BRITISH COLUMBIA CIVIL LIBERTIES ASSOCIATION

BY EMAIL to jherman@flsc.ca and dwolfe@flsc.ca
Jonathan Herman, Chief Executive Officer
Deborah Wolfe, Director, Law School Programs
Federation of Law Societies of Canada
World Exchange Plaza
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Ottawa ON K1P 1A4

Dear Mr. Herman and Ms. Wolfe:

Re: Statement by the Canadian Council of Law Deans (the "CCLD") on the Application by Trinity Western University ("TWU") for Accreditation for a Proposed Law School

We read with concern statements reported in the media and attributed to the CCLD, apparently found in a letter dated November 24, 2012 addressed to you concerning the application by TWU for Accreditation for a Proposed Law School. We are concerned as well to have heard that certain law deans have made presentations to other legal professional groups, apparently in a concerted effort to have the TWU application denied without notice to or an invitation to TWU to respond.

Our concerns are fourfold. First, we entirely reject the notion that existing law schools ought to monopolize legal education in Canada so as to exclude religious or conscience-based universities. Second, we reject the premise of the CCLD's submission that persons who adhere to religious principles ought to be excluded from legal education. Third, we reject the suggestion by the CCLD that the Association of University and College Teachers' concerns over academic freedom in religious or conscience-based universities disqualify such universities from providing an accredited legal education. Fourth, we are concerned that the process of evaluation of TWU's application may be tainted were any of the CCLD or their nominees to participate in the process or decision.

The BCCLA is a non-profit society that was formed 50 years ago to educate people about and promote civil liberties, human rights and freedoms. We have long stood for the protection of freedom of expression, freedom of association, and freedom of religion and conscience. We have long stood for the protection of all persons from unlawful discrimination. We are pleased that those protections are enshrined in our Canadian Charter of Rights and Freedoms and human rights legislation.

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Our work has involved us in many court proceedings. Those have included acting as co-plaintiff in Little Sisters Book and Art Emporium v. Canada (Minister of Justice), 2000 SCC 69, to protect the rights of the GLBT community from discrimination by Canada Customs agents who sought to filter what materials could be imported to Canada. We intervened in Chamberlain v. Surrey School District No. 36, 2002 SCC 86, to support the principle of the public school system remaining secular and to ensure that respectful education of students concerning same-sex relationships was achieved. We intervened as well in Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31, where the issue was whether TWU as a private, religious-based university, should be denied accreditation for its educational degree program. In each of these and the many other cases we have been involved with or spoken out about, we have maintained a consistent theme of protecting the rights and freedoms of Canadians and the pluralistic and diverse nature of Canada.

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

The CCLD appear to miss that point. That is surprising given that a decade ago the issue was explicitly and emphatically dealt with by the Supreme Court of Canada in Trinity Western University v. British Columbia College of Teachers, 2001 SCC 31. The court there rejected the attempt to deny accreditation of TWU's educational training program based upon assumptions made about whether religiously-based beliefs that it promoted would result in discrimination if its graduates were hired as teachers in the public school system. The court's majority wrote this:

TWU is not for everybody; it is designed to address the needs of people who share a number of religious convictions. That said, the admissions policy of TWU alone is not in itself sufficient to establish discrimination as it is understood in our s. 15 jurisprudence. It is important to note that this is a private institution that is exempted, in part, from the British Columbia human rights legislation and to which the Charter does not apply. To state that the

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voluntary adoption of a code of conduct based on a person's own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.

The court decided that the BC College of Teachers had inappropriately narrowed its consideration of matters. Instead of considering all rights, it focused just on discrimination. Instead of considering whether there was real evidence of misconduct, it focused on whether it regarded the beliefs of a particular religious group as acceptable. The court found that the BC College of Teachers was improperly forcing TWU to elect to abandon its beliefs in order to obtain accreditation:

There is no denying that the decision of the BCCT places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice. If TWU does not abandon its Community Standards, it renounces certification and full control of a teacher education program permitting access to the public school system. Students are likewise affected because the affirmation of their religious beliefs and attendance at TWU will not lead to certification as public school teachers unless they attend a public university for at least one year. These are important considerations. What the BCCT was required to do was to determine whether the rights were in conflict in reality.

Finally, the court concluded that the BC College of Teachers should have left accreditation of TWU's program in place, and deal with any discriminatory misconduct by a TWU-educated teacher (or any other teacher, for that matter) through its usual disciplinary processes:

Instead, the proper place to draw the line in cases like the one at bar is generally between belief and conduct. The freedom to hold beliefs is broader than the freedom to act on them. Absent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected. The BCCT, rightfully, does not require public universities with teacher education programs to screen out applicants who hold sexist, racist or homophobic beliefs. For better or for worse, tolerance of divergent beliefs is a hallmark of a democratic society.

The CCLD apparently were aware of that court decision, but reject its application here, calling their view a "principled" approach. With respect, their implicit derogation of the Supreme Court's decision as being

unprincipled is inappropriate. CCLD posits that "Discrimination on the basis of sexual orientation is unlawful in Canada and fundamentally at odds with the core values of all Canadian law schools." If the topic were just about public law schools, we would agree. But the topic here is whether private educational institutions formed by religious or conscience-based groups are to have their constitutional rights recognized and protected. Leaving that out of the equation is unprincipled. The CCLD approach is as burdensome to fundamental freedoms and as contrary to the Charter as the BC College of Teachers' approach was.

The second concern noted above was the CCLD's premise that those who are religiously-minded should be excluded from legal education. That would, by extension from their argument, include all professors, students and, eventually, lawyers and judges who held the religious views that the CCLD say are repugnant. Yet the same law schools that the CCLD preside over have admitted TWU undergraduates into their law school programs. There are religious adherents among the student population in existing law schools in Canada. And although no current legal scholar writing from a religious viewpoint readily comes to mind among the academics at existing public law schools, no doubt there are at least some professors who are members of religions.

Also, we note that Law Societies across Canada have not made a question about the religious beliefs of applicants part of their questionnaire for articling student program admissions. In British Columbia, we still have the stain of the Martin v. Law Society of British Columbia, [1950] 3 D.L.R. 173, decision of our Law Society and Court of Appeal on the books. There, the Law Society denied admission to the bar on grounds the applicant was a communist. The court upheld that. Such McCarthy-like tests as a condition of entering a profession are something that we would hope had long since disappeared.

The third concern was over the use by the CCLD of the CAUT criticism of TWU and other religiously-based educational institutions as somehow not being places of academic freedom. Given the absence among publicly-funded universities of encouragement for religiously-based academics to voice their perspective, one could be forgiven for questioning why CAUT would find fault elsewhere when diversity is not uniformly practiced in public universities, at least as CAUT preaches it.

The argument of CAUT adopted by CCLD reduces itself to the absurd. Secular universities preclude teaching from a religious perspective in order to maintain their secular and non-sectarian status; religious institutions require

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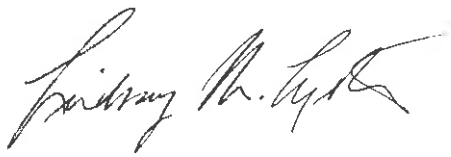
professors to be adherents and provide instruction from the perspective of their group. Positing that academic freedom does not exist in religious educational institutions becomes a front for asserting that the religious perspective simply cannot be taught anywhere. The argument about a lack of freedom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

Fourth, we note that the Federation of Law Societies of Canada delegates functions to deans of law schools in Canada, including seeking their advice on the examination of credentials of foreign-educated students and also, more recently in the case of Thompson River University and Lakehead University, on the ad hoc committee formed to report on whether to approve accreditation of law schools there. The CCLD has, by putting forward a marker on behalf of all deans of existing accredited law schools in Canada, created a reasonable apprehension of bias were any of their number to be included in the process of evaluating and deciding upon the TWU application for accreditation.

The BCCLA encourages the Federation of Law Societies of Canada to give proper consideration to the application of TWU and to reject the anti-freedom-of-religion precepts of the CCLD's letter and public statements.

Sincerely,



Lindsay M. Lyster
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