to the Canadian Bar Association. Wayne co-chaired the Alberta Law Conference, Wayne was Chair of the Membership Committee for 4 years, Wayne has been a part of the Calgary Law Day Committee for 4 years, and was the Alberta Law Day Chair for 4 years. Wayne is the Vice-Chair of the National Family Law Section.

Wayne has sat on the Alberta Justice Provincial Court Nominating and Review Committee, the Alberta Justice Queen's Bench Interviewing and Selection Committee, and the Alberta Justice Family Law Advisory Committee for Practice Note 7.

In addition, Wayne has shown his involvement and dedication to the legal profession, not only in practice, but as an instructor and an evaluator for the Bar Admission course (CPLED). Wayne sat on the Alberta Justice Family Law Advisory Committee while the new Alberta Rules of Court were focusing on the new Alberta Rules of Court project for four years.

Wayne has contributed not only to the legal profession, but to our community. He has chaired the Board of Peer Support for Abused Women for over ten years, he has sat on the Board of Directors for the Alberta Action Committee for Housing and Homelessness and he currently sits on the Board of Directors for the Calgary Homeless Foundation.

Wayne has three beautiful children; daughter Jayde, and twin sons Josh and Bryce. Wayne's first focus is his children. Wayne's dedication to his children is exemplified by his most recent outing. He wanted his 11-year-old twins to experience the midnight sun of the Yukon and Northwest Territories, so they travelled by car, camping along the way to Yellowknife where they experienced the outdoors and the midnight sun. He shares parenting with his children's mother, and no matter how busy he is, he tries never to miss a hockey or lacrosse game.

Wayne is the ultimate adventurer, spending time in Uganda and Rwanda with gorillas, swimming with great white sharks in the Pacific, climbing Mt. Kilimanjaro, and travelling down the Amazon, to name just a few adventures. These experiences have allowed Wayne to apply his considerable talent as a photographer. Wayne's passion for photography, as usual, is beyond the norm. His favourite subjects are jungle wildlife and this has taken him to the wilds of Central America, the Amazon in South America (more than once), Borneo, the Congo and other uncomfortable places, most people will never see. He is modest about his photographs; however, will show you if he is asked.

I would like to take this opportunity to congratulate the members of the Canadian Bar Association for selecting Wayne A. Barkauskas as a member of the Alberta Branch Executive as I believe selecting Wayne could not have been a better selection for leadership. Wayne is the best person that I know.

August

14-16: The Canadian Bar Association presents The CBA Legal Conference - Building a Better Lawyer. Telus Convention Centre, Calgary AB. For details, visit www.cbalegalconference.org.

September

8: The Canadian Bar Association presents Waiving Solicitor-Client Privilege: Tips and Traps. Live webinar. Contact 1-800-267-8860 or pd@cba.org.

10-11: The Canadian Bar Association presents the Eleventh Annual Pan-Canadian Insolvency and Restructuring Law Conference. Fairmont Winnipeg, Winnipeg MB. Contact Tina Ethier at 1-800-267-8860 or tinae@cba.org.

11: The Calgary Bar Association presents the annual Charity Golf Tournament. Banff Springs Golf Course. For further details, visit www.calgarybarassociation.com.

17: The Canadian Bar Association presents The Changed Landscape: The Impact of New Tax Rules on Trusts and Estate Donations. Live webinar. Contact 1-800-267-8860 or pd@cba.org.

17: The Ontario Bar Association presents For You Eyes Only: Selfies, Cyberbullying and C-13. Live webinar. Contact 1-800-668-8900 or registration@oba.org.

29: The Ontario Bar Association presents Easements for Real Estate and Municipal Lawyers. Live webinar. Contact 1-800-267-8860 or pd@cba.org.

30: The Ontario Bar Association presents Recent Federal Legislation Affecting Aboriginal Communities. Live webinar. Contact 1-800-668-8900 or registration@oba.org.

30: The Ontario Bar Association presents Procurement Commitments Under International and Domestic Trade Agreements. Live webinar. Contact 1-800-668-8900 or registration@oba.org.

30: The Ontario Bar Association presents Tax Dispute Resolution Essentials Series: Practical Advice for Dealing with Tax Authorities. Live webinar. Contact 1-800-668-8900 or registration@oba.org.

October

15-18: The Canadian Bar Association presents CBA Will, Estate and Trust Fundamentals for Estate Practitioners. Intercontinental Toronto Centre, Toronto ON. Contact Marianne Pelletier at 1-800-267-8860 or mariannep@cba.org.

29: The Canadian Bar Association presents the 29-Point Check-up for the Law Department. Calgary AB. Contact Sharon Wilson at cle@ccca-cba.org.

November

5: The New Brunswick Branch of the Canadian Bar Association presents Time Mastery for Lawyers - Over 100 Ways to Maximize Your Productivity and Satisfaction. Crowne Plaza, Fredericton NB. Contact Ginette Little at 506-452-7818 or cle@cbanb.com.

6: The New Brunswick Branch of the Canadian Bar Association presents Effective Writing for Lawyers - Simplify the Process; Simplify the Product; Manage Email. Saint John Police Headquarter, Saint John NB. Contact Ginette Little at 506-452-7818 or cle@cbanb.com.

Please send your notices to:
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Patricia (Patty) Johnston, QC, is Executive Vice President, Legal & General Counsel at the Alberta Energy Regulator and has been a regular contributor to Law Matters and its predecessor publications for over 20 years.

Fishing Expeditions and Other Flights of Fancy: Document Production Overhaul in Alberta

By Maureen Killoran, QC and Anne Kirker, QC

With two recent Court of Appeal decisions on the topic, the law on document production in Alberta appears to be evolving. Lawyers should take heed and ensure that their strategy evolves alongside it.

The document disclosure and production process can be a long, arduous part of any litigation. While previous rules in Alberta allowed discovery of anything "touching the matters" in issue[1], the current Alberta Rules of Court provide that litigants must disclose all documents that are "relevant and material" – arguably, a more narrow test:[2]

> 5.2 (1) For the purposes of this Part, a question, record or information is relevant and material only if the answer to the question, or the record or information, could reasonably be expected
>
> (a) to significantly help determine one or more of the issues raised in the pleadings, or
>
> (b) to ascertain evidence that could reasonably be expected to significantly help determine one or more of the issues raised in the pleadings.

Relevance is determined with reference to the pleadings, whereas materiality is primarily a question of proof. Facts in issue that are not able to be proven directly will result in an expanded circle of materiality.[3]

The purpose of limiting discovery to those records that are relevant and material is to prevent abuse of process, excessive demands, and unreasonable litigation costs.[4] However, litigation counsel routinely experience (and perhaps, expect) delay, frustration and long and drawn out disputes associated with the document disclosure and production process.

The Alberta Court of Appeal addressed these issues in its decision in Kaddoura v Hanson ("Kaddoura"), released on May 6, 2015. In this case, straw buyers in a mortgage fraud litigation brought a third party claim against the real estate lawyers involved, alleging that they knew, or ought to have known, that the underlying real estate transactions were not legitimate. They sought production of client files in the lawyers' office relating to similar transactions, hoping to find circumstantial evidence to support their claim.[5] The court upheld the Master's order directing disclosure of the client files but not their production. In doing so, the unanimous court effectively did away with several common arguments regularly advanced under the Rules of Court by parties wanting to avoid complete disclosure, including the following:

1. **The "Fishing Expedition" Argument:** The right to disclosure of records does not depend on the other litigant proving that those records exist. The onus is on each party to review its own records and disclose those that are relevant and material. According to the Court of Appeal, "[w]hen it comes to record disclosure, if there are fish, the respondents do not have to go fishing for them."[6]

2. **The "Secondary or Tertiary Evidence" Argument:** While always problematic due to the difficulty of defining what should be characterized as "secondary" or "tertiary" evidence, the Court of Appeal has now rejected this argument outright. The categorization of evidence as secondary or tertiary is of little value as these records may nevertheless help determine the issues, especially where facts may be proven using inferences and circumstantial evidence.[7]

3. **The "They Already Know the Answer" Argument:** One of the purposes of discovery is to narrow and define the issues between the parties.[8] The argument that the other litigant "already knows the answer" overlooks the legitimate role of questioning in getting the other party to admit the facts.[9]

4. **The "Other Methods" Argument:** According to the Court of Appeal, the discovery process set out in the rules is intended to be efficient, structured and comprehensive. The fact that there are other possible avenues for the litigant to obtain the information does not relieve the obligation of the other party to produce it. In Kaddoura, the Court of Appeal rejected the argument that some of the information sought may have been on file at the Land Titles office and therefore should not have to be disclosed.[10]

With these common arguments now bound to fail, counsel should re-visit Rule 5.2 itself and the intention behind it. Thankfully, document production is not without limits. As stated by the Alberta Court of Appeal in Dow Chemical Canada ULC v Nova Chemical Corporation ("Dow"), the production of records is not required "just

[1] *Dow Chemical Canada ULC v Nova Chemicals Corporations,* 2014 ABCA 244, at para 19 *[Dow].*
[2] Alta Reg 124/2010, r 5.2, 5.6(1)(b) and 5.25(1)(a) *[Rules of Court].*
[3] *Weatherill (Estate of) v Weatherill,* 2003 ABQB 69, at paras 16-17.
[4] *Ibid* at paras 11 and 14.
[5] *Kaddoura v Hanson,* 2015 ABCA 154 at para 5 *[Kaddoura].*
[6] *Ibid at para 17.*
[7] *Ibid at para 15.*
[8] *Rules of Court, supra note 2, r 5.1(1)(b).*
[9] *Ibid at para 16.*
[10] *Ibid at para 18.*

PRACTICE POINTERS

continued from p. 6

because some remote and unlikely line of analysis can be advanced… [Judges are] fully entitled to reject lines of pretrial discovery that are unrealistic, speculative, or without an air of reality…or where the expense involved is disproportionate to the likely benefits that will result."[11] By getting rid of old fallback arguments and clarifying the law on document production in Alberta, the decisions in Dow and Kaddoura may help curtail delay tactics and advance the expeditious resolution of disputes.

With thanks to Catherine Hamill of Osler LLP for her able assistance.

[11] *Dow, supra note 1 at paras 19 and 21.*

Maureen Killoran QC, is the Managing Partner and Partner in the Litigation Group of Osler, Hoskin and Harcourt LLP in Calgary, a Canadian Bar Association Partner Firm. Maureen has been contributing to the "Practice Pointers" column since 2008.

Anne Kirker, QC is a partner with Norton Rose Fulbright in Calgary, a Canadian Bar Association Partner Firm. She was recently named as the Best Lawyers Lawyer of the Year in the area of Legal Malpractice.

ALBERTA BRANCH NEWS

MEMBERSHIP RENEWAL & SECTION REGISTRATION

Beginning in mid-July, members will have started receiving renewal notices from the CBA national office. Members can also renew their membership online, without the renewal notice, at www.cbamembership.org. Membership renewals are due for the beginning of the new membership year, which begins September 1, 2015.

While renewing your membership, take a moment to review the Portfolio and Portfolio Plus package options available to you. These packages provide complimentary materials-level section membership, education credits to be used towards applicable CBA products and services, provide members with complimentary printed and online Alberta Legal Directories, and much more!

Section registration will also be opening for members in mid-August. Once registration is open, members will be receiving notice via email from the CBA Alberta. Remember - if you plan on purchasing a Portfolio or Portfolio Plus package and using your credits for section registration, be sure to do so PRIOR to section registration, as credits cannot be applied after the fact.

For more information on your membership status, Portfolio packages or section registration, you can contact the CBA Alberta at 403-263-3707 in Calgary, or 780-428-1230 in Edmonton.

CBA ALBERTA LEGAL DIRECTORY

The 2015-16 edition of the CBA Alberta Legal Directory is now available for purchase. Early bird pricing is in effect until August 31, 2015 - place your order before this date to save up to 10% off the regular price of your directory.

New this year is online ordering. To order online, or to download a PDF order form, visit the CBA Alberta website.

Note: All CBA Alberta members who have purchased a Portfolio or Portfolio Package for the 2015-16 year will receive a complimentary copy of the legal directory, as well as access to the online directory.

ASSIST WALK FOR WELLNESS

Assist is a charity whose goal is to keep lawyers in Alberta happy and healthy. Please join us for the Annual Walk for Wellness as we encourage the Profession to nurture their physical and mental health. The walk is free! Participants are only asked to pledge one of the following: family, active, quiet, reflective, or fun time. The walk will take place at 12:00 noon in Edmonton on September 17, 2015, Lethbridge on September 23, 2015 and in Calgary on September 24, 2015. Please visit www.albertalawyersassist.ca for more information.

LAW STUDENT SECTIONS

The CBA is looking forward to welcoming the newest class of law students to the University of Calgary and University of Alberta. Welcome receptions have been planned for students at both schools, with the Calgary reception scheduled for Tuesday, September 15 and the Edmonton reception date to be announced soon.

LEGISLATIVE SUMMARY

The Legislative Summary for the Spring 2015 sitting of the Alberta Legislature is now available online here. Hard copies will be mailed out to those who have requested them with the fall edition of Law Matters. If you would like to receive a hard copy, please email communications@cba-alberta.org.

The Charter, a Covenant and a Controversy -- Should Trinity Western University get a Law School?

By Ola Malik, M.A., LL.M. & Geoff Ellwand, M.A., LL.M.

Trinity Western University (TWU), an accredited Christian institution in Langley, BC, about 50 kilometres southeast of Vancouver, wants to open a law school. All students accepted for admission to TWU must sign a Covenant agreeing among numerous other things to abstain from sexual intimacy outside the bounds of marriage. The Covenant defines marriage as a union between a man and a woman.

Should a law school be approved at an institution which according to its Covenant is "rooted in the evangelical Protestant tradition" and which prohibits same-sex intimacy even if the same-sex partners are married? It is a question which has divided lawyers, the public, provincial law societies which help regulate the profession across the country, and the Canadian courts.

At the heart of the TWU controversy is section 2 of the *Charter* and its protections of the freedom of expression and religion. But equally important are the public policy arguments about the very cultural fabric of the legal profession.

The idea for this edition grew out of a CBA-Alberta Branch Editorial Committee meeting in the late fall of 2014. The Committee, headed by Rob Harvie Q.C., decided to tackle an issue that it knew to be of great interest to the profession and which has resulted in a lively division of opinion. Rather than shy away from a controversial subject, the Committee believed it was better to fully engage the profession by tackling the TWU issue with passionate and respectful debate.

The purpose of this publication and the selection of contributors are not intended to advance any particular view. Rather, our goal is to present a broad range of thoughtful views so that you, the reader, can make your own mind up about the role which law schools, law societies, legal education, cultural values, diversity, and religious expression should have in shaping our profession.

The contributors to this publication are leading commentators in the legal profession. Whatever your views might be on the TWU debate, we know you'll find their articles provocative and insightful. Our thanks go to Lee-Anne Wright for her wonderful creative skills in putting this publication together.

Geoff Ellwand, a former CBC reporter is now a criminal defence lawyer in Calgary. Ellwand continues to write regularly for legal publications including Law Matters. His interests outside the law extend to heritage issues and he sits on the Calgary Heritage Authority.

Ola Malik is a Municipal Prosecutor with the City of Calgary, a CBA Partner Organization, where he writes frequently on cases involving *Charter* issues. Mr. Malik co-chairs the Access to Justice Committee and is a regular contributor to *Law Matters*.

Trinity Western University Law School: Equality Rights, Freedom of Religion and the Training of Canadian Lawyers

By Alice Woolley B.A., LL.B., LL.M.
and Jennifer Koshan B.Sc., LL.B., LL.M.

Introduction

Should lawyers be trained at law schools that effectively exclude LGBTQ students? Prior to 2013, our secular and public system of legal education meant this issue never arose. But in December 2013, Trinity Western University (TWU), whose mission is "As an arm of the Church, to develop godly Christian leaders", received approval from British Columbia's Advanced Education Minister to open a law school. TWU's Community Covenant Agreement requires students (and other members of the TWU community) to refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman."

TWU's insistence that its future law students and law professors abide by this Covenant has sharply divided the legal profession and academy with respect to the appropriate place for TWU law school and its graduates in the legal landscape. In this article we outline the developments in relation to TWU law school, including responses by law societies, governments, the courts, and law schools. We also set out some of the legal and policy issues raised by TWU law school. We do not here take a position on TWU's application; our purpose is simply to foreground the other articles in this newsletter.

Responses by Law Societies, Governments and the Courts

In the first instance, the Federation of Law Societies – the non-binding but influential national working group of the provincial and territorial law societies – struck an Approval Committee to consider TWU's proposed law degree. While such a Committee would normally be composed of 4 members of the profession and 3 law deans, the 3 law deans stepped down after the Canadian Council of Law Deans took a formal position opposing TWU's application. Another Committee member stepped down during the process, with the result that the final decision was made by just 4 of 7 Committee members, and only 3 members of the original Committee. The Committee considered TWU's proposal and also opposing submissions that emphasized that TWU's Covenant "effectively bans LGBT students" and may prevent it from properly teaching legal ethics and professionalism or constitutional law. The Approval Committee acknowledged tension between the Covenant and TWU's ability to satisfactorily instruct students in Constitutional Law and Legal Ethics and Professionalism. It concluded, however, that this tension created only a "concern," not a "deficiency," given TWU's statement that its courses would "fully and appropriately" address" ethics and professionalism," and that "the courses that will be offered at the TWU School of Law will ensure that students understand the full scope of [human

rights and constitutional] protections in the public and private spheres of Canadian life." As a consequence, the Committee **granted preliminary approval** to TWU.

The Federation's decision was adopted by the law societies in several Canadian provinces and territories, including Alberta, Saskatchewan, Prince Edward Island, Newfoundland and Labrador, and Nunavut, although not necessarily with enthusiasm. For example, the Law Society of Alberta **explained** that while it had delegated its decision to the Federation, it had advised the Federation that "a review of the existing criteria [for law school approval] by the Federation is advisable… consistent with the recommendation… that the possibility of a non-discrimination provision should be discussed."

Turning to the decisions of individual law societies, in April 2014, the benchers of the Law Society of British Columbia (LSBC) voted 20-6 **against a motion** barring TWU graduates from admission to the profession. However, three months later, its membership **passed a non-binding resolution** that the LSBC reverse its decision. In September 2014, the LSBC initiated a referendum, asking its members to vote on the resolution that "the proposed law school at Trinity Western University is not an approved faculty of law for the purpose of the Law Society's admission program." The resolution passed by a 74% majority, and this outcome was subsequently **ratified** by the LSBC's benchers in October 2014, effectively withdrawing the LSBC's prior support for TWU law school. TWU has now **launched an application for judicial review** against the LSBC (for a decision on a preliminary matter in the case see *Trinity Western University v. Law Society of British Columbia*, **2015 BCSC 416**).

At the same time that the LSBC made its initial decision in favour of admitting TWU law students in April 2014, an **action was initiated** in British Columbia Supreme Court by prospective law student Trevor Loke to quash the BC Advanced Education Minister's approval of TWU's law school on constitutional grounds. In December 2014, following the LSBC's referendum results and ratification, Minister Amrik Virk **revoked approval** for the law school. According to the Minister, "The current uncertainty over the status of the regulatory body approval means prospective graduates may not be able to be called to the bar, or practise law, in British Columbia. . . There is currently nothing in the terms and conditions of consent to prevent TWU from enrolling students in the proposed law program before the law society challenges are resolved. I do not believe this would be in the interests of students given the current level of legal uncertainty." The Minister also indicated that TWU had the option to renew its request for approval of its proposed law school once its legal issues were resolved. Following his revocation for the law school, he successfully argued that Loke's action should be declared moot (see *Loke v. British Columbia (Minister of Advanced Education)*, **2015 BCSC 413**).

In Ontario, Law Society of Upper Canada (LSUC) benchers voted 28-21, with one abstention, to reject TWU's application for accreditation (see the transcript of the LSUC proceedings **here**). TWU has challenged this decision in Ontario Divisional Court, with hearings set for June 2015. A number of parties have been granted intervener status in this action including the Christian Legal Fellowship, the Evangelical Fellowship of Canada and the Christian Higher Education Canada, the Judicial Centre for Constitutional Freedoms, Out on Bay Street and OUTlaws, the Advocates' Society, and the Criminal Lawyers Association (see *Trinity Western University v. Law Society of Upper Canada*, **2014 ONSC 5541**).

Many of these groups also intervened in TWU's judicial review application in Nova Scotia, which challenged the April 2014 decision of the Nova Scotia Barrister's Society (NSBS) to make accreditation conditional on TWU withdrawing its Covenant or granting an exemption to law students. In January 2015, in the first legal decision on the merits concerning TWU law school, Justice Jamie S. Campbell ruled in favour of TWU (see *Trinity Western University v. Nova Scotia Barristers' Society,* **2015 NSSC 25**). He held that the NSBS did not have jurisdiction under the *Legal Profession Act,* SNS 2004, c 28, to make a decision that required TWU to change its policies. He noted in particular that there was no evidence that TWU law graduates would lack the training to serve their clients or be more likely to discriminate against them. In the alternative, if the NSBS did have the authority to make the decision it did, Justice Campbell ruled that the decision violated the *Charter* protected freedom of religion of prospective TWU law students, which included the right to obtain an education in accordance with one's faith. He further held that the decision could not be justified as a reasonable limit on freedom of religion. According to Justice Campbell (at para 13), "It is hardly a pressing objective for a representative of the state to use the power of the state to compel a legally functioning private institution in another province to change a legal policy in effect there because it reflects a legally held moral stance that offends the NSBS, its members or the public." Justice Campbell also awarded costs of $70,000 against the NSBS (see *Trinity Western University v. Nova Scotia Barristers' Society*, **2015 NSSC 100**).

The **NSBS** has filed an appeal of Justice Campbell's decision, indicating that "If left unchallenged, this ruling may significantly restrict the scope of the Society's authority to uphold and protect the public interest in regulating the legal profession. It may also prohibit the Society from continuing to take on a wider role in the promotion of equality in all aspects of its work, including in the administration of justice."

In **New Brunswick**, members of the Law Society Council originally voted in June 2014 to accredit TWU law school by a vote of 14 to 5. The Council then held a Special General Meeting in September 2014, where members

of the Law Society of New Brunswick (LSNB) voted 137 to 30 directing Council not to approve TWU law school as a recognized faculty of law. The resolution was not binding on Council, however, which – as a result of a tie vote in January 2015 – upheld its original decision to accredit TWU law school. The LSNB is therefore the only law society that has considered the matter independently of the Federation of Law Societies and has decided to approve TWU law graduates.

Our discussion so far has focused on provincial regulators and governments, but the federal government has also played a role in the legal proceedings concerning TWU law school. The federal Attorney General intervened in the Nova Scotia litigation, and will also intervene in the Ontario litigation. Its position has been that refusing to admit TWU law graduates to a law society is unreasonable: "The public interest does not require banning all students from Trinity Western University from becoming members of the Law Society … (the end result of the failure to accredit Trinity's Law School). This is a disproportionate approach as the [Law Society] can deal with discriminatory conduct of a member on an individual basis." The federal government's interventions have been called "perplexing" by counsel for OUTlaws, given that the provinces regulate the legal profession.

We are therefore left with three law societies that have effectively decided not to admit TWU law graduates to the profession, with challenges to those decisions by TWU underway in all three jurisdictions. The remainder of law societies across Canada have voted in favour of accepting TWU graduates either directly through their own decision making bodies, or indirectly by accepting the decision of the Federation of Law Societies.

In addition, the legal blogosphere has allowed individual lawyers to express their views on TWU law school. For a range of opinions see Omar Ha-Redeye, "A Law School for Homophobes" (Slaw, July 28, 2013); Janet Epp Buckingham, "What's all the fuss about Trinity Western University" (The Cardus Daily, February 10 2014); Julie Sobawale, "The TWU Debate Continues" (Slaw, February 26 2014); Susan Van Dyke, "What Will a Trinity Western University Law Degree Be Worth" (Slaw, April 24, 2014); Mitch Kowalski, "With TWU Decisions – Whither the Federation of Law Societies" (Slaw, April 27 2014); Jamie Maclaren, "TWU Law and the New Reality" (Slaw, October 8, 2014); Lee Akazaki, "B.C. Minister's reason for revoking TWU's JD hurts the legal academy" (Gilbertson Davis LLP Blog, December 31 2014); Albertos Polizogopouls "A Good Day for Religious Freedom in Canada" (Faith Today, January 29, 2015).

The Response by Law Schools and Legal Academics

Law schools and legal academics have also weighed in on TWU law school. A number of law schools passed faculty council resolutions or wrote letters expressing concerns to their law societies about accepting TWU law graduates: see for example the joint letter from the University of Alberta and University of Calgary Faculties of Law to the Law Society of Alberta, and faculty council resolutions from the University of Victoria (see Gillian Calder, "UVic Law and the Debate Over Accreditation of a New Law School at Trinity Western University, The Advocate, September 2014); University of British Columbia; University of Windsor, Osgoode Hall Law School; Queen's University; and Dalhousie University. Student organizations have also been active in advocating to law societies on TWU, largely through the OUTlaws branches at law schools across the country, but also through other student organizations.

Amongst legal academics, TWU's proposal for a law school has been criticized by Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25 Canadian Journal of Women and the Law and "TWU Law: A Reply to Proponents of Approval" (2014) Dalhousie Law Journal (forthcoming). Angela Cameron, Angela Chaisson and Jena McGill defend the decisions of law societies not to accredit TWU in "The Law Society of Upper Canada Must Not Accredit Trinity Western University's Law School", (2014) University of Ottawa Working Paper Series. On the other hand, TWU's law school has been defended by Faisal Bhabha, "Let TWU Have Its Law School" (Slaw, January 24, 2014) and Dwight Newman, "On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada" (2013) 22:3 Const. Forum 1-14. The implications of rejecting TWU's application have been questioned by Carissima Mathen and Michael Plaxton, "Legal Education: Religious and Secular: TWU and Beyond" (2014) University of Ottawa Working Paper Series. Saul Templeton has critiqued the discourse around the private status of TWU in "Trinity Western University: Your Tax Dollars at Work" (ABlawg, March 9, 2015); and Paul Daly has questioned the administrative law basis for Justice Campbell's decision in Nova Scotia ("Reviewing Regulations: *Trinity Western University v. Nova Scotia Barristers' Society* 2015 NSSC 25" (Administrative Law Matters, February 5, 2015)). Some legal academics and law students also made submissions to the law societies in their jurisdictions (see e.g. Dianne Pothier, "An Argument Against Accreditation of Trinity Western University's Proposed Law School" reprinted, (2014) 23(1) Constitutional Forum).

Legal and Policy Issues

That TWU's proposed law school has led to conflict and division amongst Canadian regulators, governments, lawyers, and the legal academy is unsurprising given the troubling legal and policy issues it raises. Over the past decade the legal system has clearly recognized the equality rights of LGBTQ Canadians. But the Canadian constitution also protects freedom of religion, and some human rights codes – including that in BC – protect the ability of religious organizations to grant preferences to

members of their own groups (see *Human Rights Code*, RSBC 1996, c 210, s 41).

The balance between these interests has been considered previously in the context of professional regulation, but that consideration does not eliminate uncertainty about the appropriate legal and policy response to TWU law school. In 2001, the Supreme Court of Canada reviewed a decision by the British Columbia College of Teachers not to accredit TWU's teaching college in part because of its Community Covenant. The Court overturned the College's decision for a number of reasons, but in part because it was of the view that "the admissions policy of TWU alone is not itself sufficient to establish discrimination" under the *Charter* given that it is "the voluntary adoption of a code of conduct based on a person's own religious beliefs" (*Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, para 25 (*TWU v BCCT*)). But the Court's reasoning in that case may not determine the outcome for TWU. The legal rights of LBGTQ people have evolved significantly since 2001. Legal education arguably raises different issues.

The decision does, however, observe the basic tension between freedom of religion and equality rights that TWU's Community Covenant raises. On the one hand TWU's supporters can claim the significance of their religious convictions and the traditional religious position requiring sexuality to be confined to heterosexual marriage. On the other hand, its opponents can note that there is no normative reason to view discrimination against LGBTQ people on religious grounds as any more acceptable than discrimination against people of colour or women. That religions have always discriminated against LGBTQ people creates a longer history of which to be ashamed; it does not create a justification for continuing acceptance of their doing so.

In addition, the TWU case raises regulatory conflicts. The approval (or rejection) of a law school that effectively excludes LGBTQ persons can occur through the Ministry of Advanced Education, through provincial human rights legislation or through each of the provincial legal regulators who determine which lawyers may practice in its jurisdiction. Which of these bodies is best suited to exercise this jurisdiction? It can be argued that human rights tribunals are more suitable than legal regulators to assess discriminatory conduct by TWU. But at the same time, if legal regulators have the jurisdiction to accredit law schools, and if they have a reasonable basis for concluding that a law school's conduct is discriminatory, than ought they to decline to exercise their jurisdiction simply because one province's human rights legislation exempts religious organizations from anti-discrimination obligations?

Another complexity arises from the fact that the Canadian legal regulators have agreed to work cooperatively through the Federation of Law Societies. Some legal regulators, such as the Law Society of Alberta, have put that cooperation ahead of conducting their own debate over how TWU's law school should be treated. Other law societies in Ontario and Nova Scotia have refused to do so. The absence of consensus on the Federation's actual authority and legitimacy has been revealed by the TWU issue but may also have contributed to the divided response to the Federation's initial report. Yet the implications of that divided response are uncertain given law societies' work towards national coordination. If TWU graduates can be admitted in Alberta, then what is to stop those graduates from being called there and then moving to Ontario, invoking the mobility agreement to which all the law societies are signatories? And if they are not permitted to move to Ontario, then what is the effect of that decision on inter-provincial mobility, and how does that cohere with constitutional protection of mobility rights?

There are many complexities raised by TWU law school, and we commend the Canadian Bar Association and the editors of this newsletter for gathering a broad range of views on how those complexities ought to be resolved.

An earlier version of this article appeared in (2014) 17(3) Legal Ethics 437-441.

Postscript: On July 2, 2015, after this article when to press, the Ontario Divisional Court upheld the decision of the Law Society of Upper Canada to refuse to accredit Trinity Western law school. See Trinity Western University v The Law Society of Upper Canada, *2015 ONSC 4250.*

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Trinity Western University's Community Covenant

By Earl Phillips, B.A., LL.B.

Introduction

This is a welcome opportunity to discuss the TWU Community Covenant. It is at the centre of the controversy of whether TWU should have a law school, and it deserves careful reading and consideration. I will briefly set the theological context, then discuss the content in some detail, and conclude with the legal context. But first, a brief introduction to Trinity Western University is in order.

An Introduction to TWU

Trinity Western University began as Trinity Junior College in 1962. The *Trinity Junior College Act* of 1969 set the statutory mandate for it to offer education "with an underlying philosophy and viewpoint that is Christian."[1] In 1979 Trinity Western was given statutory authority to grant undergraduate degrees, and beginning in 1985, as "Trinity Western University", it was authorized to offer graduate degree programs.[2]

TWU continues as a private Christian liberal arts and sciences university, offering over 42 undergraduate programs and 17 graduate programs. It has professional programs for Nursing, Education, Counselling Psychology and Business. TWU consistently ranks at or near the top in national university surveys and has four Canada Research Chairs. It competes in sport against all the major public universities in Canada and has won multiple women's and men's national championships in soccer, volleyball and track and field. About 4,000 students from over 50 countries are enrolled at TWU each year. It has over 26,000 alumni.

The Community Covenant

a) "Community" and "Covenant"

The concept of community is critical in the Christian faith. The Christian Church is considered to be the body of Christ, and the analogy of the physical body is common in the Bible. The individual parts of the body need each other to be complete, as do the individual members of a Christian community. There is mutual reliance and mutual support. No single member of the TWU community is complete, and no one can completely succeed, outside that community.

The concept of covenant is equally critical. It is modeled on God's covenant, which is certain and unchanging, and does not rely on an exchange of consideration as in a legal contract. While God's covenant calls for a response of obedience, it is not terminated by any failure of the beneficiary of the covenant. In a legal contract, the failure of one party to perform as promised gives the other party the right to treat the contract and all obligations under the contract as ended. In God's covenant – and in the Community Covenant at TWU – a failure by one member of the community does not release the university and the other individual members of the community from their continuing obligations to love, respect and care.

b) What the Community Covenant is

The Community Covenant is the expression of how the members of the TWU community – the students, faculty and staff – wish to study, work and live together. It is based on how

[1] S.B.C. 1969, c. 44, s. 3(2)
[2] *An Act to Amend the Trinity Western College Act*, S.B.C., c. 63

the TWU community understands Christian teaching and the Christian life. It is explicit, comprehensive and detailed. It is transparent and explains itself by citing Biblical passages on which its provisions are based.

The Community Covenant is part of the invitation to join the TWU community and recognizes that the "actions of each member have a direct effect on the other co-owners of the community."[3]

Agreeing to the Community Covenant is a requirement for all students, faculty and staff. It is explicitly stated to be a "solemn pledge", "a contractual agreement and a relational bond" among all members of the community by which they "strive to achieve respectful and purposeful unity that aims for the advancement of all, recognizing the diversity of viewpoints, life journeys, stages of maturity, and roles within the TWU community."[4] It is crucial to knitting this large and very diverse body of people into a community.

The Community Covenant is available for prospective students from their first inquiry about admission. They are encouraged to read the Covenant, to ask questions, and to seek clarifications. Reading the Community Covenant will give students a very clear idea of what TWU is, what it will be like to study there, and what life on campus will be like. The Covenant can be agreed to at any point in the admissions process prior to registering for classes.

The Community Covenant is an attraction for students who want to attend a university where everyone explicitly commits to maintaining a respectful, caring, supportive and safe environment that provides every opportunity for students to fulfill their potential.

c) What the Community Covenant is not

The Community Covenant is not a statement of faith. It does not require Christian faith or any religious faith; it deals with conduct. Nor is the Community Covenant an affirmation of belief in the Biblical ideals, principles and standards on which the Covenant is based. That is made clear where the Covenant says:

> TWU welcomes all students who qualify for admission, recognizing that not all affirm the theological views that are vital to the University's Christian identity.[5]

That is why students of different faiths, or of no faith at all, have always been admitted to and been part of the TWU community.

The Community Covenant is not an imposition or a barrier. Students choose to accept responsibilities for their conduct and are beneficiaries of the responsibilities of all other members of the community. The conduct expected is not beyond any student's capacity and does not require a compromise of identity. In particular, gay and lesbian students are neither required nor encouraged to deny their sexual orientation; they are asked to refrain from sexual activity while a student.

The Community Covenant, and specifically its provisions regarding sexual conduct outside of marriage between a man and a woman, is not a fringe or fundamentalist interpretation of Christian doctrine. Rather, it is solidly grounded in Scripture and is the historic and orthodox position of Christian faith and practice that continues to be followed by the vast majority of the Christian church today.

The Community Covenant is not a treadmill to expulsion of wayward students. There are accountability provisions that require care and compassion, and that aim at healing and restoration.

d) What the Community Covenant requires

The Community Covenant provides specifics of the conduct expected of members of the TWU community. They include reference to the sacredness of marriage between a man and a woman and a prohibition on sexual intimacy outside of such a marriage. But those provisions are only a small part of a greater whole.

The requirements of the Community Covenant are grounded in the general proposition that members of the community commit themselves to "embody attitudes and to practise actions identified in the Bible as virtues, and to avoid those portrayed as destructive."[6]

The Community Covenant promotes the Christian virtues of love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice. It calls for honesty, civility, truthfulness, generosity and integrity, treating all persons with respect and dignity, and being responsible citizens who contribute to the welfare of creation and society. It encourages the support for other members of the community while extending forgiveness, accountability and restoration.

The members of the TWU community also agree to voluntarily abstain from destructive communication, prejudice, and harassment; from lying, cheating, and plagiarism; and from other conduct such as drunkenness, the use or possession of illegal drugs, and the misuse of substances.

Each of these commitments under the Community Covenant have footnoted references to what TWU considers to be relevant passages of the Bible. The purpose of the footnotes is to explain the biblical basis for TWU's beliefs. There is no requirement that students assent to or express belief in the Bible, the passages referred to, or the interpretation or relevance of those passages.

To suggest otherwise is contrary to other provisions of the Community Covenant. For example, the Community

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[3] Student Handbook, "Accepting the Invitation" (the entire Student Handbook can be found here: http://www.twu.ca/studenthandbook/)

[4] Community Covenant, section 1 (the entire Community Covenant can be found here: http://www.twu.ca/governance/presidents-office/twu-community-covenant-agreement.pdf)

[5] Community Covenant, section 5

[6] Community Covenant, section 2

Covenant talks about forming an educational community for the pursuit of "truth and excellence", where people and ideas are treated with "charity and respect", and where people can "think critically and constructively about complex ideas."[7]

That is why TWU continues to foster debate on issues such as sexual intimacy outside of opposite sex marriage. A recent example was a well attended event on campus where two gay men energetically but respectfully expressed their opposing views on whether same-sex marriage is compatible with the Christian faith.[8]

A final part of the context for these commitments is a statement about freedom and a warning against legalisms:

> ...this covenant identifies particular Christian standards and recognizes degrees of latitude for individual freedom...
>
> TWU rejects legalisms that mistakenly identify certain cultural practices as biblical imperatives, or that emphasize outward conduct as the measure of genuine Christian maturity...[9]

e) Accountability

There is accountability for meeting the commitments of the Community Covenant. It is an accountability of the university and of each member of the community to each other.

The first thing to note is that an accountability response to conduct is itself subject to the Community Covenant. That is, any effort to hold one accountable must meet the ideals of love, kindness, compassion, mercy and justice; it must be done with respect and dignity; and it must be done so as to build up, encourage and support.[10] Those are commitments of every member of the community that always apply.

Any accountability also must take note of "Areas for Careful Discernment and Sensitivity" which concludes:

> In all respects, the TWU community expects its members to exercise wise decision-making according to biblical principles, carefully accounting for each individual's capabilities, vulnerabilities, and values...[11]

The accountability procedures for students are set out in the Student Handbook. The goals of the process are objectivity, care and acceptance (even when behaviour is unacceptable), to educate the student about the Community Covenant, and to have the student accept accountability for past behaviour and decide that future behaviour will be in keeping with the original commitment. The needs of the individual must be balanced with the needs of the community.[12] In short, the goal is development and restoration, not criticism or punishment.

The accountability procedures reflect a range of responses depending on the circumstances.[13] There are informal processes, which are most commonly used, and formal processes with procedural safeguards for all concerned, and no-cost counselling and support for the student. There is an appeal process for any accountability decision that is made.

Most matters are resolved through an apology, an educational assignment (about substance abuse or cultural sensitivity, for example) or a warning. In cases of property or financial loss, restitution or community service may be required. More serious cases may result in a suspension, usually of one or two weeks. A suspension beyond one semester is very rare, but even in such cases, students have returned to the University. There has not been an expulsion for at least 20 years.

Matters of sexual conduct are treated the same as other matters. The seriousness of the conduct, the circumstances, and the attitude of the student will be considered and the response and consequences will be proportionate. There have been instances of both same-sex and opposite-sex conduct that were addressed under the Community Covenant. In every case, the student was invited to remain at TWU. There have been several instances over the years of an unmarried student becoming pregnant. In every case, the accountability process allowed the student to continue at the University.

The Legal Context

a) The *Charter of Rights*

The Community Covenant fits comfortably within the legal context of the *Charter of Rights* and its interpretation by the Supreme Court of Canada. Freedom of conscience and religion has always been given a broad and generous interpretation, and this has been affirmed twice already this year. Both *Loyola High School*[14] and *City of Saguenay*[15] endorse the robust interpretation of section 2(a) established in *Big M Drug Mart*:

> The freedom of religion protected by **s. 2** (a) of the ***Charter*** is not limited to religious belief, worship and the practice of religious customs. Rather, it extends to conduct more readily characterized as the propagation of, rather than the practice of, religion. As this Court held in *Big M*, "[t]he essence of the concept of freedom of religion" includes "the right to manifest religious belief . . . by teaching and dissemination" (p. 336). Thus, Loyola's expressed desire to teach its curriculum in accordance with Catholic beliefs falls within the scope of **s. 2** (a)'s protection.
>
> *Big M* also affirms that the interpretation of the religious

[7] Community Covenant, section 1
[8] See an article about the event, and a video here: http://www.twu.ca/news/2015/013- building-bridges.html
[9] Community Covenant, section 4
[10] Community Covenant, section 3
[11] Community Covenant, section 4
[12] Student Handbook, "The Goal of the Accountability Process"
[13] Student Handbook, "Accountability Procedures"
[14] *Loyola High School v. Quebec* (Attorney General), 2015 SCC 12 ("*Loyola*")
[15] *Mouvement laïque québécois v. Saguenay* (City), 2015 SCC 16 ("*Saguenay*")

> freedom guarantee should be "a generous rather than a legalistic one, aimed at fulfilling the purpose of the guarantee and securing for individuals the full benefit of the *Charter* 's protection" (p. 344).[16]

b) Importance of Identity and Community

The Supreme Court of Canada has also recognized that religious faith is a matter of identity of the individual, and forms part of the believer's worldview. It is not just a matter of choice that can be dismissed or ignored. Further, the court has recognized the need for religious community and its significance to society.

In both *Loyola* and *Saguenay*, the Court adopted this from Professor Richard Moon:

> Underlying the [state] neutrality requirement, and the insulation of religious beliefs and practices from political decision making, is a conception of religious beliefs or commitment as deeply rooted, or commitment as an element of the individual's identity, rather than simply a choice or judgment she or he has made. Religious belief lies at the core of the individual's worldview. It orients the individual in the world, shapes his or her perception of the social and natural orders, and provides a moral framework for his or her actions. Moreover, religious belief ties the individual to a community of believers and is often the central or defining association in her or his life. The individual believer participates in a shared system of practices and values that may, in some cases, be described as a "way of life". If religion is an aspect of the individual's identity, then when the state treats his or her religious practices or beliefs as less important or less true than the practices of others, or when it marginalizes her or his religious community in some way, it is not simply rejecting the individual's views and values, it is denying her or his equal worth.[17] [emphasis added]

In discussing the concept of state neutrality on matters of religion in *Saguenay*, Gascon J. summarized the significance of religious freedom this way:

> The neutrality of the public space therefore helps preserve and promote the multicultural nature of Canadian society enshrined in **s. 27** of the ***Canadian Charter***. **Section 27** requires that the state's duty of neutrality be interpreted not only in a manner consistent with the protective objectives of the ***Canadian Charter***, but also with a view to promoting and enhancing diversity [citations removed].
>
> I would add that, in addition to its role in promoting diversity and multiculturalism, the state's duty of religious neutrality is based on a democratic imperative. The rights and freedoms set out in the *Quebec Charter* and the ***Canadian Charter*** reflect the pursuit of an ideal: a free and democratic society. This pursuit requires the state to encourage everyone to participate freely in public life regardless of their beliefs [citations removed].[18]

In *Loyola*, the minority concurring opinion discussed the issue of whether institutions, in addition to individuals, can claim freedom of religion under the *Charter*. While the majority did not consider it necessary to answer that question, the basis for the minority view was not disputed.

McLachlan CJ. and Moldaver J. noted the collective dimension of freedom of religion and the importance of religious relationships and religious community. They referred to previous decisions of the court and to international instruments that affirm and protect faith communities. Noting "The individual and collective aspects of freedom of religion are indissolubly intertwined", they confirmed that the *Charter* must protect religious community.[19]

Freedom of association is another *Charter* right for religious communities. The Supreme Court of Canada went out of its way in a case about a union's right to strike to note that freedom of association is vital to freedom of religion. The court adopted this from the dissent in an earlier case:

> The Court has also found that freedom of religion is not merely a right to hold religious opinions but also an individual right to establish communities of faith (see *Alberta v. Hutterian Brethren of Wilson Colony,* 2009 SCC 37, [2009] 2 S.C.R. 567). And while this Court has not dealt with the issue, there is support for the view that "the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus an issue at the very heart of the protection" of freedom of religion (*Hutterian Brethren*, at para. 131, per Abella J., dissenting [citations removed].[20]

Conclusion

The TWU Community Covenant is vital to the creation of community, and it is an expression of identity. Both are consistent with the university's mission and purpose. It has also been vital to the success of the university and its thousands of graduates who serve with distinction in many fields and professions throughout Canada and around the world. A fair reading of the Community Covenant should lead to the conclusion that it is not a threat or danger, but a reasonable support for building and maintaining the diversity we all desire for Canadian society.

[16] Paras. 132 and 133, *Loyola, infra*, and para. 68, *Saguenay, infra*
[17] Para. 44 *Loyola, infra*, and para. *Saguenay, infra*
[18] *Saguenay, infra*, at paras. 74 and 75
[19] *Loyola, infra,* at paras. 92-96
[20] *Mounted Police Association of Ontario v. Canada (Attorney General)*, 2015 SCC 1, at para. 64

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Trinity Western University's Law School: The Case for Diversity in a Free Society

By John Carpay, B.A., LL.B.

Why doesn't TWU just get with the program and accept the reality of gay marriage in Canada? Why cling tenaciously to outdated beliefs about sexuality and marriage that many Canadians consider to be silly and naïve, or even bigoted and hateful?

Diversity in a free society is the short answer to both questions. I speak here of real diversity of belief, opinion, and lifestyle choices, not only diversity in skin colour and sexual orientation as can often be found among those who think alike and practice similar lifestyles.

The TWU controversy raises the fundamental question of whether Canada should remain a free and diverse society, or take a significant step towards more government control over citizens' expression, association, and lifestyle choices. The urge to avoid hurt feelings and the urge to achieve peace through conformity (albeit only a superficial peace), are powerful forces that challenge freedom.

The Federation of Law Societies of Canada has approved TWU's law program, based on its academic credentials and professional standards. TWU's court actions against the law societies of British Columbia, Ontario and Nova Scotia raise the question of whether citizens, through voluntary associations, have the right to establish their own codes of conduct and to develop and practice their own beliefs without their members being denied admission to a profession for which they are otherwise qualified.

Authentic diversity

Tolerance of authentic diversity in thought, speech, religion, association, and lifestyle choices is what marks the difference between a free and democratic society, and a totalitarian state. Forced conformity – whether imposed by a dictatorship or by a democratically elected government – is incompatible with freedom. Free societies tolerate minority religions, the expression of minority opinions, and the flourishing of various minority associations that are created and maintained by those who reject the majority's ideology or worldview.

Authentic diversity should matter to everyone, because Canada's fundamental freedom of conscience and religion is not limited to people who are religious as such. Every person holds metaphysical beliefs in respect of questions such as: Why do we exist? What is right and wrong? How should we behave? Science can tell you how to end the life of a convicted murderer, but not whether or when it is right or wrong to do so. The *Charter* protects the rights of atheists, agnostics and theists alike to ponder these questions, arrive at their own conclusions, share their conclusions with others, and act upon their convictions. A free society protects atheists and agnostics from government coercion as much as it protects theists.

Insisting that Canadian law schools (or any other kind of institution) must subscribe to a particular set of beliefs about marriage and sexual behaviour threatens the freedoms of everyone, including gays and lesbians.

Authentic diversity in legal education

The law societies of B.C., Ontario and Nova Scotia often cite "diversity" as their reason to oppose TWU's law school. This claim is ironic, since anyone looking for actual diversity of thought and opinion would have difficulty finding it at an existing Canadian law school. Canada has indisputably the most monolithic body of law schools in the western world. They all promote a politically correct worldview which rarely if ever questions the progressive orthodoxies of radical feminism, socialist economics, aboriginal entitlements, and libertine sexual politics. Alternative views, including those of religious adherents, are rarely presented, and the purpose of discussing such views at all is often just to mock and deride them. Those shouting the loudest for "tolerance" and "diversity" are in fact the most intolerant of any real diversity. What they plainly seek is conformity.

Democratic intolerance

Tolerance does not consist of using "diversity" and "respect" as slogans to attack the creation of actual diversity in legal education or to censor disagreements about sex. Rather, tolerance means accepting the authentic diversity expressed by a wide range of different associations which adhere to different worldviews or belief systems.

Democracies like Canada, while embracing freedom in theory, can easily abandon their commitment to minority rights when doing so proves popular at the ballot box. For example, in the 1950s the Quebec government persecuted communists and Jehovah's Witnesses through targeted laws,[1] very likely with the full support of Catholic voters who formed the overwhelming majority of the electorate. In the majority's mind, there was nothing wrong with the legal suppression of "Bolshevik propaganda" in Quebec, or with restricting the distribution of anti-Catholic Jehovah's Witnesses tracts in Quebec City.

Majorities, whatever their nature or composition, see their own beliefs as objective, true and the only valid basis for sound public policy. Majorities generally mean well when restricting freedom, suppressing minority rights in the name of some higher good. This is why societies do not truly become more tolerant with time. Instead, they merely change the object of their intolerance. Yesterday's Jews and gays are today's Evangelical Christians and traditionalist Catholics. Yesterday's public policy goals of religious and moral purity are today's public policy goals of equality and non-discrimination.

Sexual ethics: today's secular majority

In 2015, the majority of Canadians do not worship weekly at a church, mosque, synagogue or temple. Many have no knowledge of what various religions actually teach, or why they teach it. The religious idea that sex ought always to be linked inextricably with marriage and procreation sounds absurd to many Canadians, especially younger ones. Worse than absurd, religious teachings that denounce sex outside of marriage as sinful ("wrong") can seem hurtful, even harmful and hateful. In a culture where most people view sex as simply a toy for adults and teenagers to make life as pleasurable as possible, with or without the purely optional burdens of marriage and the inconvenience of parenthood, the religious view of sex as God's sacred gift is offensive. When religion's insistence on sexual restraint and self-control is combined with its definition of marriage as the union of one man and one woman, this insistence is perceived by some as bigoted and hateful towards the LGBTQ+ community. However, to impute nefarious motives to people who hold to a particular opinion is unhelpful to understanding that opinion, and is also unhelpful to refuting the opinion if it is wrong.

Majorities do not need constitutional protection

Tolerance for unpopular beliefs – not popular ones – is what separates the free society from the totalitarian state. As the Supreme Court of Canada held in *R. v. Zundel*: "The view of the majority has no need of constitutional protection; it is tolerated in any event."[2] For a free society to remain free, its citizens must acquire the maturity to cope with their feelings of incomprehension and outrage when confronted with doctrines they consider putrid and offensive. Freedom depends on citizens accepting that other people can and do have radically different conceptions of reality, including unpopular ideas about sexuality. I cannot enjoy freedom of expression myself unless I grant my neighbour – whose opinions I may abhor – the same freedom. A legal right to be free from hurt feelings, if it existed, would destroy freedom of expression as well as freedom of association.

Authentic diversity in voluntary associations

A free society tolerates an authentic diversity of groups and organizations, including those with unpopular beliefs and practices. Every imaginable association, from the Liberal Party to the United Way to the United Church to the Vancouver Pride Society, has its own beliefs, goals, rules and practices. Sports clubs, temples, charities, schools, orchestras, ethnic associations, and political parties all engage in discrimination against those who disagree with the association's beliefs, goals, rules or practices. Authentic diversity in a free society is protected when each association enjoys the freedom to define its own raison d'etre, and to create its own rules.

Every voluntary association discriminates. The constitution of Out for Kicks,[3] Vancouver's gay soccer league, has as one of its purposes the elimination of prejudice and discrimination based on sexual orientation. It would be safe to assume that an Evangelical Christian who disagrees with LBGTQ+ worldviews, especially one who claims to have experienced a change in her sexual orientation, would not feel welcome to join Out for Kicks. Or, more accurately, she would be welcome to join only if she refrained from openly

[1] See e.g. *Saumur v. City of Quebec*, [1953] 2 S.C.R. 299 and *Switzman v. Elbing*, [1957] S.C.R. 285.

[2] *R. v. Zundel*, [1992] 2 S.C.R. 731 at 753.

[3] http://www.outforkicks.ca

sharing her personal experiences with, and beliefs about, sexuality. She might argue that she cannot abide by the Out for Kicks constitution and also be true to herself, and that she is not welcome there. After all, her religious beliefs and her own experience of sexuality form the core of her identity. Nevertheless, if she disagrees with Out for Kick's beliefs and practices, her choices are to abide by the Out for Kicks constitution or play soccer elsewhere. To suggest that Out for Kicks needs to change its own constitution, in order to make everyone feel welcome, is not compatible with the free society.

Other examples are easy to come by. The Turkish Society of Canada likely does not provide a welcoming environment to Canadians of Armenian ancestry, even if that Society sincerely makes every effort to be welcoming of everyone. The government does not require that Society to recognize the 100th anniversary of the Armenian genocide. A free society does not force an Orthodox synagogue to ordain a female rabbi, even if some Jewish women feel unwelcome at that synagogue by virtue of its male leadership requirement. The government does not force an animal rights group to hire a qualified job applicant who enjoys recreational hunting, or who participates in rodeos. In a free society, the government does not force the Liberal Party of Canada to accept pro-lifers as election candidates. That is for Liberals to decide themselves, without facing government coercion.

Freedom of association ceases to exist when government bodies try to coerce an association to alter its mission, purpose, or belief system in order to suit the ideological preferences of individuals who disagree with that association. This is exactly what three law societies demand of TWU: change your Community Covenant, or else your law school graduates, even though they are fully qualified to practice law, will not be welcome to join the legal profession.

"Discrimination" is a misleading term

Originally, the word "discrimination" simply meant making a distinction. It was a neutral or even positive term: a "discriminating shopper" is someone with sophisticated tastes. Since the 1960s, the word discrimination has gradually come to mean bigotry: failing to promote a qualified woman in the workplace, or refusing to rent an apartment to a non-white family. The noble ideal of protecting employees, tenants and consumers from bigotry in commercial settings was the impetus for human rights legislation. But in Canada today, the legal right to be "free from discrimination" is used aggressively to attack private and voluntary associations like gyms, barber shops, magazines, martial arts studios, and Christian schools and universities.

When a martial arts studio in Halifax requires bowing to the sensei, or physical contact between men and women during sparring, it most certainly discriminates against the Muslim human rights complainant who disagrees with these practices. But this discrimination is not bigotry. Further, people are free to pursue other sports and arts. When a Christian school or university insists on a code of conduct for its students and staff, in order to create a community that is consistent with its beliefs and teachings, this discriminates against people who have no interest in abiding by that community's standards.

In a free society, every voluntary association necessarily discriminates on the basis of its beliefs, interests, activities, or identity. Freedom of association – one of the cornerstones of Canada's free society – is undermined by a new, intolerant "right" to force changes on associations that one disagrees with. This amounts to thinly disguised totalitarianism.

A half-truth is not the whole truth, and is therefore misleading

Three law societies claim that TWU's Community Covenant "discriminates" against gays and lesbians. This claim ignores the Community Covenant's application to all TWU students, regardless of sexual orientation. Unmarried heterosexuals who insist on being sexually active are not welcome to attend TWU. Sexual activity aside, the Community Covenant prohibits vulgar or obscene language, drunkenness, viewing pornography, gossip, and other legal activities. In short, TWU's expectations "discriminate" against the majority of Canadians, for a myriad of reasons, all of which boil down to an unwillingness to practice an Evangelical Christian lifestyle. To characterize the Community Covenant as "discriminatory against gays and lesbians" is therefore misleading.

Those who disagree with Evangelical Christian teachings are not compelled to attend TWU or to abide by its rules. The same holds true for every other voluntary association in Canada, of which there are hundreds of thousands. Those who reject traditional religious teachings about sexuality and marriage will not be interested in attending TWU. They are not victims but free citizens, with every right to study law (and other subjects) elsewhere.

If individuals are permitted, why can't they associate with each other?

The three law societies will readily admit into membership Christians who, as individuals, have practiced their beliefs about sexuality and marriage while attending any Canadian law school other than TWU's. It is only when these same individuals, adhering to the same beliefs and committed to the same lifestyle, associate with each other in a community while studying law, that the law societies consider these students unfit to enter the legal profession. Essentially, the three law societies are punishing the choice of individuals to share their beliefs and to pursue common goals in community. The law societies directly attack *Charter*-protected freedom of association.

Reality check: lawyers don't discriminate

While seeking to exclude graduates of TWU's law school from entering the legal profession, none of the three law societies object to current, practicing lawyers adhering to the "wrong" beliefs about marriage and sexuality. It appears that the law societies know full well that having the "correct" views on sexuality and marriage is not relevant to lawyers providing clients with competent legal services. Practicing lawyers already reflect the diversity of Canada's population. Many (and probably most) lawyers hold to the majority opinions about sexuality and marriage. Nobody has provided evidence to suggest that LGBTQ+ individuals are not well-represented in the legal profession, or are not receiving adequate legal representation.

In 2001, the Supreme Court of Canada ruled that TWU has the *Charter* right to include traditional sexual morality as part of its community standards,[4] in a case where the B.C. College of Teachers refused to accredit TWU education graduates. In the absence of evidence that TWU graduates were mistreating gays and lesbians, the Court decisively rejected the "discrimination" argument: "there is nothing in the TWU Community Standards, which are limited to prescribing conduct of members while at TWU, that indicates that graduates of TWU will not treat homosexuals fairly and respectfully."[5]

The *Charter* serves to protect the individual from government

The *Charter* does not apply to private institutions like TWU, but rather to government bodies like the three law societies which are now discriminating against TWU. In *Trinity Western University v. Nova Scotia Barristers' Society*, Justice Campbell acknowledged that some may experience "outrage, emotional pain, minority stress, or hurt feelings" from knowing that a graduate of a private Christian university in B.C. can become a lawyer in Nova Scotia.[6] But this does not provide the Barristers' Society with any grounds to violate the' *Charter*-protected fundamental freedoms of Canadians. The *Charter* cannot be transformed into "a tool in the hands of the state to enforce moral conformity with approved values."[7]

What about equality rights?

Every Canadian without exception should have an equal right to exercise her or his fundamental freedom of expression, conscience, religion and association as that person sees fit. In a free society, equality rights should mean that Muslims, Evangelical Christians, gays and lesbians, traditional Catholics, and Orthodox Jews can all express their opinions freely, and can all form the voluntary associations of their own choosing. But freedom is destroyed in the name of equality when voluntary associations are ordered by government to change their beliefs, goals, rules or practices in order make everybody – everyone – feel equally welcome to join and belong to those associations. For example, Canada is no longer a free society when a Muslim association is forced by government (or by a government body like a law society) to practice complete gender equality as understood by modern, progressive Canadians. Freedom is destroyed when Vancouver's gay soccer league, Out for Kicks, is ordered by government in the name of equality to welcome as soccer players Muslims or Evangelical Christians who openly express their disapproval of gay sex. When a government body orders TWU to change its Community Covenant in order to please those who disagree with it, this destroys freedom of association for TWU, and for every other voluntary association as well.

A free society can survive and flourish only if equality is defined as every person's equal right to exercise her or his *Charter* freedoms according to that person's beliefs and conscience. When equality is defined as including a right to impose changes on associations that one disagrees with, society is no longer free, and authentic diversity can no longer flourish.

Conclusion

The TWU law school controversy provides an opportunity to choose the free society and authentic diversity over authoritarianism and conformity. A free society does not allow hurt feelings or majority opinion to deny individuals their right to create, maintain, and belong to the voluntary associations of their own choosing. The freedom to express offensive opinions, practice minority religious beliefs, and create unpopular organizations forms the cornerstone of Canada's free and democratic society. These fundamental freedoms benefit all Canadians, including gays, lesbians, and Evangelical Christians.

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[4] *Trinity Western University v. College of Teachers*, 2001 SCC 31.
[5] *Ibid.* at para. 35.
[6] *Trinity Western University v. Nova Scotia Barristers' Society,* 2015 NSSC 25 at para. 180.
[7] *Ibid.* at para. 222.

Saying "Yes" to Trinity Western University's Law School Says "No" to Diversity

By Shad Turner, B.Sc, M.L.I.S., J.D.

I grew up in Langley, British Columbia and went to high school there in the 1990s. When I got my driver's licence, I would exercise my freedom during lunchtime and class spares to drive from my fine arts (read: alternative) school to "downtown" Langley, if it can be called that. En route, I would roll past TWU and stare wonderingly at its estate. Having been raised without much of any religious influence – its probably more accurate to call my parents lapsed Anglicans than atheists – I could only imagine what TWU was or what it represented. I also had a private music teacher who taught there as a sessional instructor; she made oblique comments about its religious overtones, but otherwise I had not even a passing familiarity with TWU.

Fast forward to the summer of 2013, when I was licking my first year wounds and obsessing about securing an article. News of TWU emerged from the noise of the Ontario articling crisis. My mind turned initially to the supply and demand of a lawyer's labour, so I selfishly objected to the creation of yet another law school that might jeopardize my own value in the market.

I had, in 2000, completed a teaching diploma at Simon Fraser University, and faint memories of the legal storm surrounding TWU's teacher-education program bubbled to the surface. Before that, as an undergrad, I spent my summers working as a Student Customs Inspector for Canada Customs in Surrey. My then-boyfriend was employed at Little Sister's bookstore in Vancouver, and I remember the sharp sunburn that was my souvenir from marching in my first Pride Parade in Vancouver, joining the shop's contingent, holding up a banner decrying Customs and its prudish seizure policies. Having come of age in the context of these limited experiences, I was not aware of thorny legal legal issues engaging LGBTQ rights coming out of other provinces. But 13 years later, as I was exploring articling options, and learning something about provincial regulation and the national mobility of lawyers, it dawned on me that the consequence of whether or not TWU's law school opened its doors transcended BC's border.

It has been difficult to take a stand on TWU. Finding myself hemming and hawing–and especially in the midst of poignant positions taken on both sides–I have felt guilty of being at times indecisive, unprincipled, inarticulate. (For this reason, and for better or worse, I would be an absolutely terrible politician.) After all, I wear all sorts of hats. I am the son of don't-rock-the-boat and keep-your-nose-down-and-work-hard parents. I am a gay man who came of age on the coattails of LGBTQ human rights and gay-marriage achievements, believing that the hard-fought battles were a thing of the past. I am a former teacher whose first gig was at a "fundamental" school; my single earring agitated a 14-year-old enough to push religious pamphlets on me. I am also a budding lawyer trying to reconcile the administrative law and *Charter* principles, which are taking jabs at each other with TWU and law societies caught in the middle.

Based on my experience, most LGBTQ individuals choose to omit revealing their sexual orientation and gender identity in various circumstances, hoping they will pass for straight and cisgender. For me, this has taken many forms. At times, I have allowed friends, family, employers, colleagues, and neighbours to believe that I am straight. Usually, this takes the form of split-second decisions triggered by questions about dating or spouses. Or deceptive pronoun practices that essentially result in lies ("*I* bought a house this winter" instead of "*My partner and* I bought a house this winter"). Or just choosing to obscure or not to share with others the ordinary experiences my partner and I enjoy because of my discomfort with not knowing which line of questions might follow. Even today, 20 years after graduating from high school, and especially as I am entering this rather conservative profession, I find myself occasionally undertaking a tiring risk–reward analysis: For how long can I get through my article without my principal finding out I'm gay? Might I be seen as "flaunting" my sexuality if I use the terms "my boyfriend" or "my partner"? Should I even care? Well, if you still find yourself seeking approval from your peers and superiors like I do, then these are the questions that form an anxious backdrop of many social and professional encounters.

It goes without saying that many LGBTQ individuals will choose not to attend TWU because of, among other things, the principles espoused in the Community Covenant which all students and staff are required to sign. But the LGBTQ student who attends TWU faces the ordinary identity dilemma writ large. The consequences of breaching the Covenant are not entirely clear, although it threatens "formal accountability procedures".[1] Considering its potentially repressive effect on one's ability to express his or her identity fully, the Covenant either discourages queer and trans individuals from attending TWU, or it imposes a chilling effect on enrolled students.

I don't buy the argument that TWU students would necessarily receive a substandard legal education. At the University of Alberta, legal principles were presented more often than not without moral commentary—when we studied *Vriend v. Alberta*,[2] for example, there was no substantive discussion about sexual diversity in society. That would have been a great supplement, but I think my professor's canvassing of the case's relevant legal principles set me up just fine for extracurricular application, research, or musing. However, when professors did leak personal opinions about important cases, the effect was to provoke greater engagement. Isn't that what we want from universities?

But, all *Charter* and administrative law arguments aside, there is something oxymoronic about an institution of higher education purporting to uphold principles of academic excellence and exploration while forcing its students to remain silent about their very identities and lived experiences, and enforce such silence against one another. Colleges and universities are launch pads where individuals engage with the world and grow new layers, emerging as wiser versions of themselves, their skills, creativity, and reasoning burnished. What does it mean when we tolerate institutions of learning, which require a targeted group of individuals to check their identities at the door? How does one engage with the world of knowledge when one is compelled to leave attributes of his or her own character on the threshold?

It seems ironic that not only does TWU as an institution of higher learning effectively require its LGBTQ students to masquerade as straight and cisgender individuals, but also that its proposed law school rests on certain noble and liberal objectives. For example, TWU on its website states its law school will "infuse leadership and character development into its very core".[3] How it will achieve this for its LGBTQ students who are required by the Covenant essentially to repudiate their sexual and gender identities is perplexing. It is a rather hollow and half-hearted vision considering the implied caveat.

For its part, TWU also states that it will "provide a place where the great questions of meaning, values and ethics are confronted, debated and pondered, and the broad and diverse communities of Canada are served through a richer understanding of the law". This is admirably bold! Who would not want to attend a school that promised such ambitious vision? Pardon my sarcasm, though: I do not suggest that TWU is simply giving lip service to diversity and the "great questions of meaning, values and ethics", but I doubt that the proposed law school could achieve much success in this regard without voices in the room embodying said diversity. A roomful of heterosexual and cisgender students can very genuinely pursue those "great questions", but to what end? Discussion and debate lacking in sexual and gender diversity reinforce the same stale norms that dominated during less enlightened times.

LGBTQ students asked at the door of an institution of higher learning to pretend to be people they are not is an insult to the very ambition that brings them to the threshold. It is a sign that says, "you are not welcome", unless they agree to remain silent, on pain of some unspecified sanction. Were it not for the general invisibility of sexuality and gender identity, these students might not even be able to pay their way in with tuition. Justice L'Heureux-Dubé in her 2001 dissent recognized that "the history of struggles against sexual orientation discrimination has been described as a battle against 'the apartheid of the closet'".[4] While this has allowed many a queer or trans student to fly under the radar, this has also allowed discriminatory forces to remain unchecked for longer.

On one hand, Canadian society abhors patent racial and

[1] http://twu.ca/studenthandbook/university-policies/community-covenant-agreement.html.
[2] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1607/index.do.
[3] http://twu.ca/academics/school-of-law/about.html.
[4] http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1867/index.do.

gender discrimination. But when the religious banner is flown, we equivocate about sexual orientation. Compelling arguments are made that the TWU law school as a private religious institution would be within its legitimate rights to proscribe personal, intimate conduct that the Supreme Court has recognized as inseparable from and emblematic of one's identity. In other words, principles drawn from scripture trump certain human rights because they form part of the fabric of sincerely held religious belief.

Perhaps because the TWU matter cannot be so neatly categorized, legally or ethically, it suffers from great circularity and lack of precision. Each side has taken up "the public interest", "*Charter* values", "religious freedom", and "diversity" variously as swords and shields. Various decision-makers have gathered in the round and have built a self-perpetuating cycle of deference and delegation—the Government of BC, the FLSC, many provincial law societies (I'm looking at you, Alberta), and the courts. None of them will declare unequivocally that it is not in the public interest to bar LGBTQ students from an accredited law school in Canada.

Nobody can agree on what the *obiter* means in the Supreme Court's 2001 *Trinity Western University* case, or how to apply it today. And from *Bedford* and *Carter*,[5] we now know that the Court has signalled to lower courts that they can shrug their shoulders and shelve stare *decisis* if societal values have evolved and the "matrix of legislative and social facts" have changed. In *Trinity Western*, TWU successfully argued that its discriminatory covenant would not foster discrimination in public schools in BC. When these judicial reviews come before the Supreme Court, law societies will emphasize not that the public will be poorly served by graduates of TWU but that their being compelled to recognize TWU graduates—either directly or through the FLSC—would make them complicit in enforcing TWU's discriminatory covenant.

Why must law societies bear the legal consequence of endorsing fiats of the FLSC? Some jurisdictions, including Alberta, argue that they have passed resolutions that bar their consideration of accreditation matters, relying on the FLSC to make those decisions. As I argued in a letter last year to the then-President of the Law Society of Alberta, the LSA cannot delegate to third parties decisions that require a consideration of *Charter* and human rights values. I further argued that the LSA's adoption of the FLSC decision runs directly contrary to the LSA's own respect and diversity values in its Strategic Plan.

It seems axiomatic to me that Canadian governments should operate to promote *Charter* and human rights values, fostering inclusive societies that promote and celebrate diversity. The BC legislature in its wisdom saw fit to create a private, faith-based university, which sits outside the reach of the *Charter*. Only that legislature should have to answer to its constituents who are upset that this institution is closed to or discourages openly gay and trans students. However, statutory delegates in other jurisdictions should not be hamstrung by the Government of BC's decision to accredit a discriminatory law school within its boundaries. Nor should law societies be compelled to decide in favour of TWU because of the collective will to honour the principle of national mobility, the genesis of which was from a time when all Canadian law schools were open to students of all stripes: straight, gay, trans, black, brown, disabled, et cetera.

The Government of BC has no choice but to rubber-stamp TWU programs (considering the intent of its legislators), and the FLSC will bend over backwards to make accreditation decisions that align with national mobility principles. That provincial and territorial law societies should take these stances as indicia of public interest misapprehends how best the public is served, especially in light of the Supreme Court's recent emphasis on the imperative for public decision-makers to consider *Charter* and human rights values where they are implicated. More alarming is that the LSA did not even appear to undertake an independent assessment of whether recognizing TWU graduates conflicts with its public-interest mandate.

I am not a betting man, so I won't guess how this will play out as it percolates upward. I know—and in fact went to law school with—TWU graduates who have nothing but gushing things to say about the school. They also happen to be wonderfully liberal, open-minded, and gay-friendly. I do not object to more law schools in Canada; I will leave the supply-demand matters to the experts. But wouldn't it be lovely if TWU, as a private, faith-based university, warmly welcomed all individuals to its learning community? Where, without stigma, any clever and passionate individual—gay, straight, or somewhere in between—can learn the law? The next time I drive past TWU's pearly gates, I hope to see that "All Welcome!" sign.

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[5] https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/13389/index.do; https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14637/index.do.

The Accreditation of Trinity Western University's Law School

By Richard Moon, B.A., LL.B., B.C.L.

Religious Freedom and Institutional Autonomy

When an individual believer claims exemption from the law for his or her religious practice, the key issue for the court is whether the exception – the accommodation – will negatively affect the public interest or the rights of others. According to the Canadian courts, s. 2(a) of the *Charter* is breached any time the state restricts a religious practice in a nontrivial way. Even when a law advances a legitimate public purpose, such as the prevention of drug use or cruelty to animals or violence in the schoolyard, the state must justify, under section 1 of the *Charter*, the law's nontrivial interference with a religious practice. Yet, despite the Supreme Court of Canada's formal declaration that the state must justify any nontrivial restriction of a religious practice (or reasonably accommodate the practice), the Court has given this requirement little substance. The Court appears willing to uphold a legal restriction if it has a legitimate objective (that is, an objective other than the suppression of an erroneous religious practice) that would be noticeably compromised if an exception was made.

In some cases, the accommodation claim is made not by an individual, who is seeking exemption for a specific practice, but by a religious organization or institution, which is seeking a degree of autonomy in the governance of its affairs – in the operation of its internal decision-making processes. In these institutional autonomy cases, the court must determine (1) whether the exemption from state law will impact the rights and interests of others (whether the group's application of its norms will negatively affect outsiders to the group) but also (2) whether the members of the group should be protected by state law from internal rules that are unfair and contrary to public policy. The courts have generally treated religious organizations as voluntary associations (of individuals pursuing common ends) that should be free to operate as they choose. However, the state may sometimes decide to intervene in the affairs of a religious community characterized by hierarchy and insularity when the prevailing practices in that community are thought to be harmful to some of its members, even though the members have, in a least a formal sense, chosen to participate in those practices. The deep communal connections that are part of the value of religious life and commitment (a source of meaning and value for adherents) may also be the source of what the courts regard as harm – the lack of meaningful choice or opportunity open to the members of such communities or the oppression of vulnerable group members.

The Accreditation of a Law School at TWU

There is a debate at the moment about whether the law societies (which regulate the legal profession in the various provinces) must accredit a law program to be offered by TWU, a private Evangelical Christian college. The Law Society of Upper Canada [LSUC], along with the law societies of British Columbia and Nova Scotia, refused to the accredit the proposed program because of the school's discriminatory admissions policy and in particular the covenant that all students are required to sign, in which they agree, among other things, not to engage in sex outside marriage.

The issue in the TWU accreditation case is whether the covenant is simply an internal matter (a rule that applies simply to the internal operations of a voluntary religious association) or whether it impacts outsiders to the religious community or the public interest, more generally. As I understand it, the law societies are not claiming that the members of a religious community need to be protected from oppressive or discriminatory internal rules.

There are two ways in which it may be argued that the TWU program (and the covenant in particular) will have an impact on the public interest. The first argument is that a school that teaches its students that homosexuality is wrongful or immoral will not properly prepare lawyers for practice in the general community. Lawyers have duties to their clients, to the law, and to the institutions of justice. An accredited school must be willing to affirm basic equality rights. Second, admission to Canadian law schools is competitive. If its program is accredited, TWU will select students from a large number of applicants. Following graduation (as well as articling, and bar exams), TWU students will be eligible to practice law in a particular province. The accredited law schools are a gateway to the legal profession. The concern then is that TWU's admissions policy will have a discriminatory impact on gays and lesbians who wish to enter the legal profession.

Training Lawyers

The first claim -- that the TWU program will not adequately prepare students to work as lawyers in the general community – may be ruled out by the Supreme Court of Canada's earlier judgment in *Trinity Western University v British Columbia College of Teachers* (2001) [*TWU v. BCCT*]. In that case the Court found no reason to deny accreditation to TWU's teacher training program because there was no evidence that the program's graduates (even if they believed that homosexuality is sinful) acted on that belief as teachers in the public schools, engaging in acts of discrimination.

While the law societies cannot simply ignore this judgment, I have the academic luxury of respectfully arguing that the Court was mistaken. The Court was mistaken first in thinking that the belief/conduct distinction (drawn from anti-discrimination law) could simply be applied to classroom teachers, and second in focussing on the actions of the program's graduates rather than on the program itself – and whether it adequately prepared students to teach in the public school system.

In *TWU v. BCCT*, the issue was whether the British Columbia College of Teachers [BCCT] acted outside its powers when it refused to accredit the teacher-training program of a private evangelical Christian university because the program taught or affirmed the view that homosexuality was sinful. In deciding not to accredit the Trinity Western University [TWU] program, the BCCT referred specifically to the contract of "Responsibilities of Membership in the Community of Trinity Western University," which teachers and students were expected to sign. Of particular concern to the BCCT was the obligation, assumed by teachers and students, to "refrain from practices that are biblically condemned" such as "homosexual behaviour" (*TWU v. BCCT*, para 4). According to the BCCT, an institution that wishes to train teachers for the public school system must "provide an institutional setting that appropriately prepares future teachers for the public school environment, and in particular for the diversity of public school students" (*TWU v. BCCT*, para 11).

The majority of the Supreme Court of Canada, in a judgment written by Iacobucci and Bastarache JJ, held that the decision of the BCCT to deny accreditation to TWU's teaching program should be overturned. The majority found that while the BCCT acted properly in considering whether the TWU program might contribute to discrimination against gays and lesbians in the public schools, the college should also have taken account of the religious freedom rights of TWU faculty, students, and graduates. "The issue at the heart of this appeal," said the majority, "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 . . ." (*TWU v. BCCT*, para 28). The majority observed that the denial of accreditation "places a burden on members of a particular religious group . . . preventing them from expressing freely their religious beliefs and associating to put them into practice" (TWU v. BCCT, para 32.) The BCCT decision means that TWU must abandon its religiously based "community standards" if it is to run a program that trains teachers for the public school system. Graduates of TWU "are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers . . ." (*TWU v. BCCT*, para 32).

If a teacher engages in discriminatory conduct, she "can be subject to disciplinary proceedings before the BCCT"; but, said the majority, the right of gays and lesbians to be free from discrimination is not violated simply because a teacher holds discriminatory views (*TWU v. BCCT*, para 37). According to the majority, "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" (*TWU v. BCCT*, para 36). A teacher may believe that homosexuality is sinful or wrongful, and even that gays and lesbians are less worthy or deserving than others, but as long as she does not act on those views, denying benefits to, or imposing burdens on, particular individuals because of their sexual orientation, she will not be found to have breached their right to equality. The majority found no evidence that any TWU graduate had acted in a discriminatory way in the classroom. And so the limitation on the religious freedom of the staff and graduates of TWU (the denial of accreditation) was imposed in the absence of any

evidence that the program had a detrimental impact on the school system. The majority concluded that in the absence of any "concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C.," the BCCT had no grounds to deny accreditation to TWU and interfere with the religious freedom of TWU instructors and students to hold certain beliefs (*TWU v. BCCT,* para 36).

The majority judgment seemed to say that had there been evidence of clear and direct acts of discrimination on the part of TWU graduates, the BCCT would have been justified in refusing to accredit the TWU teacher-training program. Yet, it is not clear why this should be so. Once the court distinguished between anti-gay/anti-lesbian belief and action, and accepted that a teacher may hold such beliefs, provided s/he does not act on them, why was it relevant whether any TWU graduates had engaged in acts of discrimination? If belief and action are separable in this way (public action as wrongful and personal belief as not), then TWU, even though it supported anti-gay and anti-lesbian views, should not be held responsible for any discriminatory actions taken by its graduates. Similarly, the improper actions of some graduates should not affect the accreditation of other graduates who may believe that homosexuality is immoral but refrain from engaging in acts of discrimination. The inconsistency in the majority's reasoning, I suspect, reflects a deeper uncertainty about the distinction between belief and action in the school context.

While the distinction between belief and action is central in human rights codes (which prohibit acts of discrimination in the market but do not otherwise regulate an individual's beliefs or the decisions she/he makes concerning "private" matters), it may not be applicable to the role of a teacher in a public school. An important part of a teacher's role is to teach his or her students basic values, including tolerance for different religious belief systems and respect for the equal worth of all people. As the majority in *TWU* observed, "Schools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance" (*TWU v. BCCT*, para 13). Teachers, though, do not simply instruct students in these values. They are role models and counsellors. If sexual-orientation equality is to be affirmed in the public schools, teachers must do more than simply refrain from direct acts of discrimination against gay and lesbian students. A teacher when confronted with bigoted words from students about gays and lesbians should contradict those words or when approached by a student who is struggling with his sexual identity should provide support and reassurance or direct him to an individual or group that can offer support. Because the public values of the school curriculum (broadly understood) are taught by example and because they must be affirmed in different ways, it may be that a teacher who is not personally committed to these values cannot perform her/his role effectively.

This is not to say that individual teachers should be closely examined on their views about sexual-orientation equality (or racial or gender equality). A serious probe into the individual's thoughts or attitudes about sexual orientation might involve too great an invasion into his/her personal sphere. Nor should we preclude an individual from teaching in the public schools simply because we suspect she/he may be racist or homophobic – because, for example, she/he belongs to a particular church or attended a particular religious school. But this is not the same as saying that it is all right to employ an anti-gay or anti-lesbian teacher provided he/she refrains from explicit acts of discrimination in the classroom. A teacher should be excluded from the schools, if she/he has indicated in his/her public statements or actions that he/she regards homosexuality as sinful or objectionable, even though there is no evidence that he/she has directly discriminated against gays and lesbians in the classroom. She/He should be excluded because discrimination is sometimes subtle and difficult to prove but also because a teacher should do more than simply tolerate gays and lesbians.

In *Ross v N. B. School District* (1996), the Supreme Court of Canada held that an individual who holds racist views, as evidenced by her words or actions outside the classroom, may be disqualified from serving as a classroom teacher in the public schools. Justice La Forest, for the Court, upheld the decision of an adjudicator, appointed under the New Brunswick *Human Rights Act*, that ordered the school board to remove from the classroom a teacher who had expressed in a public setting racist views, which he claimed were religiously based. In *Ross*, there was no evidence that the teacher had treated any minority students in his class unfairly, or differently from other students, or had deviated from the curriculum and taught racist views. However, because Mr. Ross had expressed racist opinions at public meetings and in the local media, students in his school (and the general community) had come to know of his views. The Court found that Mr. Ross's public racist statements had "poisoned" the learning environment in the school (*Ross*, para 40-1).

The Court in *Ross* recognized that a teacher is a role model, an authority figure, and a conduit for public values. Public knowledge of Mr. Ross's racist views mattered because his support for such views might have legitimized them in the minds of some students and undermined the school's affirmation of racial equality. If all that is expected of a teacher is that he/she refrain from teaching racist views, then it might be possible to separate what he/she says and does in the classroom from what he/she says and does outside, on his/her own time. There are very few jobs from which an individual would be dismissed because she/he (publicly) expressed racist views after work hours (unless contrary to the *Criminal Code*). Moreover, there are views that a teacher is not permitted to express inside the classroom but is free to express outside. For example, a teacher should not expressly support the Liberal Party,

or the Communist Party, inside the classroom but is permitted to do so outside. We expect the teacher in the classroom to remain neutral on issues of partisan politics. But in the case of racial equality, we expect more than formal neutrality in the classroom. We expect the teacher to positively support the value of equality. A teacher who publicly affirms racist views cannot perform this role. It would seem even more obvious that a teacher-training program that affirms such views does not adequately prepare its graduates to teach in the public school system.

This takes me to the more fundamental error in the Court's decision. The issue in the *TWU* case was not whether a particular graduate and prospective teacher might be anti-gay or anti-lesbian because he/she attended an educational institute that affirmed anti-gay or anti-lesbian views. It was, instead, whether a teacher-training program that affirmed values that are incompatible with those of the civic curriculum should be denied accreditation because it will not adequately prepare its students to teach in the public school system – a system in which gays and lesbians should be treated with equal respect and not simply tolerated. Had the BCCT denied accreditation to a teacher training program that had a racist element in its curriculum, it seems unlikely that the BCCT's decision would have been overturned by the Court, even though not every graduate of the program would carry the lesson of racism with him. A program that taught or affirmed values so fundamentally at odds with the basic civic values of the public school system would not be accredited. Yet TWU sought accreditation for a program that supported values the BCCT thought were incompatible with the civic mission of the public schools – based on the public commitment to sexual-orientation equality expressed in both provincial and federal human rights codes. The existence of TWU, and more specifically its teacher-training program, rests on a belief that the values of those who teach are important in the education process. TWU recognizes that its students will become better Christians, or Christian school teachers, if they are taught in an environment that is fully Christian in its values and practices. This is why TWU requires that all instructors adhere to the code of conduct, which, among other things, forbids "homosexual behaviour." Even if anti-gay views are not an explicit part of the teacher-training program, they form part of the ethos of TWU. Moreover, TWU has applied for accreditation so that it can train teachers who will support or model Evangelical Christian virtues in the public school system.

The law societies that have refused to accredit the TWU program have not relied on this argument, since it appears to be ruled out by the earlier Supreme Court of Canada judgment. There may, of course, be ways to distinguish lawyers from teachers, although I am inclined to think that we should be more worried about anti-gay public school teachers (and a program that reinforces such attitudes in prospective teachers).

Law School as Gateway to the Profession

In another important way, TWU's discriminatory admission's policy (the covenant) is not simply an "internal" matter that has no impact on the public interest. Admission to law school is an important gateway to the profession. Accredited law schools play a role in determining who enters the legal profession in Canada. TWU's discriminatory admissions policy then may affect access to the profession for gay and lesbian students – and indeed for non-Christian students, who may feel unable to sign a covenant that affirms key elements of Evangelical Christian doctrine. The law societies that refused accreditation to the TWU program argue that they have a responsibility to ensure that there are no discriminatory barriers to access to the legal profession.

TWU is a "private" religious institution that wants to run a law program. The school can, of course, run a program without law society approval but its graduates will not be eligible to practice law (or they will only be eligible if they go through additional steps). TWU wants to train individuals to be lawyers who will serve the general community -- that is why it is seeking accreditation for its program. The three law societies that have refused to accredit the TWU program see the (accredited) law schools as part of the system for selecting and training lawyers. As long as law school admission remains a gateway to the profession then the admissions criteria of an accredited program will have an impact on individuals outside the religious community.

The law societies have not issued a general condemnation of TWU and its beliefs about homosexuality. They have not sought to interfere with the operations of TWU as a private Christian university. They have simply refused to accredit TWU's law program – a program that in their judgment would have an exclusionary impact on gays and lesbians seeking entry into the legal profession. TWU is asking for the right or privilege to operate an accredited law program (and to play a role in choosing who will be trained in law and ultimately join the legal profession). Yet, at the same time, it is claiming that the law society's refusal to accredit its law program amounts to an interference in its internal affairs. TWU's assertion has resonance only if we are ambivalent in our commitment to sexual orientation equality. For it seems plain that a law program would not be accredited, if it had a religiously-based admission rule that excluded women (or married women, or women with children) because the institution believed that a woman's

role is to care for the children of her family and to provide support in the home for her husband.

There are several arguments that TWU might make in response to the claim that its admissions policy has an impact on the public interest. First the school might claim that any institution of higher education, either private or public, that wants to deliver a law program is free to apply to the various law societies for accreditation – and that lack of interest or initiative by these institutions is the only reason there are a limited number of law programs. TWU might argue that admission to law school is no longer a significant barrier to entry to the legal profession – because, on the one side, there are so many accredited law school places in Canada (and it is increasingly possible to study abroad and be admitted to practice in Canada), and on the other side, graduation from law school no longer ensures employment as a lawyer in Canada. (TWU might also note other barriers to law school, which receive far less attention from the law societies – most notably the very high cost of tuition at many accredited schools, which excludes some students on the basis of economic class.)

I am not sure that any of these arguments is credible in the current context of legal education in Canada. Nevertheless, they do highlight the difficulty in determining when the actions of a "private" religious institution impact the public interest or the interests of individuals outside the community to a degree that precludes or limits the institution's claim to the protection of religious freedom. TWU has the legal authority to grant degrees – a public role of sorts. Few have claimed that this makes TWU into a "public" institution that is precluded by anti-discrimination law from enforcing its covenant. What is less certain, though, is whether TWU could claim a breach of s. 2(a) if the state were to refuse to give it degree-granting authority because of its covenant. These are different questions and it important not to confuse them. What if the Law Society of Upper Canada, for example, proposed to accredit only one law school? There would, I assume, be agreement that the LSUC should not, perhaps could not, accredit a program with a discriminatory admissions policy. Even if the LSUC is not precluded from accrediting the TWU program (because of its discriminatory admissions policy), it should not be required to accredit a program that discriminates on the grounds of sexual orientation and religion. Section 2(a) of the *Charter* may protect TWU, as a "private" religious institution, from some forms of state interference in its internal affairs. It does not give TWU the right to operate an accredited program; not as long as there are a limited number of such programs in the country.

TWU further argues that that the refusal to accredit its program will breach the religious freedom of the program's graduates. It will deny its Evangelical Christian students the opportunity to practice law. There are many things could be said in response to this claim, but I will confine myself to the two most obvious.

First, TWU's claim about the unfairness to its imagined (hypothetical) student body, composed of Evangelical Christian students, allows TWU to avoid answering important questions about admissions – about how the student body will be selected (who will apply and who will be accepted) – the very questions that concerned the law societies and led some of them not to accredit the program. It seems unlikely that the only students who might apply to the TWU program will be Evangelical Christians, given the large number of applicants for law school. TWU insists that the program will be open to non-Christians, as long as they are willing to sign and adhere to the covenant. If TWU intends to give preference to Evangelical Christian applicants then the argument against accreditation is strengthened.

Second, Evangelical Christian students are free to apply to, and attend, any law school in Canada. There are no religious barriers to admission. Nevertheless, the supporters of TWU have argued that if the TWU program is not accredited, Christian students will be forced to attend secular law schools (if they want a career in law) and this will interfere with their religious freedom. (Presumably then the law societies should accredit law schools operated by every religious group.) The argument rests on a claim that secular law schools are unwelcoming to religious students. In support of this claim, TWU offers an account by a recent University of Toronto student of her experience at law school. This is what the student said:

> As a religious individual, I have felt that law school is generally a hostile environment for those who hold religious views. For example, professors were comfortable making disparaging remarks in class about religion; this includes invoking the name of Jesus Christ in hypotheticals. When discussing universal human rights, students and professors sought legitimacy by making clear they were Atheists. As a Christian, these remarks made me feel uncomfortable. Religion is not positively discussed in or outside of the classroom. In my law faculty, there is not a single professor who shares my evangelical Christian faith - at least not publicly. The law school ethos is generally socially progressive, with very few opportunities for socially conservative students to participate.
>
> I was given advice by a Christian lawyer prior to entering law school to "keep your head down" and to not tell anyone that I am a Christian. I could not do that. People know I am a Christian, but it resulted in my becoming withdrawn in my law school community. Since starting law school, I have felt that I am not entirely free to discuss my beliefs and have become far more introverted. Since starting law school, I have felt that I am not

> entirely free to discuss my beliefs and have become far more introverted. During law school orientation, students underwent mandatory instruction where we were told it is our duty to stand up to bigoted remarks; a scenario used to exemplify unacceptable conduct and the duty to intervene was a student making comments labeled "homophobic" that reflected a belief in traditional marriage. This was a clear indication that only socially progressive views would be tolerated and of great concern to me. It made me feel nervous and isolated, unable to feel like my religious identity was welcomed within the law school community. (Applicants Factum *TWU v. LSUC*)

The obvious response is that this is anecdotal. The suggestion is that anti-religious views are routinely expressed by faculty in "secular" law schools; but there is no evidence of this other than the student's description of her personal experience. Should this story carry more weight than the assertion of someone who has taught in a law school for 30 years (alongside several colleagues who are religious) that I have never witnessed or heard of any religious tradition being dismissed or mocked? It should be noted that while the student's claim begins as a general assertion that religion is unwelcome at the U. of T. law school (or secular laws schools generally), it then shifts to the slightly-different claim that socially conservative views are unwelcome – and in particular that the school is unreceptive to the view that homosexuality is wrongful. The question then is whether a law school should refrain from affirming sexual orientation equality, because some of its students, on religious grounds, reject the equal worth of gays and lesbians or same-sex relationships. (The unintended claim is that TWU is a place where equality rights are not affirmed in this way.) A law school that affirms the equal value of its student members, regardless of their race, gender, sexual orientation, and religion, and that expects contributions to class discussion to respect equality values, is inclusive. The "exclusion" of intolerant acts and words – whether or not they rest on a religious outlook – does not amount to discrimination against, or the exclusion of, religious believers or a particular group of believers.

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A Personal Objection to the Accreditation of Trinity Western University*

By Richard Devlin, LL.B., LL.M.

Introduction

The Nova Scotia Barristers' Society is to be congratulated for holding this public forum on whether to accredit Trinity Western University if it comes forward with a proposal for a law school. While many other law societies have decided to dodge this issue, or abdicate their responsibility to regulate in the public interest to the Federation of Law Societies of Canada, the Nova Scotia Barristers' Society has embraced the democratic norms of participation, transparency and accountability.

I am particularly thankful that the Society has granted my request to make this submission, even though I am not a member of the Society. I am, however, a member of faculty at the Schulich School of Law, Dalhousie University and have taught our compulsory course on "The Legal Profession and Professional Responsibility" for many years. I also voted in favour of the Faculty Council resolution that opposed the accreditation of Trinity Western[1] and signed an extensive, eleven page memorandum crafted by Professor Downie which objects to the accreditation of Trinity Western University on both procedural and substantive grounds.[2]

I will not repeat the arguments from Faculty Council or Professor Downie's memorandum as both the Executive and Bar Council have these on record. Rather I will make four more personal, perhaps idiosyncratic, points that explain my objection to the accreditation of Trinity Western and why the Nova Scotia Barristers' Society would be justified in saying no to Trinity Western while it continues to enforce its Community Covenant. I will structure my remarks under the following headings: the values of good governance; freedom of religion; choice; and responsibility.

The Values of Good Governance

Many of the arguments presented to the Society either in favour or against the accreditation of Trinity Western University are filtered through the prism and discourses of legality/constitutionality. These are important and sophisticated arguments that require careful consideration

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[1] The resolution, unanimously approved on January 10th, 2014, reads as follows:

> The Faculty Council of the Schulich School of Law regrets that the FLSC's analysis of "the national requirement" does not bring a human rights lens to its assessment of applicant institutions.
> The Faculty Council believes it is part of the essence of legal education and the existence of the Bar that human rights and equality be promoted by law schools and law societies.
> The Faculty Council believes that Trinity Western University's Community Covenant will necessarily distort the composition of its faculty, demean some members of its student body and send a damaging message to the public about law schools.
> The Faculty Council believes that subjects involving professional ethics, the *Charter*, and human rights principles cannot be adequately taught and learned in an institutional environment which systematically excludes or devalues groups of Canadians.
> The Faculty Council laments the decision of the Approval Committee to provide preliminary approval to Trinity Western University.
> While recognizing that there are freedom of religion issues at stake here, ultimately we are of the view that these are outweighed by equality concerns regarding sexual orientation and Trinity Western University's Community Covenant.
> The Faculty Council encourages the Nova Scotia Barristers' Society to properly apply a human rights lens and thus refuse to approve LL.B or J.D. degrees issued by Trinity Western University for the purposes of admission to the practice of law in Nova Scotia.

[2] On file with author.

and they have been thoroughly canvassed and interrogated by many of my colleagues.

However, in my opinion, the Trinity Western University issue is not just a legal question; it is also an ethical question, a question of the values that are to provide the foundation for the good governance of the legal profession.

Over the course of the last decade, in light of the changing nature of the legal profession, intensified public concerns about the role of a self-regulating legal profession, the insights of contemporary regulation theory, and an increasing awareness of the shift in regulatory regimes for lawyers around the world, the Nova Scotia Barristers' Society has sought to identify and articulate a core set of principles to govern our legal profession.

These values were crystallized in the President's Report from January 20, 2014, penned by Rene Gallant. In that Report, in its discussion of the Strategic Framework for the Barristers' Society, and the commitment to the twin desiderta of good governance and access to justice, President Gallant identified seven core values:

- Excellence
- Respect
- Visionary Leadership
- Fairness
- Integrity
- Diversity
- Accountability

If the Nova Scotia Barristers' Society truly embraces these values, if "they are to be much more than just words" as President Gallant has stated in his Report, then these values must also inform and guide the process and substance in determining whether to accredit Trinity Western University.

In my opinion, Trinity Western's Community Covenant priorizes: dogma over excellence; hatred over respect; fear over vision; inequality over fairness; ideology over integrity; homogeneity over diversity; and fundamentalism over accountability.

Such values are the antithesis of good governance and access to justice in a modern, plural democratic society. They impoverish rather than enrich us a profession. They undermine our social contract with Nova Scotian society to regulate in the public interest.

Freedom of Religion

Advocates and apologists for Trinity Western University seek to characterize defenders of the LGBT community as attacking freedom of religion. While this may be true of some secularists, it is not an accurate description of all of those who object to Trinity Western University's covenant.

As someone who grew up in Belfast, Northern Ireland, in the '60s, '70s and early '80s, I have thought carefully about freedom of religion. As someone who attended a law school in Belfast that actively practiced discrimination against Catholics, as someone who personally experienced discrimination and exclusion in the legal job market in Northern Ireland on the basis of religion, I can confirm that freedom of religion is a very important principle and practice for me. Indeed, I am deeply appreciative of the fact that I have been able to pursue a career in Canada that (for me at least, although perhaps not for others) has been free from religious intolerance. I cherish freedom of religion as a shield against unjustifiable discrimination.

But Trinity Western University is not using freedom of religion as a shield. Rather, Trinity Western University is using freedom of religion as a sword; a sword to discriminate, a sword to exclude, a sword to oppress certain members of the Canadian community, exclusively because of their sexual orientation. Even in its darkest days, the Faculty of Law at Queen's University of Belfast did not have the temerity to endorse and enforce an anti-Catholic "Community Covenant." Now, forty years later in Canada, law societies are being asked to endorse a homophobic Covenant, and the FLSC and some societies have said yes. This is not freedom of religion as tolerance, it is freedom of religion as bigotry.

In this regard, it is important not to get too caught up in abstract principles, as excessively legalistic arguments sometimes do. It is important for all members of the Barristers' Society, indeed I would say all Canadians, to read the actual text of the Community Covenant and the biblical quotations upon which they are based. It is not easy for me to read these biblical verses, but if Bar Council endorses Trinity Western University and its Covenant, this is what you are affirming. I will share just two, and I would ask you to read them aloud not just for yourself but also to your loved ones, your children, your family:

> Romans 1:26
> For this cause God has given them up to shameful lusts; for their women have exchanged the natural use for that which is against nature.
>
> Romans 1:27
> … and in like manner the men also … have burned in their lusts one towards another, men with men doing shameless things and receiving in themselves the fitting recompense of their perversity.

In reading these aloud I no longer think I am in Canada. Once again I am transported back forty years ago to Belfast and the spittled venom of the Reverend Ian Paisley "Homo-sex-ual-ity-is-an-a-bom-min-ation … an-a-bom-min-ation!"[3]

[3] "Paisley campaigns to free Ulster from Sodomy" Irish Times 20 October 1977. Ian Paisley (1926-2014) was an evangelical Protestant leader in Northern Ireland. He rose to prominent in the 1960's and founded the Free Presbyterian Church of Ulster. He was known for his staunch anti-Catholic and anti-gay positionings. He became the leader of the Democratic Unionist Party and ultimately the Prime Minister of Northern Ireland. Late in his career he had a rapprochement with Catholics.

So despite Trinity Western University's Covenant with a heavy rhetorical emphasis on "community" "compassion", "reconciliation", "hope", "respect" and "dignity" the opposite is true: Trinity Western University is an organization akin to Ian Paisley's Free Presbyterian Church of Ulster, committed at its core to institutionalized fanaticism, exclusion and discrimination.

Such an organization is, I submit, incompatible with an institution such as the Nova Scotia Barristers' Society which has a legislative mandate to protect "the public interest" and which has embedded in Chapter 6-3 of its Code of Conduct a commitment to "Equality, Non-Discrimination and Anti-Harassment."

Choice

Advocates and apologists for Trinity Western University have also argued that, at bottom, this is simply a question of choice—if a student does not agree with, or want to endorse, the Community Covenant they need not apply to Trinity Western University. Again, the abstraction of "freedom of choice" is wide of the mark.

The harsh reality of today's educational marketplace is that it is not easy to get into a Canadian law school. Statistically, across the country, it seems that there are approximately eight applications for every one seat available. Each year a significant number of students "choose" to go abroad for their legal education, planning to come back seeking admission via the NCA process. Getting into a Canadian law school is not like picking one chocolate bar rather than a different one because you do not like nuts. Law Schools are, in reality, gatekeepers to the legal profession. Trinity Western University's Community Covenant is an intentionally crafted barrier targetted at a particular constituency within the Canadian community– it is a form of direct, unvarnished and deliberate discrimination. It is unapologetically designed as an instrument of exclusion.

As someone who has taught contract law for almost three decades, one important theme that I have emphasized year in and year out is that while in theory contracts (and covenants) give effect to freedom of choice, in reality many contracts (and covenants) are premised upon, constitute, and reinforce relationships of inequality. As the legal realists taught us almost a century ago, contracts (or covenants) can be as much a weapon of coercion, as they are an instrument of freedom. It all depends upon the content of the contract and the context of the relationship. When one analyses both the content and context of Trinity Western University's Community Covenant, it is manifestly as instrument of coercion that undercuts the principle of freedom of choice.

Responsibility

Finally, as a member of Bar Council, you might be tempted to say:

- I am not LGBT, so why should I get involved?, or
- This is not really our problem here in Nova Scotia, it is up to the Law Society of British Columbia, or
- The FLSC has made a decision, so let's go with that, or
- We are a small province, so we should wait and see what the big provinces do, or
- This is all academic because if a Trinity Western graduate is admitted in another province, because of the National Mobility Agreement, they will be entitled to move to Nova Scotia regardless of whether the NSBS has accredited Trinity Western University or not, or
- This is inevitably going to be litigated, perhaps even to the Supreme Court of Canada, and we should not be squandering our limited financial resources in this manner.

I want to urge you to resist such temptations. It is justifications like these—abdications of personal responsibility like these—or if we are going to invoke the Judaeo-Christian tradition, Pontius Pilate rationalizations like these—that allow for the banality of oppression to grow like a cancer on the body politic. And it is excuses like these that betray the seven core values of Excellence, Respect, Visionary Leadership, Fairness, Integrity, Diversity and Accountability.

To make this point about responsibility slightly differently, I want to come back to my remarks on freedom of religion and share with you—or perhaps simply remind you—of a famous quotation from a German Protestant pastor, a pastor who embraced tolerance and inclusion rather than hatred and exclusion. His name was Martin Niemöller, and this is what he had to say:

> First they came for the Socialists, and I did not speak out—
> Because I was not a Socialist.
> Then they came for the Trade Unionists, and I did not speak out—
> Because I was not a Trade Unionist.
> Then they came for the Jews, and I did not speak out—
> Because I was not a Jew.
> Then they came for me—and there was no one left to speak for me.

Thank you for your consideration of my submissions.

*This commentary is a slightly revised version of a submission I made to the Nova Scotia Barristers' Society, 13 February 2014. On 25th April 2014, the Nova Scotia Barristers' Society approved the accreditation of Trinity Western University but only on the condition that it "amends the Community Covenant for law students in a way that ceases to discriminate." To no one's surprise, Trinity Western University appealed this decision to the Supreme Court of Nova Scotia. On January 21st, 2015 Justice Jamie Campbell found in favour of Trinity Western University and struck down the decision of the Nova Scotia Barristers' Society. In February 2015, the Nova Scotia Barristers' Society announced that it would appeal Justice Campbell's decision.

Richard Devlin is a Professor of Law, Schulich School of Law and University Research Professor, Dalhousie University.

Committing to Pluralism in the Legal Profession (Or, Committing to the Good, the Bad, and the Ugly)

By Joshua Sealy-Harrington, B.Sc., J.D.

I have heard many arguments against accrediting TWU's proposed law school: that it discriminates against LGBTQ law students and staff; that it will create barriers to accessing legal education for LGBTQ students; that increasing the number of law graduates in Canada will exacerbate the "articling crisis". I am confident that my friends in this Law Matters publication will address many of these arguments. I will also note, in passing, that I think many of these arguments identify significant problems with TWU's program (though I will refrain from commenting on whether those problems are sufficient to preclude TWU's accreditation). However, rather than discussing these arguments against TWU's program, many of which I agree with, I will focus on a different argument against accrediting TWU's program which I adamantly oppose, namely, that TWU's law school will result in the licensing of lawyers with "bad" social views. It is myopic to regulate against social views held by a minority of practicing lawyers in Canada. Indeed, entrenching majoritarian views in the legal profession will likely undermine the cause of social progress, which I and many opponents of TWU are committed to.

While part of me wants to support the diversity of a Christian law school in an otherwise secular (and, at times, anti-theistic) academic landscape, TWU's effective exclusion of gay students makes this aim of diversity ring hollow. But some opponents of TWU, too, fail to recognize the importance of diversity. While TWU disregards the value of gay law students, some of its opponents question the value of Christian lawyers (see *e.g.* the Canadian Common Law Program Approval Committee's Report on TWU's Proposed School of Law Program, at para 26). As a consequence, diversity and adversarial discourse – the cornerstones of liberalism – are often disregarded by both sides of the TWU debate. Whether for or against TWU's law school, some advocates are short-sighted enough to believe that their opinions are infallible and, even worse, that their opinions should be uniformly held by members of the legal profession – a profession which recognizes that adversarial discourse is a critical mechanism for uncovering truth. It is against this backdrop that I oppose the regulation of the social views held by lawyers.

If we are going to truly commit to diversity within the legal profession, that must necessarily include an acceptance of social views different from our own. In other words, committing to pluralism in the legal profession requires a corresponding acceptance of diverse views being held by lawyers: *the good, the bad, and the ugly*. Indeed, it is those views which we find most repugnant that truly test our commitment to diversity.

Optimal discourse and social progress follow from committing to pluralism within the legal profession. On that basis, I oppose the regulation of the social views held by lawyers.

First, what is pluralism? By pluralism, I mean the unconditional acceptance of differing social and political views – a staunch affirmation of diversity. In my opinion, the benefits flowing from affirming pluralism within Canadian society are ubiquitous, from making new Canadians feel that their cultural values are **respected during citizenship ceremonies**, to ensuring that LGBTQ students **feel safe and supported in school**. However, the focus here will be on the specific benefits of pluralism in the legal profession.

Lawyers are often at the frontier of social change. Movements relating to **civil rights**, **gay rights**, and **women's rights** are but a few examples of important social causes that were advanced, in part, through the legal system. A diverse legal profession is more sensitive to social change on the horizon, which a homogenous legal profession may fail to detect.

Some may claim that TWU educated lawyers would not assist in positive movements like those discussed above because the "social change" TWU lawyers would advocate for is regressive. But such a claim incorrectly assumes an ability to delineate "good" social views worth protecting and "bad" social views that should be discouraged. Indeed, social views that are now almost universally considered "good" (such as women's suffrage) faced significant opposition when they were first debated in the courts. Accordingly, opposing TWU because it will produce lawyers with "bad" social views fails to recognize that society's assessment of social views is often deeply flawed.

Indeed, history has repeatedly shown how progressive social change often confronts majoritarian opposition. Expanding women's rights was a minority view in the 1920s, expanding civil rights for Blacks was a minority view in the 1950s, and expanding gay rights is, to this day, a **hotly contested issue**. In consequence, regulating against minority social views could have a devastating impact on the important advocacy work done on behalf of these groups, which, with the benefit of hindsight, resulted in important and positive social change.

The negative consequence of undermining important social movements demands the inclusion of lawyers with diverse social views. The legal system is a critical mechanism for social change, and silencing potentially meritorious social movements because the gut reaction of a majority of the legal profession opposes such movements is a myopic model for the evolution of social values in Canada. Without a legal community that is sympathetic to a variety of social views, lawyers may be unwilling to take on many important cases relating to certain causes. This is especially true in the context of public interest litigation because such litigation is often done on behalf of marginalized communities on a pro bono basis, and accordingly, is only possible through the generosity of lawyers who, presumably, share the social views of the clients they represent. As the Supreme Court explained in ***Carter v Canada (Attorney General)***, 2015 SCC 5 at para 140, public interest litigation can result in pro bono counsel "bear[ing] the majority of the financial burden associated with pursuing the claim"; a burden few would accept unless their personal interests aligned with the interests of the clients they represent.

The potential for filtering out positive social movements is, however, not the only flaw of regulating against social views held by a minority of lawyers. Even if certain "bad" views never ultimately become "good" views in the eyes of the majority, the inclusion of those "bad" views in legal discourse is still beneficial.

First, passionate advocates advancing "bad" social views force those with "good" social views to justify their position and substantiate the merit of their social views. This process of justification is critical because it filters out strongly-held majoritarian views that cannot stand up to thoughtful scrutiny (**the weak opposition to legalizing gay marriage being a prime example of this**). Alternatively, if the majority really does hold a "good" social view, then justifying that view in the face of criticism helps create a more nuanced understanding of why that social view is good rather than simply relying on the social view being supported by a majority under the *status quo*.

Second, even if advocates with "bad" social views cannot convince the majority to fully agree with their views, they may convince the majority to qualify their "good" social views making them "great" social views. For example, the type of consensus required to reconcile religious freedoms with equality rights is greatly undermined when we regulate against lawyers who hold certain religious views. Indeed, it is precisely those religious lawyers that often contribute to the adversarial discourse necessary to navigate complex rights-conflicts such as issues relating to conscientious objection – "a task fraught with complexity" (see: "**Conscientious Objection to Creating Same-Sex Unions: An International Analysis**" at 154).

In sum, all social views should co-exist within the legal profession, even those we despise. While I doubt a lawyer who thinks a minority group should have no rights will conduct advocacy I would consider beneficial, I also doubt my own abilities (and the abilities of a majority of the legal profession) to precisely define, at this moment, which social views will result in beneficial advocacy in the future. Moreover, the interaction of "good" and "bad" social views today is critical to both uncovering which views will be deemed "good" in the future and to qualifying "good" social views so that they become "great". In consequence, all views should be welcome and the social views of lawyers should not be regulated.

But, to be clear, accepting the presence of lawyers with diverse social views does not mean that such views should be immune from criticism. As I explained above, it is precisely the criticism of differing views that produces the best discourse on social issues, and in turn, the most nuanced and thoughtful perspective on those social issues. If TWU

educates future accredited lawyers and some of those lawyers have regressive social views I would welcome (and likely participate in) the criticism of those views. But I would, by that same token, welcome criticism by TWU educated lawyers of progressive views they disagree with. I do not support the presence of lawyers with certain regressive views in the legal profession because I agree with them. To the contrary, I support their presence because I disagree with them, and because engaging with that disagreement is central to developing the most nuanced conception of social issues. Similarly, a discussion about whether TWU's law school should be accredited would be incomplete without hearing from advocates on both sides. Indeed, the varying perspectives provided for in this edition of Law Matters is precisely the kind of adversarial discourse that enables the thoughtful discussion of controversial issues which I am advocating for.

Along similar lines, my acceptance of lawyers with diverse social views does not mean that the expression of such views will necessarily be without consequence. For example, I can simultaneously support a legal profession with diverse views while also supporting limits on hate speech. Without wading too far into the controversies of hate speech laws, I will simply note that opposing hate speech laws based on free speech, without any consideration of the consequences unique to hate speech, **oversimplifies the issue**. Regardless, I need not oppose hate speech laws to argue for a diverse legal profession. Rather, I demand a diverse legal profession so that issues like hate speech can be subject to the open and passionate debate they deserve.

There are many problems with TWU's law school, but the licensing of lawyers with "bad" social views is not one of them. If you think that a lawyer's social views are undesirable, defeat them with logic and argument, not exclusion. Further, the individual holding a "bad" social view should be able to defend it, and preferably, with the resource of a legal education to assist them. If a social view really is obviously "bad", you should not need the unfair advantage of a legal education to beat it.

Canadian courtrooms benefit every day from the virtues of adversarial discourse in the pursuit of truth. The same applies to the makeup of the legal profession. Legal discourse is stifled when it consists of a **progressive echo chamber**. In contrast, legal discourse is at its best when lawyers with differing views can challenge one another, force each other to justify their positions, and hopefully, convince each other to critically reflect on their views no matter their political stripe. That critical reflection cannot truly happen unless a diversity of views are present, especially those views we disagree with most.

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Let Trinity Western University Have its Law School

By Raj Sharma, J.D., LL.M.

Robed and gowned the ordained, those initiated in dogma, petition the altar beseeching the higher power for redress, mercy, benediction or relief against iniquity. Congregants attend seated in wooden pews watching ancient ceremony and pageantry stretching back to antiquity. They listen to formal language, archaic English and Latin terms few now understand.

The higher power represents one third of the Constitutional Trinity; the judiciary which must act as a bulwark against the overreaches of the executive or the legislative branches of government.

It's easy to confuse our judicial and legal processes to those of the Christian church. Our profession and our tradition has its roots deeply grounded in the soil of Christianity. In fact, judicial administration began with the Old Testament. Verses 13-27 of Chapter 18 of Exodus are an early example of considerations of institutional structure and operational continuity:

> Moreover thou shalt provide out of all the people able men, such as fear God,…of truth, hating, covetousness; and place over them, to be rulers of thousands, and rulers of hundreds, rulers of fifties, and rulers of tens.

Lawyers, following this tradition, have put able men (and women) to govern them and rule them in the form of Benchers of their Law Societies. The ostensible mandate of the Societies is to protect the public interest. However, the Law Societies have collectively focused on the providers of legal services rather than the consumers. It`s time for reform along the lines of the United Kingdom (the *Clementi Report*), but this is not likely. These Societies -- which have struggled with their actual mandate now seek additional powers to regulate the admission of individuals in law school (aimed squarely, and solely, at TWU's covenant that enjoins every student to restrict sexual intimacy with their opposite sex marital partner).

The actual task that they are mandated with is one that they have discharged in a confused, chaotic, inefficient and bumbling manner. In this case, the Societies in their non-religious fervour and zealotry have far overstepped their mandate, which is to focus on protecting the public interest by errant members of the society.

> But when they continued asking him; he lifted up himself, and said unto them, He that is without sin, let him first cast a stone at her. John 8:7

No matter. Undeterred by their questionable moral high ground, Societies across the country have lined up to deny the admission of law graduates because of a religious, private covenant.

The priority now is to deny TWU graduates eligibility for admission and for the Societies to protect their monopoly over the profession. The Societies have crossed the Rubicon and become little Caesars eager to expand their powers to regulate to the social values of lawyers

in Canada. They now bestride this narrow world like a Colossus with little regard for little men and women, mere aspirants to the practice of law, and will be the arbiters of acceptable values that lawyers are to hold.

These little Caesars also, grudgingly, allow the admission of foreign trained, NCA accredited lawyers. Surely, they must realize that some of these foreign lawyers come from countries that have differing social values than ours. Like the Christian God, the eyes of the Societies "are in every place, beholding the evil and the good" (*KJV, Proverbs* 15:3). Perhaps additional hurdles will be placed over these suspect newcomers to the profession.

But the legal professionals who are part of this crusade that have donned the breastplate of righteousness have recently suffered a setback. The Nova Scotia Barristers' Society (NSBS) amended its definition of "law degree" in its regulatory provisions to exclude degrees from a law school that discriminated in its admission criteria. Justice Campbell found that the NSBS overstepped its authority in *Trinity Western University v Nova Scotia Barristers' Society,* 2015 NSSC 25. Perhaps Justice Jamie Campbell said it best in his recent decision:

> The *Charter* is not a blueprint for moral conformity. Its purpose is to protect the citizen from the power of the state, not to enforce compliance by citizens or private institutions with the moral judgments of the state.

Unfortunately, this will not be the final word.

Irony abounds with the efforts of such Societies to regulate religious institutions that provide legal education within the context of their tradition without regard to the separation of church - as this too is an ideal which was expressed by Jesus the Christos, allowing the possibility of the rule of law to take root and to flower.

> And Jesus answering said unto them, Render to Caesar the things that are Caesar's, and to God the things that are God's. And they marvelled at him. *KJV, Mark* 12:17.

Obviously freedom of religion also means the freedom from religion, however, the Supreme Court, in 2001, has already dealt with reconciling the competing rights engaged in this matter.

Members of the bar must be representative of the communities that make up Canada, and that means we must allow the admission of Christians practicing the values that they have defined for themselves.

As lawyers we are trained to detect logical fallacies. The "stars of heaven" will not fall "unto the earth" (*KJV, Revelation* 6:13) and the imagined slippery slope will not emerge if we allow some five dozen Christians trained in a Christian school admission in our ranks of sinners every year.

The Societies should confine themselves to improving their governance and ensuring that lawyers are fit to practice. If the institution produces graduates that are not competent or fit or fail to serve the public then the Law Society must take action. But the opprobrium of the Societies is more than misplaced and the aggrieved righteousness smacks of hypocrisy, or some kind of psychological projection.

In the Old Testament, a goat was symbolically laden with the collective sins of the Israelites by their high priests and sent into the desert to die. Have our high priests anointed TWU as the scapegoat to bear our sins and be destroyed?

Enough. Allow TWU their institution and grant their graduates entrance to the practice of law.

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Re-Framing the Trinity Western University Debate: Tax, Trans and Intersex Issues

By Saul Templeton, J.D., LL.M.

The lenses of tax law and trans[1] and intersex issues provide a fresh perspective on the Trinity Western University ("TWU") debate. This article explores four arguments that, to the author's knowledge, have been absent from the public and legal discourse on TWU thus far. Each of these arguments could stand alone, so this article should be read as having four separate theses rather than expounding four premises supporting one thesis. The arguments are as follows:

1. **TWU is Publicly Funded;**

2. **TWU Should Lose its Charitable Tax Status;**

3. **TWU was Further Subsidized by Aggressive Tax Planning While Arguing it was a Private Institution before the Supreme Court of Canada; and**

4. **Existing *Charter*-balancing Decisions on TWU are Deficient Since they fail to Account for Trans and Intersex Rights.**

TWU has an opportunity to make a valuable contribution to the Canadian legal profession, since its Covenant emphasizes positive character traits the public would value in its lawyers. This makes it even more disappointing that TWU is pursuing litigation through Canadian courts to legalize its exclusion of LGBTQI[2] people from its proposed law school.

1. TWU is Publicly Funded

TWU is the recipient of direct public funding, as well as funding through the tax system. Its charitable tax status grants it an exemption from income tax, and it is exempt from a number of property tax statutes under section 14 of BC's *Trinity Western University Foundation Act*, SBC 1989, c 82. TWU's charitable tax status also grants it the ability to issue charitable tax receipts. Charitable donation tax credits enable donors to give more money to TWU, since their donations entitle them to a tax subsidy offsetting part of their contribution. The federal Department of Finance accounts for spending through the tax system in an annual tax expenditure report. The charitable donation tax credit is the first item on the 2014 report, projecting that an estimated $2.305 billion in tax revenue was foregone in 2014 alone.

Information about government funding and donations received by TWU is publicly available on the CRA's website. In TWU's 2014 fiscal period, the most recent period for which its financial information is available on the CRA website, TWU received $1,054,643 in direct

[1] I use "trans" here to refer to transgender and transsexual individuals who have a binary (male or female) gender identity.

[2] I am using the acronym LGBTQI to stand for lesbian, gay, bisexual, transgender/transsexual, queer and intersex people.

government funding, and $10,585,806, in receipted charitable donations, representing 13% of its total revenue for the period.

TWU's receipted charitable donations in its 2014 fiscal period are higher in both absolute terms, and as a percentage of TWU's total budget, than in any of the previous 4 fiscal periods. TWU's receipted charitable donations jumped from $5,498,766 in its 2013 fiscal period to almost twice that amount, $10,585,806, in its 2014 fiscal period. That latter fiscal period ended April 30, 2014, coinciding with a storm of controversy around TWU's applications for accreditation of its law school.

What precipitated this massive increase in donations during TWU's 2014 fiscal period? Could it have been related to impending legal challenges that TWU would need to pursue through the courts? In answer to the question on the Registered Charity Information Return's question, "Did the charity carry on any political activities during the fiscal period?" TWU answered "No", and claims that $0 and 0% of its budget was devoted to political activities. Yet the return also tells us that TWU spent $1,293,254 on fundraising in the 2014 fiscal period, including through "Advertisements / print / radio / TV commercials", "Internet", "Mail campaigns", "Targeted contacts", "Telephone / TV solicitations", and, troublingly, "Cause-related marketing".

Canadian taxpayers deserve an audit into what "cause-related marketing" TWU was engaged in, and whether it was related to TWU' legal agenda, since public tax dollars support TWU's advertising campaigns. As I have argued elsewhere, TWU's advertising and legal campaigns could be considered political activity under the political purposes doctrine in charity law, since donated funds support TWU's pursuit of legal protection for its exclusion of LGBTQI law students.

2. TWU Should Lose its Charitable Status

Even if TWU is found not to engage in political activities sufficient to revoke its charitable status, it falls afoul of another doctrine in Canadian charity law. Charitable tax status can be revoked for the pursuit of activities contrary to public policy. TWU can be said with certainty to be engaging in activities contrary to public policies protecting LGBTQI people that are explicit in the *Charter,* regardless of whether courts ultimately decide the *Charter* applies to TWU.

Supporters of TWU might argue that its charitable status would be saved by an invocation of freedom of religion or expression. It would not. Those freedoms cannot be used to guarantee access to public funding. Protection of TWU's freedom of religion implies freedom from interference (subject to the balancing of other *Charter* rights), not freedom to claim an absolute right to charitable tax status.

Anti-abortion organizations disseminating pro-life literature have attempted to invoke freedom of expression to maintain charitable status despite engaging in significant political activities. The Federal Court of Appeal in *Human Life International in Canada Inc. v Canada*, [1998] 3 FC 202 (FCA) rejected this argument in a single paragraph, explaining,

> The appellant is in no way restricted by the Income Tax Act from disseminating any views or opinions whatever. The guarantee of freedom of expression in paragraph 2(b) of the *Charter* is not a guarantee of public funding through tax exemptions for the propagation of opinions no matter how good or how sincerely held. (Para 18, followed in *Alliance for Life v Canada*, [1999] 3 FC 504 (FCA)).

Although freedom of expression is distinct from freedom of religion, the same logic applies: denying TWU access to public funding in the form of tax exemptions and credits in no way restricts its freedom of religion. Regardless of whether courts decide that TWU may continue to deny an education to LGBTQI people, TWU ought to be denied charitable tax status as long as it continues to discriminate against them.

3. TWU was Further Subsidized by Aggressive Tax Planning While Arguing it was a Private Institution before the Supreme Court of Canada

Throughout 2000 to 2003, representations were made to families of TWU students that they could have up to 45% of TWU students' tuition covered by tax credits, where tuition payments were characterized as charitable "donations". Students of TWU were instructed to solicit "donations" from family and friends to a registered charity that provided "scholarships" to TWU students. The registered charity, the National Foundation for Christian Leadership ("NFCL"), also operated this scheme for a handful of other Christian educational organizations. The NFCL's "scholarships" were provided to the same students who had solicited corresponding "donations". "Donors" received charitable tax receipts for these payments.

This scheme enabled parents of TWU students to claim charitable tax credits on payments that were, in economic substance, tuition payments ultimately directed to TWU for the benefit of their children. The tax benefits this scheme provided to families of TWU students were also subsidies to TWU because they shifted part of TWU's tuition (roughly three times that charged for comparable programs at other Canadian universities) to all Canadian taxpayers in the form of tax reductions for "donors". These benefits were eventually denied to "donors" when the scheme was found to be unsupported in Canadian tax law by both the Tax Court of Canada and the Federal Court of Appeal.

Justice Campbell Miller of the Tax Court called it "disturbing" that "the objective evidence points so very clearly to an understanding, indeed a knowledge, at the time of donation, that 80 to 100% of monies they donated would go to cover the education cost of those students who solicited the funds – primarily their offspring" (*Coleman v Canada*, **2010 TCC 109** at para 35). However, no penalty was imposed on TWU for its involvement in this tax plan, so as an institution TWU retained the benefits of the scheme.

The period during which the NFCL scheme was in place overlaps with the period that TWU was before the Supreme Court of Canada in *Trinity Western University v British Columbia College of Teachers*, **2001 SCC 31**. A key argument in that case was that TWU was a private institution, and that therefore the *Charter* could not be applied. The case was heard in 2000 with a decision released in 2001, all while TWU was benefitting from the NFCL scheme in addition to receiving tax exemptions and credits. It should further be noted that the scheme preserved students' ability to claim the tuition tax credit on the full value of their tuition, so that students of TWU and their parents were double-claiming credits on the same amount.

That TWU would represent to the Supreme Court that it was privately funded, while parents were told that Canadian taxpayers would reimburse almost half of TWU's tuition, casts into doubt TWU's commitment to the virtues expressed its own Covenant, let alone its commitment to train **virtuous Christian lawyers**. TWU's administration has yet to acknowledge its involvement in this aggressive tax planning scheme, or apologize to Canadian taxpayers.

In 2011, the president of TWU declined to comment on the tax credit scheme when approached by the media, on grounds that the scheme was in place prior to his tenure, and that **he didn't "fully understand the issue"**. An estimated **$12 million** in tax receipts were issued under this scheme, so for TWU's senior administration to deny knowledge of its involvement is disingenuous at best.

4. Existing *Charter*-balancing Decisions on TWU are Deficient Since they fail to Account for Trans and Intersex Rights

No *Charter*-balancing court decision on TWU has analyzed trans or intersex issues. This is an unfortunate omission, since claims that LGBTQI people have the option to avoid TWU, and that "same-sex" sexual activity is a matter of behavioural choice, are thoroughly demolished with even a cursory analysis of trans and intersex issues.

I have written **elsewhere** about the complications that the diversity of intersex and trans identities present to enforcement of TWU's Covenant where those individuals might be members of the TWU community. The problems with applying the Covenant to trans and intersex people can be illustrated even assuming that no members of TWU are currently, or ever will be, trans or intersex.

Consider the following hypothetical: a female student is enrolled at TWU. On paper, she is married to a man who is not a member of the TWU community. While the female student is in the middle of completing her degree, her husband comes out as a trans woman, and informs the TWU student of a plan to medically transition from male to female. TWU's Covenant discourages divorce, and as is often the case for couples in these circumstances, the TWU student and her spouse decide they will try to make the marriage work. Once the trans woman spouse (formerly the husband) has legally changed her sex to female, the couple will be a same-sex couple in the eyes of the law.

Even if TWU took the position that transitioning is prohibited by the Covenant, the student enrolled at TWU is not the one undergoing transition in this hypothetical. She is respecting the Covenant by doing her best to preserve her marriage to a person she loves, but she is in contravention of the rule that marital intimacy must be reserved for one "man" and one "woman".

The hypothetical becomes even more complicated if we assume the TWU student is a male and is married, on paper, to a woman who transitions to male. It would be possible for this latter couple to engage in marital intimacy for the purposes of procreation, in compliance with the terms of the Covenant, **even after the trans spouse appears to all observers as male**.

The harm done by the myth that "same-sex" relations are a matter of choice is perhaps most dramatic for intersex people. There is wide range of biological variation in human sexes, besides the expected XY/male and XX/female. These intersex differences occur naturally. Estimates of the number of intersex people in the general population range from as few as 1 in 2,000 to as much as 1.7% of the population. Even at the lowest estimates, it is probable from the number of students **currently and previously enrolled at TWU** that TWU has already had, and may currently have, intersex members of its student body.

Many intersex people learn of their intersex difference later in life, and thus may already be enrolled at TWU, and possibly already married, at the time of discovery. Cases of so-called "same-sex" marriage that would have otherwise been prohibited, resulting from intersex difference, have been documented by doctors **since the late 1800s**. The Intersex Society of North America has pointed out the contemporary problem posed by the prohibition of **"same-sex" marriage** for intersex people:

> … lots of people with intersex we know can't get legally married, because some doctor decided for them which sex they would count as forever more. Why should a doctor get to decide who you can grow up to marry?

Many intersex people identify strongly as either male or female. They have the right to have their identities respected by those around them, even if their identities do not match their sex assigned at birth. Others, such as Shon Klose, adopt a non-binary gender identity. Shon Klose has written movingly about the physical and emotional harm done by attempts to force a female gender role on them when their intersex difference was discovered. In Shon Klose's case, they learned of their intersex difference while applying for a nursing degree. Interference with Shon's body and gender identity continued into their time as a student, causing emotional trauma for which they were not offered counselling by doctors pushing surgery as Shon's only option.

TWU would be hard-pressed to argue that it has a right to determine such a student's gender identity and choice of marriage partner, given the trauma this sort of determination is known to cause intersex people. If TWU decided to make exceptions for intersex people in applying the Covenant, it would run into an irresolvable problem in determining who had a right to an exception, given the wide range of chromosomal and physical arrangements that make up a person's sex or intersex difference. It would also cause unfairness to gay and lesbian students, who similarly have no choice about their sex, gender identity and sexual orientation.

None of the court decisions on TWU discuss trans or intersex rights in their Charter balancing exercises. Transgender individuals are mentioned only in passing, with the Nova Scotia Supreme Court's decision in Trinity Western University v Nova Scotia Barristers' Society, 2015 NSSC 25 appearing to use the acronyms "LGB" and "LGBT" interchangeably, with no analysis of transgender rights. The reasons given by the courts suggest, disappointingly, that trans and intersex issues were not raised by counsel, even though trans and intersex people are often vocal and active members of the LGBTQI community. As long as courts perform Charter-balancing exercises involving LGBTQI equality while omitting the "T" and the "I", their analyses are incomplete.

A Higher Standard of Conduct in the Legal Profession

As unfortunate as TWU's exclusion of LGBTQI people is, select parts of its Covenant could incrementally improve the calibre and reputation of the legal profession in Canada. The Covenant requires members of the TWU community to "commit themselves to: cultivate Christian virtues, such as love, joy, peace, patience, kindness, goodness, faithfulness, gentleness, self-control, compassion, humility, forgiveness, peacemaking, mercy and justice". These virtues, in a secular context, might be referred to as positive character traits.

These traits are not incompatible with fearless advocacy; they could improve advocacy where lawyers develop a reputation for integrity in their dealings with clients and opposing counsel. Such commitments, if taken seriously, could go a long way in curing the culture of callous competition cultivated in most Canadian law schools and in law firms themselves. The bar has long recognized a lack of public confidence in the moral fiber of lawyers, as is demonstrated by the Ontario Bar Association's "Why I Went to Law School" campaign, which aimed to help the public "get to know lawyers in a different way".

A law school that promotes the virtues embodied in TWU's Covenant would be revolutionary in a profession characterized by a hired gun mentality. TWU has the potential to produce lawyers who have committed, at least for the duration of their studies, to a much higher standard of conduct than law societies' vague good character requirements. It is therefore doubly disappointing that TWU continues to openly oppose LGBTQI equality, and use public funds to do so.

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FRONT AND CENTRE

St. Paul Law Day - April 17, 2015

Law Day Chair Renee Moore (l) and other participants at Law Day 2015 in St. Paul

Students participate in the mock trial at the St. Paul Law Day event

Calgary Chair Appreciation Dinner - May 26, 2015

Members of the CBA Alberta Branch Council, Section and Committee Chairs and Past Presidents at the 2015 Chair Appreciation Dinner in Calgary

Criminal Justice Law & Literature Dinner - June 18, 2015

(l to r) Chris Evans QC, Karen Hewitt, Brian Vail QC, The Honourable Mr. Justice Jack Watson

(l to r) Chris Evans QC, The Honourable Mr. Justice Jack Watson

FRONT AND CENTRE

Edmonton Chair Appreciation Dinner - June 16, 2015

Members of the CBA Alberta Branch Council at the 2015 Chair Appreciation Dinner in Edmonton

CBA Alberta President Steve Mandziuk (l), QC recognizes outgoing North Section Coordinators Karen McDougall (c) and Frank Friesacher (r)

CBA Alberta Past Presidents, dating back to 1975 - 76, attend the Chair Appreciation Dinner in Edmonton

CBA NATIONAL NEWS

CALL FOR SUBMISSIONS

In the winter of 2016, the CBA Legal Futures Initiative is hosting a workshop, in partnership with the Canadian Bar Review, on transforming the education and training of lawyers in Canada. Futures and the Canadian Bar Review are currently soliciting submissions for interventions at the workshop, which will use design theory to determine how to build skills incrementally through each stage in the development of competent lawyers, and lay the groundwork for other future career paths. Do you have opinions about reforming legal education and training in Canada? If so, check out the call for submissions at the Legal Futures Initiative website – we want you to join the conversation.

ADVOCACY

A new integrity regime announced by the federal government earlier this month adopts a number of the CBA's recommendations, responding to concerns the association raised with the previous policy's lack of flexibility. Otherwise, June was a slow month for CBA advocacy initiatives, with just four submissions to government before the 41st session of Parliament adjourned in June. But we have a full slate of resolutions ready to go before council at the CBA Legal Conference in Calgary in August. Read on for details of the changes to the integrity guidelines, June submissions and CLC resolutions.

SPOTLIGHT ON THE CBA INTERNATIONAL INITIATIVES: 25TH ANNIVERSARY

When the Berlin Wall fell 25 years ago, it exposed – and created – a legal problem in former Warsaw Pact countries that the Canadian Bar Association was glad to help solve, bringing lawyers from there to Canada for a legal internship program. That was the beginning of the CBA's involvement in international development. Read on to find out more about the program, read the message from the Chair, read testimonials from former young lawyer interns, and find out what International Initiatives has planned for the CBA Legal Conference in Calgary.

North

From the desk of Frank Friesacher

Karen and I are signing off as your North Section Coordinators! Two years for me and (a record-setting) four years for Karen, it has been a great opportunity for us both to engage and work with our fabulous and diverse sections and their executives. We welcome aboard our replacements, Bonnie Bokenfohr and David Hiebert!

Volunteer! Volunteering with sections you attend is strongly encouraged. While you can do this year-round, getting involved at the start of the section year is especially beneficial to you and others! Check out the 2015-16 Section Handbook and contact the section chairs to find out how you can get active.

Input! Now is an excellent opportunity to pass on your ideas regarding topics and speakers, both for lunch meetings as well as for a future Alberta Law Conference! Contact any section executive member and pass on your valuable thoughts.

Portfolio! The Portfolio and Portfolio Plus packages are a great add-on investment to CBA membership, and include credits which can be used towards section enrollment, educational opportunities, conference registration and other CBA products. Go to www.cbamembership.org for more information.

Self-identify! While you are logged into your profile, take the time to update your contact information and member profile.

Register! Make sure that you renew your section membership when you renew your CBA National and Provincial memberships. This unfortunately gets skipped from time to time. Watch for regular e-mail reminders in the fall so you don't miss out!

Workshop! The annual spring section executive workshop was held in May for both incoming and outgoing section executives. It was well-attended and we reviewed the steps and insights needed to run a smooth and stress-free section year, and create valuable content for our members. Succession planning was also a focal point.

Inns of Court! The 29th installment of this junior lawyer program was held in May, topic "Being an Effective and Efficient Barrister: Problems and Procrastination, Planning and Process". Watch for the next opportunity to deepen your professionalism and advocacy skills in November.

It has been a pleasure and honour to serve. We wish you a warm and relaxing summer!

Frank Friesacher is a partner with McCuaig Desrochers LLP in Edmonton. He is an avid CBA member and volunteer, having previously served as Internet Advisor, Legislative Review Committee member, and more, in addition to acting as North Section Coordinator.

Karen McDougall is the Acting Associate Director of Educational Resources at the Legal Education Society of Alberta, and is a long-time CBA member and volunteer, currently serving her fourth year as North Section Coordinator.

South

From the desks of Kate Bilson and Anthony Strawson

Summer is here! Long days of sunshine, a more relaxed pace, perhaps some much anticipated holidays – these are just a few things to celebrate during the warm and bright mid-year months. It is also a time to celebrate all the effort and energy that went into a great season of section activity during the 2014-15 year. Many of the sections not only developed a strong and interesting speaker series for their members, but they also created opportunities throughout the year for section members to socialize and give back to the community. All of these events were inspiring and provided a good reminder of the strength that can come to the profession when we are able to engage in a variety of activities together.

There is much to look forward to in the coming year as well. Section executives are already busy planning their meeting slates for 2015-16. In addition, there will be some new choices in the section list this coming year, including the new Diversity Section, which we hope will be of interest to everyone across the various sections regardless of your practice background. The section handbook will be available later this summer. Please take a look and see what appeals to you. The year ahead promises to be a great one! We are looking forward to some of the planned cross-section activity we have been hearing about and are excited to see sections work together to enhance their speaker offerings. If you are interested in volunteering for a section executive, please feel free to contact Linda Chapman, Section Registrar, or one of us. There is still some room to do so in a number of the sections.

August will be busy for the CBA Alberta Branch as the annual national CBA Legal Conference is coming to Calgary. Registrations are still being accepted and the agenda includes a wonderful range of CLE activities, social and networking opportunities, and an enriched focus on personal and professional development topics. Many of you have already stepped up to help out, but we encourage all of you to get involved. It is a great opportunity to show other CBA branches across Canada just what a special thing we have going on here in Alberta.

We also want to let you know that Anthony Strawson will be completing his role as Section Coordinator. "He has shown great care in carrying out the various duties of the role and it was a true privilege to serve alongside him," says Kate. Anthony will be replaced by Sean Fitzgerald commencing in September.

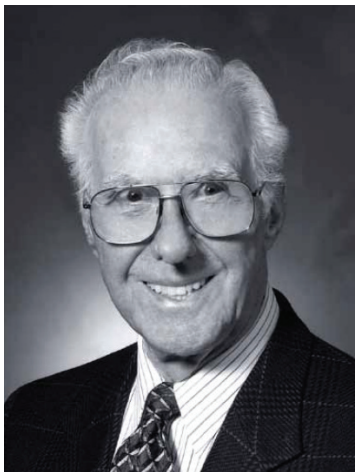
Wishing all of you the best for a happy and safe summer season!

Kate Bilson is Senior Legal Counsel, HR and Immigration Law at TransCanada Pipelines Ltd. Kate is a previous chair of the Privacy and Access Law (South) section, and also sits on the Editorial Committee.

Anthony Strawson is a partner with Felesky Flynn LLP, where his practice is restricted to taxation law. Anthony is a frequent speaker and writer on taxation matters.

Justice Clarence George Yanosik

By Robert Harvie, QC



Justice Clarence Yanosik, of the Court of Queen's Bench of Alberta passed away on January 10, 2015 at age 88.

A true "citizen" of Lethbridge in the fullest sense of the word, Justice Yanosik was born in Lethbridge on April 20, 1926, and from his birth, through his practice, his appointment to the Bench, and during his retirement, he remained a resident of Lethbridge until the date of his death.

As a young man, Justice Yanosik attended school in Lethbridge, but dropped out in Grade 11 to serve in the Royal Canadian Naval Reserves during the Second World War – serving aboard the minesweeper Grandmere and the frigate Springhill.

After the war ended, he completed high school in Lethbridge and then pursued his post-secondary education, receiving his law degree from the University of British Columbia in 1952. Following his graduation he returned to Lethbridge, where he practiced law and eventually became a law partner with a firm comprising two other later Judges of the Superior Courts – Justice L.D. Maclean and Justice Hubert S. Prowse - at the firm of Rice, Prowse, MacLean and Yanosik.

Justice Yanosik was a devoted member of the Liberal Party of Canada during his lifetime, which was no mean feat in Southern Alberta, and actually ran for Parliament as a Liberal candidate in 1958, losing that election to the Progressive Conservative Candidate.

In 1969, Justice Yanosik was appointed to the District Court of Alberta, which court was later amalgamated with the Court of Queen's Bench, and Justice Yanosik remained a sitting Justice of the Court of Queen's Bench until his retirement in 2001.

Justice Yanosik was an excellent athlete in his younger years, excelling at baseball and later becoming a principal architect in supporting and building baseball in Southern Alberta, being inducted into the Lethbridge Sports Hall of Fame in May of 2007 as an athlete and builder.

Justice Yanosik was predeceased by his wife, Cecily, and left four children to survive him at the time of his passing, Robert, Larry, Laurie and Tim.

He most certainly will be missed, not only by his family, but also by the Lethbridge Bar and by the whole of the Lethbridge community to whom he gave so much of himself throughout his lifetime.

Clarence Yanosik rounds third base after hitting a home run for the Lethbridge Cubs in 1954.

Judicial Updates

PROVINCIAL COURT

The Honourable Judge P.L. Adilman (Edmonton) retired as a supernumerary judge on April 26, 2015.
The Honourable Judge M.G. Stevens-Guille (Edmonton) retired as a supernumerary judge on May 1, 2015.
The Honourable Judge L.S. Witten (Edmonton) retired as a supernumerary judge on May 25, 2015.
The Honourable Judge K.A. Holmstrom has been designated as the Assistant Chief Judge for Edmonton Family & Youth, effective June 24, 2015.
The Honourable Judge J.C. Koshman (Edmonton) has been appointed as a supernumerary judge, effective July 1, 2015.
The Honourable Judge E.R.R. Carruthers (Calgary) retired, effective July 6, 2015.
The Honourable Judge L.E. Malin (Edmonton) has been appointed as a part-time judge, effective August 1, 2015.
The Honourable Judge J.K. Wheatley (Edmonton) has been appointed as a part-time judge, effective September 2, 2015.

COURT OF QUEEN'S BENCH

The Honourable Mr. Justice D.R.G. Thomas (Edmonton) has elected to hold office as a supernumerary justice, effective June 23, 2015.
Richard A. Neufeld (Calgary) has been appointed as a Justice of the Court of Queen's Bench, effective June 26, 2015.
John William (Bill) Hopkins (Edmonton) has been appointed as a Justice of the Court of Queen's Bench, effective June 26, 2015

COURT OF QUEEN'S BENCH

The Honourable Madam Justice Frederica L. Schutz (Edmonton) has been appointed as a judge of the Court of Appeal of Alberta, effective August 14, 2015.

A VIEW FROM THE BENCH

By The Honourable Judge A.A. Fradsham

Each phase of life seems to have its own rite of passage. Puberty brings with it skin eruptions and changes in the body. Middle age brings with it a slowing metabolism, often creeping weight gain, and, for males, thinning hair. As one sails out of middle age and into that unchartered part of the "age map" which simply bears the notation "here there be dragons", one is likely to stumble upon a new delight: the colonoscopy.

Now, I well understand and acknowledge that it is not my place to comment on whether routine colonoscopies are useful. That is a debate best left to those with actual knowledge of the topic (as opposed to political debates which do not seem to suffer from that tiresome encumbrance). In any event, now that I have had a colonoscopy, I can think of no reason why others should be spared the delight. With the event now safely in the rear-view mirror (this topic begs for such comments), I can look back (I warned you… it goes with the topic) at the experience with sanctimonious bravado.

I can tell you that I was extremely impressed with the kind treatment I received from everyone involved. From the first contact to arrange an intake appointment to the final friendly wave as I left the facility in the care of my dear wife, I was treated with consideration and patience. The talking, thinking end of me was not ignored just because the other end was the real object of interest. The booking staff even saw the humour in the fact that they booked my procedure for April 1… April Fools' Day.

"Purge" may not be a classic example of onomatopoeia (when the sound of the word imitates that to which it refers), but it is one of those words, the very sound of which captures the emotion of the act it represents. In preparation for a colonoscopy, one must clean out the area to be examined, and to do that one must purge one's self of what is normally found in one's bowels. "Purging" is as much fun as it sounds, and accomplishing it in the early 21st century is not much more pleasant than it was when it was effected by medieval physicians. The method currently in use is having one consume about four litres of a viscous liquid which one would have thought to be more at home in a nasal cavity. I will leave it at that. When one goes to the pharmacy to get the concoction, one is handed a very large plastic container which is empty but for a small amount of powdered substance lying benignly at the bottom. However, it is not the foreshadowing of the large volume of liquid one is going to have to drink which is most distressing. Rather, it is the look of sympathy on the face of the dispensing pharmacist which is most unsettling. Picture the look one would have received from a prescient booking agent as one purchased passage on the Titanic. One can read in the apothecary's eyes the plea: "Don't blame me for what is about to befall you."

Quite simply, the preparation for the colonoscopy is far worse than the actual procedure. However, the preparatory phase does have one additional benefit: along with the spirited expulsion (cannon fire, comes to mind) of any bodily contents which are not firmly attached, any sense of modesty is also pretty much gone by the time one reports for the procedure. By then, it is undaunting to be placed beside a bed which is screened off by sheets from many other identical beds beside which stand other similarly defeated individuals, and to be left with the instruction to "take off all your clothes, and put on this gown. You may keep your socks, if you wish". I assume that keeping one's socks is a function of warmth, and not a defence of some oddly placed and final bastion of modesty.

I know that we in the legal profession are often criticized for making people feel uncomfortable in places such as courtrooms, but it seems to me that we are mere amateurs at creating discomfort when compared to a profession which starts off by having you discard your clothes. It is pure genius to then have the person put on a gown which has ties at the back but certainly does not close at the back (and, I suspect, was never meant to). One can do no more than sit back in admiration, and learn from such people.

As for the procedure itself, I remember nothing due to the wonders of drugs. However, I have had it described to me, and I do wonder what kind of person wakes up one day and says, "I think it would be a great idea to take a tube, affix it with a light and camera, and then insert it into a person's….", well you get the idea. I can report that, in my case, all's well that ends well.

The only remaining question is how I should bring this column to a close. Given the topic, there really is no alternative, except: THE END.

The Honourable Judge A.A. Fradsham is a Provincial Court Judge with the Criminal Court in Calgary. His column "A View From the Bench" has been a highlight in the Canadian Bar Association newsletters for over 15 years.

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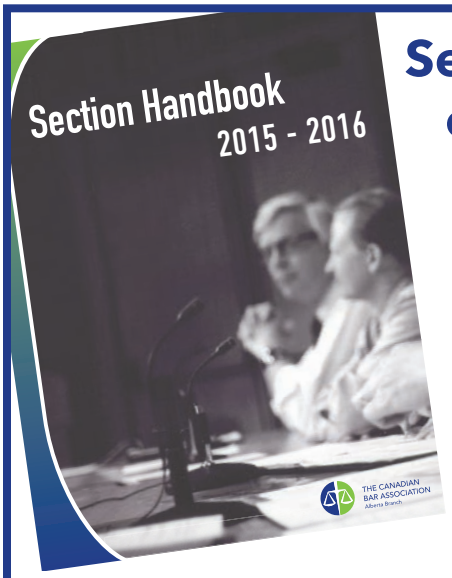

Section Registration open mid-August

2015-16 Section Handbook is now available online.

Click here to view the handbook and plan your upcoming section year.

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