The Advocates' Society
PROMOTING EXCELLENCE IN ADVOCACY

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Dear Treasurer:

RE: Trinity Western University

1. Introduction

The Advocates' Society ("TAS")[1] makes these submissions to the Law Society of Upper Canada ("LSUC") in response to its request for submissions on the issue of the accreditation of the proposed law school at Trinity Western University ("TWU").

The LSUC has posed the following question to be considered by Convocation:

> Given that the Federation Approval Committee has provided conditional approval to the TWU Law Program in accordance with processes Convocation approved in 2010 respecting the National Requirement and in 2011 respecting the approval of law school academic requirements, should the Law Society of Upper Canada now accredit TWU pursuant to Section 7 of By-Law 4?

2. Overview of TAS' Submission

It is TAS' submission that accrediting a law school that operates under a policy of discrimination is contrary to the *Charter*, the values of the legal profession, and the LSUC's statutory mandate to protect the public interest and advance the cause of justice.

A person wishing to become a licensed lawyer in Ontario must attend an accredited law school. The LSUC could not and would not discriminate on the basis of sexual orientation when issuing licenses to practice law. Equally, the LSUC cannot and should not condone such discrimination when it is imbedded in the process of determining whether a

[1] TAS is a not-for-profit association dedicated to promoting access to justice and excellence in advocacy. TAS' membership is made up of over 5,000 lawyers who practise as advocates in various areas of the law throughout Ontario and the rest of Canada. TAS was established in 1963 to ensure the presence of a courageous and independent bar and the maintenance of the role of the advocate in the administration of justice.

prospective student should be admitted to a law school. Given the importance of the accreditation of law schools to the process leading to the licensing of lawyers, it is the duty of the LSUC to require that the admission of students to accredited law schools be decided on a non-discriminatory basis.

TAS opposes the accreditation of a law school that expressly discriminates against potential and actual law students on the basis of sexual orientation and marital status. These are prohibited grounds of discrimination under the *Charter*, representing a recognition by Parliament and by courts across the country that individuals in same-sex or unmarried relationships are members of minority groups who have suffered historical marginalization and disadvantage. Accrediting a law school that promotes such values and disadvantages some students by restricting their entry into law school on the basis of irrelevant personal characteristics or beliefs is inconsistent with the *Charter*, the duties and responsibilities of lawyers, and the LSUC's mandate.

The Federation of Law Societies of Canada ("FLSC") Approval Committee (the "FLSC Approval Committee"), in its report, noted concerns regarding discriminatory practices in the curriculum of TWU.[2] Specifically, the FLSC Approval Committee saw "a tension between the proposed teaching of these required competencies and elements of the Community Covenant". The FLSC Approval Committee proposed that the concerns could be alleviated through additional reporting of course content at a future time.

Although not the focus of these submissions, TAS shares the concerns of the FLSC Approval Committee about the effect of TWU's policies on the curriculum and notes that the education of Canadian law students in the twenty-first century necessarily involves discussion of *Charter* values and professional responsibilities that are at odds with TWU's policies.

However, and without taking away from other concerns,[3] TAS is most concerned with, and these submissions will largely focus on, the barriers to entry into law school created by TWU's policies and the particularly overt and discriminatory exclusion of lesbian, gay, bisexual, transgendered and queer ("LGBTQ") students from admission. Deferring the issue of course content, as suggested by the FLSC Approval Committee, does nothing to alleviate these concerns. Equality rights cannot be advanced or protected through a wait-and-see approach.

Moreover, what the FLSC has decided is not determinative of the LSUC's decision on accreditation of the TWU law school. As will be discussed, the roles and mandates of the

[2] FLSC, Canadian Common Law Program Approval Committee, Report on Trinity Western University's Proposed School of Law Program, December 2013 at p. 9-10 ("FLSC Approval Committee Report"). The Approval Committee's concerns were related in part to the teaching of ethics, professionalism, and public law as it relates to the *Charter*, in light of the Covenant. It was satisfied that these were concerns and not deficiencies, however, in part due to TWU's undertaking that courses at TWU would teach students about the full scope of protection offered by the *Charter* and human rights law "in the public and private spheres of Canadian life".

[3] The Covenant arguably also offends the expressive, associational, liberty and security interests of gays and lesbians, unmarried people and members of certain religious groups, contrary to ss. 2, 7, 15 and 28 of the *Charter* by demanding that individuals conceal or suppress their personal beliefs or characteristics as a condition of admission or attendance.

FLSC and the LSUC are fundamentally distinct. This distinction is critical to the issue faced by the LSUC at this time.

For the reasons detailed below, TAS submits that the LSUC should reject TWU's application for accreditation in Ontario.

3. Relevant Facts

In June 2012, TWU, a private Christian faith-based university in British Columbia, submitted a proposal for a law school program to the Approval Committee of the FLSC. TWU identifies as one of its objectives the integration of a Christian worldview into the law school curriculum. TWU requires all prospective students, faculty and staff of the proposed law school to sign the Community Covenant Agreement (the "Covenant"). As a result, it appears to TAS that the Covenant impacts upon admissions, the personal lives of students who are admitted, the faculty who teach them and the educational experience of students who are being trained in the law.

The Covenant is in the form of a contract. Its execution is a pre-requisite to studying law at TWU. The Covenant requires students to abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman". The provisions of the Covenant are designed "to ensur[e] […] the integrity of the TWU community." The only logical reading of these provisions is that if LGBTQ people are permitted to be part of the TWU community, the TWU community would lack integrity. In other words, even associating with LGBTQ people at TWU would affect the integrity of the TWU educational environment.

The Covenant reads in part as follows:

Our Pledge to One Another

> Trinity Western University (TWU) is a Christian university of the liberal arts, sciences and professional studies with a vision for developing people of high competence and exemplary character who distinguish themselves as leaders in the marketplaces of life.
>
> […]
>
> **3. Community Life at TWU**
>
> […]
>
> In keeping with biblical and TWU ideals, community members voluntarily abstain from the following actions: [...]
>
> • sexual intimacy that violates the sacredness of marriage between a man and a woman
>
> […]
>
> **Healthy Sexuality**
>
> People face significant challenges in practicing biblical sexual health within a highly sexualized culture. A biblical view of sexuality holds that a person's decisions regarding his

> or her body are physically, spiritually and emotionally inseparable. Such decisions affect a person's ability to live out God's intention for wholeness in relationship to God, to one's (future) spouse, to others in the community, and to oneself. Further, according to the Bible, sexual intimacy is reserved for marriage between one man and one woman, and within that marriage bond it is God's intention that it be enjoyed as a means for marital intimacy and procreation. Honouring and upholding these principles, members of the TWU community strive for purity of thought and relationship, respectful modesty, personal responsibility for actions taken, and avoidance of contexts where temptation to compromise would be particularly strong.
>
> […]
>
> **5. Commitment and Accountability**
>
> This covenant applies to all members of the TWU community, that is, administrators, faculty and staff employed by TWU and its affiliates, and students enrolled at TWU or any affiliate program. Unless specifically stated otherwise, expectations of this covenant apply to both on and off TWU's campus and extension sites. Sincerely embracing every part of this covenant is a requirement for employment. Employees who sign this covenant also commit themselves to abide by TWU Employment Policies. 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. Students sign this covenant with the commitment to abide by the expectations contained within the Community Covenant, and by campus policies published in the Academic Calendar and Student Handbook.
>
> Ensuring that the integrity of the TWU community is upheld may at times involve taking steps to hold one another accountable to the mutual commitments outlined in this covenant. As a covenant community, all members share this responsibility. The University also provides formal accountability procedures to address actions by community members that represent a disregard for this covenant. These procedures and processes are outlined in TWU's Student Handbook and Employment Policies and will be enacted by designated representatives of the University as deemed necessary.
>
> **By my agreement below I affirm that:**
>
> I have accepted the invitation to be a member of the TWU community with all the mutual benefits and responsibilities that are involved;
>
> I understand that by becoming a member of the TWU community I have also become an ambassador of this community and the ideals it represents;
>
> I have carefully read and considered TWU's Community Covenant and will join in fulfilling its responsibilities while I am a member of the TWU community.
>
> (Emphasis added.)

The Covenant makes clear the expectation that students police each other to "ensure the integrity of the TW community", and "hold each other accountable" for any breach of the Covenant. According to TWU's stated policy, students who do not comply with the Covenant will be subject to sanctions which could include discipline, dismissal, or refusal of a student's re-admission to TWU:[4]

[4] Trinity Western University Student Handbook, online at http://twu.ca/studenthandbook/university-policies/student-accountability-process.html.

> If a student fails to maintain his or her commitment to the Community Covenant and/or policies and guidelines of the University as outlined in the Student Handbook, Academic Calendar and TWU website, an accountability process exists that is structured around the goal of bringing the student back into relationship with the community while contributing to the student's personal and spiritual growth. Initial and/or minor violations may be dealt with through a discussion process facilitated by Student Life staff. Subsequent and/or more serious breaches of the Community Covenant may be dealt with in a formal process overseen by the Director of Community Life or Associate Provost. Such cases may be referred to a Community Council or the University's Accountability Committee, consisting of faculty, staff and students, for resolution.
>
> […]
>
> If a student, in the opinion of the University, is unable, refuses or fails to live up to their commitment, the University reserves the right to discipline, dismiss, or refuse a student's re-admission to the University.

It appears that students, faculty, and staff at TWU are expected to police perhaps the most intimate aspect of each other's personal lives *and* that TWU will impose meaningful sanctions for "breaches" of the Covenant.

The Covenant's institutionalization of discrimination at TWU manifests itself in two distinct ways: restricting admission to straight applicants and/or policing and controlling intimate behaviour of those who are admitted. It also appears that unmarried cohabitants would be offered the same false "choices" as a term of admission: adopt and act upon the proscriptions contained in the Covenant, and thereby conceal or renounce one's identity, or face rejection or dismissal.

When considering any claim grounded in substantive equality, the appropriate inquiry is into the *effect* of the provision. This is the essence of substantive equality – the consideration of, in this case, the effect of the Covenant, from the perspective of the LGBTQ student. It should be apparent to all that the Covenant creates significant personal cost to individuals. Justice L'Heureux-Dubé explained the effect of a similar covenant in these terms:

> I am dismayed that at various points in the history of this case the argument has been made that one can separate condemnation of the "sexual sin" of "homosexual behaviour" from intolerance of those with homosexual or bisexual orientations. This position alleges that one can love the sinner, but condemn the sin. But, in the words of the intervener EGALE, "[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation."[5]

[5] *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 [2001] 1 S.C.R. 772 [*BCCT*] at para. 34. As explained elsewhere in this letter, Justice L'Heureux-Dubé's dissenting opinion in this case is consistent with how the equality jurisprudence in Canada has developed since 2001.

4. The Role of the LSUC is distinct from that of the FLSC Approval Committee

a) The FLSC's Role

The FLSC is the umbrella organization of the 14 provincial and territorial law societies that govern lawyers and notaries.

The FLSC Approval Committee is responsible for assessing whether a law school curriculum meets the national requirement. However, in the case of TWU's proposed law school, there were a significant number of submissions received by the FLSC Approval Committee from groups and individuals opposed to TWU's proposed law school, and these submissions raised issues which were deemed to be outside the mandate of the Approval Committee. As such, the FLSC established the Special Advisory Committee on TWU's proposed law school.

Specifically, the Special Advisory Committee considered whether the requirement that students and faculty at TWU must agree to abide by the Covenant raises additional considerations that should be taken into account in determining whether graduates of the proposed law school program should be eligible to enter law society admission programs.

After reviewing the many submissions received by it, the Special Advisory Committee concluded that so long as the FLSC Approval Committee concludes that the TWU law school curriculum meets the national requirement, there is no public interest reason to exclude future TWU graduates from law society bar admission programs.[6]

The Approval Committee subsequently reviewed the application by TWU for approval of the law school program and concluded that TWU's program meets the national requirement, subject to the concerns and comments regarding the teaching of ethics, professionalism and certain aspects of public law (see Section 2, and in particular Footnote 2, above).

The LSUC should consider the Approval Committee's report pursuant to its statutory mandate to set policies for admission to the legal profession in Ontario. However, the Approval Committee report is only one of a number of factors the LSUC should consider in making its decision. The LSUC must arrive at its own decision, consistent with its statutory mandate and duties.

b) The LSUC's Duties

The LSUC has a much broader mandate than the FLSC.

The FLSC's Approval Committee's mandate is restricted to the delegated authority of determining whether existing and proposed common law programs meet the national requirement. The national requirement establishes the knowledge and skills that all applicants for entry to the bar admission programs of the law societies in the Canadian common law jurisdictions must possess.[7]

[6] FLSC, Special Advisory Committee on Trinity Western's Proposed School of Law, Final Report, December 2013 at pp. 18-19 ("FLSC Special Advisory Committee Report").

[7] FLSC Approval Committee Report, *supra* note 2 at p. 1.

The LSUC has a statutory responsibility to regulate the legal profession in the public interest, which includes the responsibility of admitting lawyers to the profession in Ontario.

Included in the LSUC's mandate is a duty to advance the cause of justice, to facilitate access to justice, and to protect the public interest. Sections 4.1 and 4.2 of the *Law Society Act* were added to the legislation in 2006[8] to provide:

> **Function of the Society**
>
> 4.1 It is a function of the Society to ensure that,
>
> (a) all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide; and
>
> (b) the standards of learning, professional competence and professional conduct for the provision of a particular legal service in a particular area of law apply equally to persons who practise law in Ontario and persons who provide legal services in Ontario.
>
> **Principles to be applied by the Society**
>
> 4.2 In carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles:
>
> 1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
>
> 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
>
> 3. The Society has a duty to protect the public interest.
>
> 4. The Society has a duty to act in a timely, open and efficient manner.
>
> 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.

The language in s. 4.2 of the *Law Society Act* is mandatory, not discretionary. The LSUC is obliged to consider its duties to maintain and advance the cause of justice and the rule of law, facilitate access to justice, and protect the public interest, in rendering a decision on any issue within its mandate, including the decision to accredit a particular law school. The LSUC cannot defer to another entity's evaluation of an issue within the LSUC's statutory mandate. In determining pursuant to By-Law 4[9] whether a law school meets the

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[8] See *Access to Justice Act, 2006*, S.O. 2006, c. 21, Sched. C, s. 7.

[9] By-Law 4 sets out the requirement for admission to the Law Society of Upper Canada:

Requirements for issuance of Class L1 licence

9. (1) The following are the requirements for the issuance of a Class L1 licence:
1. The applicant must have one of the following:

LSUC's criteria for accreditation, the LSUC must act in accordance with its statutory mandate. The LSUC cannot abdicate its statutory obligations by engaging in an inquiry that begins and ends with the ability of a law school to simply deliver legal education, or by relying on the decision of another body such as the FLSC.

The LSUC also recognizes and affirms the unique obligation held by itself and by its members to stamp out discrimination as contrary to the rule of law and the advancement of justice.

The LSUC's Rules of Professional Conduct state:

> **5.04 DISCRIMINATION**
>
> **Special Responsibility**
>
> 5.04 (1) A lawyer has a special responsibility to respect the requirements of human rights laws in force in Ontario and, specifically, to honour the obligation not to discriminate on the grounds of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, gender identify, gender expression, age, record of offences (as defined in the Ontario Human Rights Code), marital status, family status, or disability with respect to professional employment of other lawyers, articled students, or any other person or in professional dealings with other licensees or any other person.
>
> **Commentary**
>
> The Society acknowledges the diversity of the community of Ontario in which lawyers serve and expects them to respect the dignity and worth of all persons and to treat all persons equally without discrimination.
>
> This rule sets out the special role of the profession to recognize and protect the dignity of individuals and the diversity of the community in Ontario.

The LSUC has a duty to decide on its own, pursuant to its statutory mandate, whether accreditation of TWU's law school is in the public interest, advances the cause of justice and the rule of law, and facilitates access to justice for the people of Ontario. The LSUC is a public institution whose mandate and decisions are governed by the *Charter* and the Ontario *Human Rights Code*. In addition, the Benchers voting on this matter will have to do so in a way that is consistent with every Ontario lawyer's "Special Responsibility" to promote equality as set out in Rule 5.04.

5. Application of the LSUC's Duties: Accreditation of TWU is Contrary to the LSUC's Mandate, Initiatives and Rules of Professional Conduct

It is respectfully submitted by TAS that the LSUC simply cannot reconcile its obligations with the accreditation of the proposed TWU law school.

> i. A bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school. […]

An "accredited law school" is defined as "a law school in Canada that is accredited by the Society" (s. 7 of By-Law 4). (R.S.O. 1990, c. L.8.)

Accrediting a law school that utilizes an admission policy which discriminates against a vulnerable group is contrary to the LSUC's statutory mandate of maintaining and advancing the cause of justice and protecting the public interest and undermines the LSUC's diversity/equity initiatives. It also offends fundamental *Charter* rights and values and creates an unfair disadvantage to LGBTQ students..

The LSUC has a duty to render this decision in a manner consistent with the public interest and the cause of justice. What does that mean? How can the concept be defined, particularly in the context of a body that licenses and regulates the legal profession?

In one of the earliest *Charter* cases, *R. v. Oakes*, Chief Justice Dickson was called upon to define "the values and principles of a free and democratic society" for the first time. TAS submits that in the context of the LSUC's mandate, this language illuminates the core values of the public interest and the cause of justice. The Chief Justice wrote:

> The Court must be guided by the values and principles essential to a free and democratic society which I believe embody, to name but a few, respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society.[10]

TAS submits that accrediting TWU's law school would be inconsistent with the principles enunciated by the former Chief Justice and would not be consistent with the public interest or the LSUC's mandate to advance the cause of justice.

Accrediting TWU's law school will send a message to the legal profession and the public that discrimination on the basis of sexual orientation is acceptable and is supported by the LSUC. Such a message will undermine the evolution of equality rights generally, and LGBTQ rights in particular, in Canada. As Justice L'Heureux-Dubé wrote in the 1995 decision *Egan and Nesbitt v. Canada*,

> Given the marginalized position of homosexuals in society, the metamessage that flows almost inevitably from excluding same-sex couples from such an important social institution is essentially that society considers such relationships to be less worthy of respect, concern and consideration than relationships involving members of the opposite sex. This fundamental interest is therefore severely and palpably affected by the impugned distinction.[11]

The damage of this message, particularly when sent by a law school or law society, cannot be underestimated. As Justice Cory wrote in *M. v. H.*:

> The exclusion of same-sex partners … implies that they are judged to be incapable of forming intimate relationships of economic interdependence as compared to opposite-sex couples, without regard to their actual circumstances. […] [S]uch exclusion perpetuates the disadvantages suffered by individuals in same-sex relationships and contributes to the erasure of their existence.[12]

[10] *R. v. Oakes*, [1986] 1 S.C.R. 103.

[11] *Egan v. Canada*, [1995] 2 S.C.R. 513 at 567.

[12] *M. v. H.,* [1999] 2 S.C.R. 3 at para. 73.

A requirement that students comply with the Covenant as a condition of admission is as equally offensive as a statute that expressly excludes members of the LGBTQ community. There is no difference between the two. The Covenant not only has the practical effect of denying admission to LGBTQ students, but also perpetuates a stereotypical view that fails to recognize their dignity and equality, without any regard to their actual circumstances. Such an outcome is clearly contrary to the public interest and the advancement of the cause of justice.

The LSUC would not accredit any proposed law school that expressly discriminated on a constitutionally protected ground, such as race, gender or disability, even if the discrimination was the result of sincerely held beliefs. The LSUC would never accredit a law school with a "No Women" or "No Blacks" or "No Jews" admission policy, regardless of whether that policy was based on sincerely-held religious beliefs, and particularly where the direct and stated objective of these groups' exclusion was to "ensure the integrity" of the educational "community". The LSUC should not, therefore, accredit a law school with a "No Gays or Lesbians" admission policy.

The LSUC also has a long history and has played a key role in promoting and celebrating LGBTQ equality in Ontario. Education programs offered by the LSUC are required to be in compliance with *Charter* values. The Rules of Professional Conduct make the promotion of equality, including sexual orientation, a professional obligation as set out in Rule 5.04. The Law Society's Equity Initiatives Department was created in 1997 following the adoption of the Bicentennial Report on Equity Issues in the Legal Profession by the Law Society's governing body. In 2013, the LSUC released an inclusivity guide for sexual orientation and gender identity issues for law firms. The LSUC has been outspoken about human rights offences; recently, the LSUC has made public efforts to raise concerns about harassment of lawyers representing LGBTQ individuals in Nigeria and Uganda.[13] Over the past decade, at least four lawyers have been awarded the Law Society Medal for their work in achieving and promoting LGBTQ equality. It is not an understatement to say that equality is a cherished value and critical ideal to the Law Society of Upper Canada. Accrediting a law school, like TWU's, that discriminates on the basis of sexual orientation will only serve to undermine the LSUC's leadership and credibility in promoting these issues. Once that ground is lost, it will not easily be won back.

6. The LSUC would be Breaching the *Charter* and Unfairly Discriminating by Accrediting TWU's Law School

a) Accreditation of TWU's Law School Is Contrary to *Charter* Values

Perhaps few things are more important than the freedom to choose the spouse of one's choice and make other decisions about intimate personal relationships. The Supreme Court of Canada has repeatedly referred to such decisions as engaging our fundamental

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[13] See Law Society of Upper Canada News Release, "The Law Society of Upper Canada Expresses Concern that Human Rights Lawyers Representing LGBTI Clients in Nigeria Face Possible Harassment" (February 28, 2014); and Law Society of Upper Canada News Release, "The Law Society of Upper Canada Expresses Concern that Human Rights Lawyers Challenging Uganda's Anti-Homosexuality Bill Face Possible Harassment" (February 28, 2014).

liberty and security interests.[14] Policies that require censorship or concealment of the very identity of a student are patently inconsistent with *Charter* values.

In this case, admission to and full participation in TWU student life would be denied to a whole class of people on the basis of sexual orientation in a manner that offends the human dignity of gays, lesbians and bisexuals. It exacerbates pre-existing disadvantage by deeming same-sex relationships less worthy of respect and recognition and fails to recognize the lived realities of gay and lesbian commitments. Any decision that involves the sanction of this policy by the LSUC would, in TAS' respectful submission, be contrary to s. 15 of the *Charter*.

The Covenant also clearly would have an impact on the academic environment for LGBTQ students (and others whose conduct might offend the Covenant due to their unmarried status). The broader effect is illustrated by the comments of the B.C. Court of Appeal in *Kempling*. In that case, a teacher believed, wrote and lectured that gays and lesbians could be "fixed" with a form of therapy. Lowry J.A. wrote:

> As I have said, the harm in evidence in this case is not that of discriminatory actions directed against particular individuals, but rather is that sustained by the school system as a whole. In his writings, Mr. Kempling made clear that his discriminatory beliefs would inform his actions as a teacher and counsellor. His writings therefore, in themselves, undermine access to a discrimination-free education environment. Evidence that particular students no longer felt welcome within the school system, or that homosexual students refused to go to Mr. Kempling for counselling, is not required to establish that harm has been caused. Mr. Kempling's statements, even in the absence of any further actions, present an obstacle for homosexual students in accessing a discrimination-free education environment. These statements are therefore inherently harmful, not only because they deny access, but because in doing so they have damaged the integrity of the school system as a whole.[15]

Discriminatory treatment and exclusion is not less damaging because it is long-standing or common, or because it is based on "firmly held beliefs." There would be no end to discrimination if traditional beliefs provided a defence to equality claims. Section 15 guarantees the "unremitting protection of the individual rights and liberties" of minorities who have been historically vulnerable to stigma and stereotyping. It aims to protect the traditionally disadvantaged from discrimination, however deeply ingrained, accepted, and longstanding. While freedom of religion is constitutionally recognized and should be given force and expression, it is not unlimited and must be balanced with competing *Charter* rights when they conflict and cannot co-exist.[16]

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[14] *M. v H.*, *supra* note 12; *Miron v. Trudel*, [1995] 2 S.C.R. 418; *Nova Scotia (Attorney General) v. Walsh*, 2002 SCC 83, [2002] 4 S.C.R. 325; *Quebec (Attorney General) v. A*, 2013 SCC 5, [2013] 1 S.C.R. 61.

[15] *Kempling v. British Columbia College of Teachers*, 2005 BCCA 327, 43 B.C.L.R. (4th) 41 (C.A.) at para. 79 [*Kempling*].

[16] *Law v. Canada (Minister of Employment and Immigration)* [1999] 1 S.C.R. 497 at para. 72 [*Law*]; *Hunter v. Southam*, [1984] 2 S.C.R. 145 at 155. See also *R. v. N.S.*, 2012 SCC 72, [2012] 3 S.C.R. 726, especially at paras 46-49.

Freedom of religion does not operate as a sort of trump card to extinguish the rights of others. In fact, when equality claims compete with religious values, the opposite is true. Where freedom of religion is asserted as the basis on which equality rights are denied, the Supreme Court of Canada recently (and unanimously) held that only a limited justification for the equality infringement should even be considered. In its 2013 decision in *Whatcott*,[17] the Court affirmed its previous (and also unanimous) ruling in the Malcolm Ross[18] appeal, as follows:

> In *Ross*, La Forest J. recognized that there could be circumstances in which the infringement of an exercise of freedom of religion, like that of freedom of expression, could merit only an attenuated level of s. 1 justification. La Forest J. noted that the respondent's religious views in that case sought to deny Jews respect for dignity and equality. He went on to state, at para. 94, that "[w]here the manifestations of an individual's right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate."[19]

On that basis, despite accepting that the actions of Mr. Whatcott against LGBTQ individuals were motivated by a sincerely held religious belief, the Supreme Court of Canada upheld certain findings of discrimination and hate speech against Mr. Whatcott. Like Mr. Ross and Mr. Whatcott, TWU has over-reached and ought not to be permitted to hide its expressly discriminatory admission policy behind a claim of freedom of religion.

Although TWU is a private institution, the LSUC is a public institution whose mandate and decisions are governed by the *Charter* and the *Human Rights Code*. It strains credulity to say that, when considering the accreditation of a private or faith based law school, the LSUC can exercise its public interest role without regard to the *Charter* and human rights principles, both of which expressly prohibit the very type of discrimination that TWU promotes.

b) Accreditation of TWU will Impose an Unfair Disadvantage on LGBTQ Students

In addition to being overtly discriminatory, the impugned provisions of the Covenant are irrelevant to whether LGBTQ students and unmarried individuals in a common law relationship should be admitted to and will succeed in their legal education, which surely should be the core objective of a law school's admission policy. This irrelevance highlights the offensive and capricious nature of the Covenant.

An additional concern is that accrediting TWU's law school will impose an unfair disadvantage on LGBTQ students applying to law school. There are a limited number of first-year law student openings across the country. The fact that a new law school has been approved would be positive, were it not for the fact that only some applicants will be admitted or will be welcome. An express barrier to entry (and one that would be sanctioned by the LSUC if the law school is accredited) will mean one fewer law school

[17] *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, [2013] 1 S.C.R. 467 [*Whatcott*].

[18] *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825 [*Ross*].

[19] *Ross*, *ibid.* at para. 162 (per Rothstein J.).

open to LGBTQ applicants than to others. No evidence is required to confirm the negative impact it will have on a community that has just recently achieved equality in Canada. No evidence is required to demonstrate how particularly offensive it would be to sanction anti-gay barriers to *legal education* when the right to be free of such barriers has been achieved in the legal context, by lawyers and judges, and by virtue of the supreme law of our land.

7. Distinguishing the *BCCT* Decision

In TAS' view, the decision of the Supreme Court of Canada in *Trinity Western University v. British Columbia College of Teachers*[20] is not determinative of the question before Convocation. This is because: (1) the LSUC's public interest mandate is broader than that of the BCCT; (2) societal acceptance of LGBTQ rights and the law in that regard has evolved in the 13 years since the BCCT decision, and (3) courts will be deferential to the LSUC's decision.

a) The LSUC's Public Interest Mandate is Broader than the BCCT's

There are important differences between the *Law Society Act* and the former BC *Teaching Profession Act*, R.S.B.C. 1996, c. 449 (the "BC *Teaching Profession Act*"), which was the legislation considered in *BCCT*. Under its enabling statute, the BCCT may consider the public interest *only with respect to considering the qualifications of individual applicants*.[21] Unlike the BCCT and its statute, the *Law Society Act* requires the LSUC to consider the public interest and the advancement of the cause of justice in everything it does.

In *BCCT*, the Supreme Court held that, by virtue of the reference to "the public interest" in s. 4 of the BC *Teaching Profession Act*, the BCCT could "consider the effect of public school teacher education programs on the competence and professional responsibility of their graduates."[22] The Court went on to consider whether TWU graduates would be unworthy teachers. The Court concluded that, in the absence of concrete evidence that they would discriminate in the school environment, TWU graduates should not be denied licensing on the basis that they might hold the discriminatory beliefs reflected in the predecessor Covenant document.

By contrast, the *Law Society Act*, since its amendment in 2006, imposes a duty on the LSUC to "maintain and advance the cause of justice and the rule of law" and "protect the public interest." The LSUC's mandate to consider the public interest and advance the cause of justice is thus not limited to a consideration of the suitability of TWU's graduates

[20] *Supra* note 5.

[21] The former BC *Teaching Profession Act*, R.S.B.C. 1996, c. 449, s. 4, reads:

> It is the object of the college to establish, having regard to the public interest, standards for the education, professional responsibility and competence of its members, persons who hold certificates of qualification and applicants for membership and, consistent with that object, to encourage the professional interest of its members in those matters.

[22] *BCCT*, *supra* note 5 at para. 13 (emphasis added), citing the dissenting judgment in the Court of Appeal in that matter.

to practice law. In everything the LSUC does – including the accreditation of law schools – it has a mandatory duty to "maintain and advance the cause of justice and the rule of law" and "protect the public interest".

The LSUC's statutory duty requires it to consider whether accreditation of TWU's law school would be contrary to the cause of justice. Whether graduates of such a law school would act in a discriminatory fashion is not the issue. The issue is whether TWU's discriminatory policies are contrary to the public interest and the cause of justice.

b) The Legal Context has Evolved since the *BCCT* Case

In our view, a court reviewing a decision in this matter by the LSUC will be required to consider several changes that have occurred since 2001 when the *BCCT* case was decided. In particular, the evolution of the legal recognition of LGBTQ rights since 2001 has been significant and was only just beginning when the *BCCT* case was decided.

In 1999, just two years before the *BCCT* case, the Supreme Court of Canada released its decision in *M. v. H.* The decision was legally ground-breaking and had significant implications, requiring widespread legislative amendment at the federal and provincial levels, so that same-sex couples had the same rights and obligations as unmarried opposite-sex couples across all laws, across the country.[23] In 2003, the *Halpern* decision was released, requiring full and equal marriage for same-sex couples in Ontario. In 2004, other court decisions rolled out equal marriage in B.C. and Quebec[24] and the Supreme Court of Canada decided the *Marriage Reference*.[25] In 2005, Parliament passed the federal marriage statute, the *Civil Marriage Act*.[26] In 2007, the Court of Appeal for Ontario released its decision in *A.A. v. B.B.*,[27] recognizing the reality of three-parent families for same-sex couples and permitting declarations of parentage for same-sex parents.

A significant amount of time and debate on the *Marriage Reference* centred on the so-called "tension" between the freedom to marry and the religious views of those opposed to it. The parenting cases, including *A.A. v. B.B.*, also engaged religious and firmly held, traditional beliefs. The dialogue and legal understanding of these issues has continued since that time, with new challenges arising from new facts and claims, including pensions, benefits, divorces, and the rights of transgendered people. As discussed, the law has also continued to evolve with respect to religious freedom and in particular we have seen a shift away from the concept of "competing rights" in these cases.[28] Such

[23] 68 Federal Statutes were amended; 67 Ontario Statutes were amended; similar numbers were amended in other provinces.

[24] *Catholic Civil Rights League v. Hendricks*, [2004] RJQ 851 (Que. C.A.); *EGALE Canada Inc. v. Canada*, 2003 BCCA 251, 13 B.C.L.R. (4th) 1 (C.A.); *Dunbar v. Yukon*, 2004 YKSC 54, 122 C.C.R. (2d) 149 (Yukon S.C.).

[25] *Reference re Same-Sex Marriage*, 2004 SCC 79. [2004] 3 S.C.R. 698 [*Marriage Reference*].

[26] S.C. 2005, c. 33.

[27] 2007 ONCA 2, 83 O.R. (3d) 561 (C.A.).

[28] *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567 and *Whatcott*, *supra* note 17.

issues had not even been considered when the *BCCT* case was decided. The sensitivities, the conceptualization and the understanding of the legal context of same-sex equality claims have evolved significantly since 2001.

So too has our courts' understanding about evidence in *Charter* cases. One of the critical reasons for the *BCCT* decision is that there was insufficient evidence demonstrating a connection between the private institution's policies and the effect on the education and the teachers who would graduate from TWU. TAS submits that many *Charter* cases decided since that time have moved away from formalistic comparisons and evidentiary requirements.[29] Perhaps the best example of this is the *Halpern* case, in which over thirty experts opinions were filed, only to be met by both levels of court recognizing the obvious and common sense propositions offered by the applicants seeking equal marriage.[30] Such an obvious "connect the dots" approach could be applied in the current context when the LSUC or a reviewing court considers the issue of whether the Covenant and in particular the obligation it places on teachers will have an effect on the quality and content of the legal education. In fact, that is precisely what the British Columbia Court of Appeal concluded, without the necessity of extrinsic evidence, in the *Kempling* decision – released four years after the *BCCT* decision.[31]

Even the basic test for equality cases has evolved since 2001. At that time, *Law v. Canada*[32] set out a multi-part test for a successful equality claim. That test has not just been refined in subsequent years; it has been entirely restated and *Law* has been specifically discredited in not one but two cases – *Kapp* in 2008 and *Withler* in 2011. The test is now more flexible, less comparative, and less formulaic than in the past. The Court has instructed that the dignity of all citizens and the goal of substantive equality should be the main considerations.[33]

These fundamental shifts in equality analysis have occurred since BCCT was decided. It is difficult to imagine how it could be predicted with any degree of certainty that a case decided then would be decided similarly today. Times change. Law and society evolve. When *M. v. H.* was released in 1999, two judges of the Supreme Court of Canada, including the Chief Justice, literally reversed their positions since the *Egan* decision four years earlier.[34] Even in its own judgments, the Supreme Court has recognized the evolving concepts of equality and attitudes towards LGBTQ people.[35] If the LSUC

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[29] *R. v. Kapp*, 2008 SCC 41, [2008] 2 S.C.R. 483 at para. 22 [*Kapp*]; *Withler v. Canada (Attorney General)*, 2011 SCC 12 at para. 66.

[30] *Halpern v. Canada (Attorney General)* (2002), 60 O.R. (3d) 321 (Div. Ct.), aff'd (2003) 65 O.R. (3d) 161 (C.A.) [*Halpern*].

[31] See the passage written by Lowry J.A. in *Kempling*, *supra* note 15, cited above in Section 6(a).

[32] *Law*, *supra* note 16.

[33] *Kapp*, *supra* note 29.

[34] Contrast the positions of Chief Justice Lamer and Justice Major in *Egan* and *M. v. H.*

[35] 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 148. See also *R. v. Tran*, 2010 SCC 58, [2010] 3 S.C.R. 350.

considers two snapshots in time – 2001 when BCCT was decided and 2014 – it is apparent that the legal context of this controversy has changed drastically between those dates.

Based on the foregoing, TAS submits that it is reasonable to conclude that a reviewing court today would reach a substantially different conclusion regarding TWU's compliance with societal norms regarding the respect and fair treatment of gays and lesbians than it did in the *BCCT* case.

c) LSUC Decision Will Be Accorded Deference by the Courts

The governing principles of the standard of review to be applied on the judicial review of administrative action have also undergone marked changes since the Supreme Court considered *BCCT*. Formerly, the courts considered it their original mandate to resolve questions of law and questions involving the *Charter* and human rights statutes. Where those questions were under review, the courts previously substituted their own views by using a standard of correctness.

In *BCCT*, the Court applied a correctness standard based on the finding that BCCT did not have expertise in interpreting human rights legislation and in balancing *Charter* values. Even under the old standard of review regime, the LSUC would be afforded greater deference than the BCCT in this regard. Unlike the BCCT, the LSUC has exclusive and long-standing jurisdiction to govern the conduct of its members and the criteria for admission to the Bar of Ontario. In contrast to the BCCT, the Attorney General cannot disallow the LSUC's by-laws. The LSUC is also capable of forming its own legal opinion on the intersection of *Charter* values and the accreditation of TWU.

In any event, under the modern approach to standard of review,[36] administrative decision makers' expertise over their home statutes and the intersection of the *Charter* and human rights laws with their own jurisdiction properly demands that the reviewing courts will show deference to the decisions of the tribunal. Such decisions are reviewed on a standard of reasonableness – not to limit litigation or to ease the task of reviewing courts, but because the courts have recognized that the decision is for the statutory decision-maker, not the courts. Wherever an administrative decision maker is interpreting its home statute, the presumption is that its decisions – even decisions on pure questions of law – will only be overturned where they are unreasonable.[37]

The LSUC's public interest mandate, as discussed above, arises from Section 4.2 of the *Law Society Act*. The LSUC has a responsibility to decide on its own, pursuant to its statutory mandate, whether accreditation of TWU's law school is in the public interest. If the LSUC were to simply follow the *BCCT* decision, it would be abdicating its responsibility to consider the public interest in light of its own statutory regime and the

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[36] *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paras. 44-64.

[37] *Alberta (Information and Privacy Commissioner) v. Alberta Teachers Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paras. 30-34, 37-49 [*Alberta Teachers*]; see also *Canada (Canadian Human Rights Commission) v. Canada (A.-G.)*, 2011 SCC 53, [2011] 3 S.C.R. 471 at paras. 16, 18, 21-25; *Doré v. Barreau du Québec*, 2012 SCC 12, [2012] 1 S.C.R. 395 at paras. 43-48 and 71 [*Doré*]; and Craig, *ibid.* at p. 166.

change in the equality landscape since the *BCCT* decision. This primary responsibility, and expertise, lies at the foundation of the substantial shift in the courts' approach to judicial review and the Supreme Court's near-uniform deference to administrative tribunals interpreting their home statute.

In *Doré v. Barreau du Québec,*[38] the Supreme Court recently emphasized the need for all administrative decision makers, and particularly the law society at issue in that appeal, to balance *Charter* considerations as part of the exercise of their expertise and discretion.

This change in judicial attitudes not only ensures that the LSUC's decision on this issue will be reviewed on a standard of reasonableness - it obliges the LSUC to undertake its own evaluation of the public interest. The bases articulated in the case law to rebut the presumption of a reasonableness standard would not apply in this case.[39]

8. The LSUC Process

TAS congratulates the LSUC on its open and transparent consultation process in this matter. As we hear so often, it is important not just that justice be done, but that it be seen to be done as well. TAS greatly appreciates the opportunity to provide these submissions and to assist the LSUC in its deliberations.

9. Conclusion

The LSUC, and the Province of Ontario, have a long history of championing equality rights and the other fundamental freedoms found in the *Charter*. The first same-sex adoption case,[40] the first same-sex parenting case,[41] the first gay and lesbian spousal status case,[42] the first equal marriage case,[43] even the first same-sex divorce[44] – all of these firsts were achieved in Ontario courts, in decisions written by Ontario judges, in cases argued by members of the Ontario bar.

These decisions have had significant impact across the country, and indeed around the world. The first equal marriage decision in the United States relied heavily on the Ontario Court of Appeal decision in *Halpern*, citing the case at the remedial stage.[45] *M. v. H., A.A. v. B.B.* and *Halpern* have also had widespread international attention and have been cited

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[38] *Doré*, *ibid*.

[39] *Alberta Teachers*, *supra* note 37 at paras. 30-34.

[40] *Re K.* (1995), 23 O.R. (3d) 679 (Prov. Div.).

[41] *Rutherford v. Ontario* (2006), 81 O.R. (3d) 81 (S.C.J.); *A.A. v. B.B.*, *supra* note 27.

[42] *M. v. H.*, *supra* note 12.

[43] *Halpern*, *supra* note 30.

[44] *M.M. v. J.H.* (2004), 73 O.R. (3d) 337 (S.C.J.).

[45] *Goodridge v. Dept. of Public Health*, 798 N.E.2d 941 (Mass. 2003).

in cases in the U.K., Ireland, Israel, Australia, New Zealand and South Africa.[46] Ontario is not simply a province that recognizes the equality rights of its LGBTQ citizens. Ontario has been an international leader in this area.

The decision before the Law Society does not require it to break new ground. The law in this area is clear and settled. It does, however, require the LSUC to recognize and be consistent with the equality jurisprudence in this province.

The Covenant is a barrier to LGBTQ students seeking to attend TWU and the Covenant creates an environment for students, teachers and staff that is offensive to our fundamental and cherished *Charter* values. For the LSUC to accept and sanction this discriminatory practice would be a significant step backwards that would undermine so many of the finest human rights accomplishments we have witnessed in this province in the last two decades.

Given that graduation from an accredited law school is a prerequisite to entry to the profession, TAS respectfully submits that the LSUC, in determining whether to accredit a law school, must not accredit a law school which discriminates on prohibited grounds. Any law school that effectively bars prospective students from admission on the basis of immutable personal characteristics – whether it be race, gender, or sexual orientation – should not be accredited by the LSUC.

TAS submits that Convocation should reject TWU's application for accreditation of its law school in Ontario.

Yours very truly,

Alan H. Mark
President

CC: Policy Secretariat

[46] See, for example: *Fitzpatrick v. Sterling Housing Association Ltd,* [2001] 1 A.C. 27 (H.L.); *Fourie and Another v. Minister of Home Affairs and Another*, [2005] ZACC 19 (Constitutional Court of South Africa); *In re Marriage Cases*, 43 Cal.4th 757 (2008); *Zappone and Another v. Revenue Commission and Others*, [2006] IEHC 404 (Ireland H.C.); *Ben-Ari v. The Director of the Population Administration in the Ministry of the Interior*, HCJ 3045/05 (21 November 2006) (Israeli Supreme Court). The recent landmark decision of the Supreme Court of the United States in *United States v. Windsor*, 570 U.S. 12 (2013) which will result in equal marriage opening up across the United States concerned a couple who were married in Ontario (Edith Windsor and Thea Spyer).