



Lindsay M. Lyster
President
president@bccla.org

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By email to submissions@lsbc.org

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The Law Society of BC
845 Cambie Street,
Vancouver, BC, V6B 4Z9
Attention: Tim McGee, Executive Director

Dear Mr. McGee:

Re: Trinity Western University School of Law Proposal

I write in my capacity as President of the British Columbia Civil Liberties Association (the “BCCLA”), in response to the January 24, 2014 news posting on the Law Society of British Columbia website inviting submissions to be presented before March 3, 2014 for consideration by the Benchers at their April 2014 meeting in relation to the application of Trinity Western University (“TWU”) for approval as a faculty of law for the purpose of meeting the academic qualification requirement of the Law Society’s admission process.

The BC Civil Liberties Association (“BCCLA”) was established in 1962, and is Canada’s oldest and most active civil liberties organization. Our mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. We are an independent, non-partisan charity.

In making this submission to the Benchers, the BCCLA takes the position that TWU’s status as a private, faith-based institution, and more specifically, the Community Covenant which members of the

TWU community agree to abide by, ought not to stand in the way of TWU's accreditation nor the right of its graduates to become members of the Law Society of BC.

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The Federation of Canadian Law Societies (the "Federation") has already approved TWU's application and the British Columbia Ministry of Advanced Education has granted TWU the right to grant law degrees, and in doing so have approved the academic standards and curriculum of TWU's proposed law school. The only apparent basis upon which the Law Society could now deny TWU accreditation would be that their voluntary adherence to the Community Covenant while attending TWU somehow renders its graduates unfit to practice law. The BCCLA submits that, as a matter of binding legal precedent and fundamental constitutional principle, the Law Society of BC must not adopt any resolution that would deny TWU accreditation and its graduates entry into the profession of law on such a discriminatory basis.

To adopt such a resolution would be to discriminate against TWU, its faculty and students, on the basis of their conscientiously held religious beliefs, and to deny them their freedom to associate, on the terms they choose to associate, in accordance with their freedom of religion.

TWU is a private religious educational institution that has proposed to open a new law school and is seeking formal accreditation from the Law Society. As stated in the Law Society's news release:

In December 2013, the Federation of Law Societies of Canada announced the Canadian Common Law Program Approval Committee had completed its work and decided to grant TWU preliminary approval of its proposed law school program. Shortly thereafter, the BC Ministry of Advanced Education authorized TWU the right to grant law degrees.

The question now is whether the Law Society of BC will exercise its authority under Rule 2-27(4.1) to declare that TWU's faculty of law is not or has ceased to be an approved faculty of law.

The BCCLA wrote to the Federation in January 2013 while it was considering its decision. We made a number of arguments that were directly in response to a submission by the Canadian Council of Law Deans. In sum, we took the position that any decision to grant or deny TWU's bid to have a law school accredited must be considered properly on its merits, and not be rejected on grounds that would violate the freedom of religion and freedom of association of the school's community. A copy of that letter is attached to this submission for your reference.

The BCCLA

At the outset, we wish to provide some background about our Association and the perspective we bring to bear on the issue now before the Benchers.

The BCCLA has long fought against discrimination on the basis of sexual orientation, including in multiple court cases. This includes our acting as co-plaintiffs in *Little Sisters Book and Art Emporium v. Canada* to protect the rights of the LGBT community from discrimination by Canada Customs agents targeting shipments to bookstores catering to the community, and intervening in *Chamberlain v. Surrey School District No. 36* 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. It is the BCCLA's deeply held conviction that queer rights are human rights.

Of course, we intervened as well in *Trinity Western University v. British Columbia College of Teachers* ("Trinity Western University"), where the issue was whether TWU, as a private, religious-based university, should be denied accreditation for its educational degree program. In that case, as now, we took the position that TWU's Community Covenant should not disqualify its professional programs from accreditation nor bar its students from entry into our self-regulated professions.

In each of these and the many other cases we have been involved with, we have sought to maintain a consistent theme of protecting the rights and freedoms of individual Canadians and safeguarding the pluralistic and diverse nature of Canada. We see those rights and freedoms as both grounded in a profound respect for the dignity of the individual and each individual's inviolable right to choose for themselves how to live, subject only to proven harms to others. It is this respect for human dignity and the right of each person to choose for themselves how to live in accordance with their conception of the good life which enables the BCCLA to both advocate for equality rights for GLBTQ people and to defend the equality rights and fundamental freedoms of those who may not share all of our views.

Given the BCCLA's commitment to both equality and civil liberties, we are well-versed in the challenges that may arise when it appears that rights and freedoms collide. We are convinced that one group's right to equality and non-discrimination cannot be bought at the price of intolerance for the fundamental freedoms of others. As Chief Justice Dickson said in *R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295:

A truly free society is one which can accommodate a wide variety of beliefs, diversity of tastes and pursuits, customs and codes of conduct. A free society is one which aims at equality with respect to the enjoyment of fundamental freedoms and I say this without any reliance upon s. 15 of the *Charter*. Freedom must surely be grounded in respect for the inherent dignity and the inviolable rights of the human person. The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that.

Freedom can primarily be characterized by the absence of coercion or constraint. If a person is compelled by the state or

the will of another to a course of action or inaction which he would not otherwise have chosen, he is not acting of his own volition and he cannot be said to be truly free. One of the major purposes of the *Charter* is to protect, within reason, from compulsion or restraint. Coercion includes not only such blatant forms of compulsion as direct commands to act or refrain from acting on pain of sanction, coercion includes indirect forms of control which determine or limit alternative courses of conduct available to others. Freedom in a broad sense embraces both the absence of coercion and constraint, and the right to manifest beliefs and practices. Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.

What may appear good and true to a majoritarian religious group, or to the state acting at their behest, may not, for religious reasons, be imposed upon citizens who take a contrary view. The *Charter* safeguards religious minorities from the threat of "the tyranny of the majority". (paragraphs 94-96)

Those words, written in 1985 in the infancy of our *Charter* jurisprudence, remain true today, and in our respectful submission, must guide the Benchers in their present deliberations.

Discussion

As civil libertarians, we value the fundamental freedoms of people to come together with like-minded persons to express and seek to further their conscientiously held beliefs. That's what s. 2 of the *Canadian Charter of Rights and Freedoms* is all about, protecting our freedoms of association, of assembly, of belief and of expression.

Those freedoms were called "fundamental" by the framers of the *Charter* for a reason – without them, we would have no right to hold or express our conscientiously held beliefs, religious or not, or to join with

others, whether to worship, to educate, to celebrate, to create art, for mutual support, or to work for political, social or economic change. Indeed, the freedom to join together in accordance with our beliefs with those who share our beliefs, on the terms we choose, is vital, not least for equality-seeking groups. That freedom is essential to the ability of the marginalized, the powerless, and the vulnerable to act collectively to challenge unjust laws, practices and institutions.

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The Law Society is mandated by statute to regulate the legal profession of BC in accordance with the public interest. In the exercise of these responsibilities, the Law Society is bound by the *Canadian Charter of Rights and Freedoms*, and it is bound to respect and comply with the freedoms and rights the *Charter* guarantees in the exercise of its regulatory powers. In the application before you, the right to equality, freedom of expression, freedom of association and freedom of religion are all implicated. In our respectful submission, only through adopting the Federation's approval of TWU's proposed law school for accreditation can the fundamental freedoms of the students and faculty of TWU be recognized and respected.

TWU is a private religious university. TWU requires its students, as a condition of enrolment, to sign a Community Covenant under which they agree to "voluntarily abstain" from "sexual intimacy that violates the sacredness of marriage between a man and a woman." While it is the implications that this aspect of the Community Covenant have for LGBTQ students that that have received the most attention in this current controversy, it is worth noting that that is only one part of a comprehensive faith-based code of conduct that members of the TWU community agree to abide by.

Were such conditions imposed on students attending a public faculty of law they would rightly be seen as unlawful discrimination contrary to s. 8 of the *Human Rights Code* of BC, as well a breach of students' rights to equality under s. 15 of the *Charter*. But it is crucial to remember that TWU is not a public university and these conditions are not imposed on TWU students – they are voluntarily accepted by those students who choose to attend TWU. The *Charter* does not apply to TWU as a private

institution, and, as held by the Supreme Court in *Trinity Western University*, s. 41 of the *Code* means that TWU does not contravene the *Code* where it prefers members of its religious constituency (para. 35).

Human rights anti-discrimination laws and *Charter* guarantees of equality are of vital importance to the legal ordering of Canadian society, but they are not the only the legal norms which play a role in defining and safeguarding our social relations and personal rights and freedoms. Our legal norms also create space for private relationships ordered under self-defined terms and conditions, such as those that exist between TWU, its students and faculty.

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The BCCLA believes that any private religious institution must have the right to its conditions for membership in accordance with the religious beliefs held by that membership. Individual members of a religious faith are similarly free to observe or to reject these conditions, and to make decisions about whether they wish to belong to these institutions accordingly. These freedoms are essential to the ability of any religious group to carry on its existence. People who are not members of a particular religion (and even those who are) may not approve of or be comfortable with the beliefs of that faith. However, BCCLA's position – in accordance with the decision of the Supreme Court of Canada in *Trinity Western University* - is that the repugnance of a certain set of beliefs even to a majority of Canadians cannot be the basis to deny a public good, such as entry to a profession, to members of that faith.

In this case, the public good is accreditation for the purpose of admission to the bar by students graduating from TWU's proposed law school. The denial of that public good to graduates of TWU's law school would infringe the freedom of religion, of association and of expression of the members of the TWU community. We are unaware of any sufficient rationale being offered that would justify that infringement. Permitting graduates of TWU to enter the legal profession does not send the message from the state to LGBTQ Canadians that they are less worthy of respect than others nor does it deny them any rights or freedoms to which they would otherwise be

entitled. All it does is respect the freedom of those who wish to govern their own conduct in accordance with the religious tenets encompassed within the Community Covenant.

In the *Trinity Western University* case, the Supreme Court of Canada considered whether TWU should be certified to train teachers. The Supreme Court held that TWU's policies and standards did not constitute discrimination as understood under section 15 of the *Charter*:

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Although the Community Standards are expressed in terms of a code of conduct rather than an article of faith, we conclude that a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost. 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 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. (paragraph 25) (emphasis added)

The Court decided that the BC College of Teachers had inappropriately narrowed its consideration of relevant matters. Instead of considering all rights, it focused just on discrimination to the exclusion of freedom of religion. 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. (paragraphs 32-33)

It is fundamentally wrong to assume that because some law students are prepared to agree to conduct themselves in accordance with the Community Covenant while attending TWU that they will not also conduct themselves in accordance with the legal requirement, found

both in the *Human Rights Code* and the rules that govern the legal profession, that they not discriminate in their practice of law. Again, the decision of the Supreme Court of Canada in *Trinity Western University* is dispositive:

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It cannot be reasonably concluded that private institutions are protected but that their graduates are *de facto* considered unworthy of fully participating in public activities. In *Ontario Human Rights Commission v. Simpsons-Sears Ltd.*, [1985] 2 S.C.R. 536, at p. 554, McIntyre J. observed that a “natural corollary to the recognition of a right must be the social acceptance of a general duty to respect and to act within reason to protect it”. In this particular case, it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985. While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers. In addition, there is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully. Indeed, the evidence to date is that graduates from the joint TWU-SFU teacher education program have become competent public school teachers, and there is no evidence before this Court of discriminatory conduct by any graduate. Although this evidence is not conclusive, given that no students have yet graduated from a teacher education program taught exclusively at TWU, it is instructive. Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system. (paragraph 35) (emphasis added)

The Court also made clear that a fear about future discrimination by TWU graduates was no reason to deny TWU the ability to train teachers, and that such discrimination could be dealt with through its usual disciplinary processes:

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[T]he 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. (paragraph 36) (emphasis added)

The same reasoning applies to the accreditation of TWU's law school and the training of lawyers. To apply section 15 *Charter* in a way that would deny a public good to a group of people who have adopted a code of conduct based on their religious beliefs would deeply undermine the freedom of religion, and the freedom of association, of members of the TWU community.

As for graduates of the TWU faculty of law, they, like all lawyers, ought to be judged on their conduct and not on their beliefs. The fact that a law student has graduated from TWU does not mean that he or she will discriminate against people on the basis of sexual orientation in the future. If a lawyer discriminates in the future legal practice, their conduct can and will be addressed by the Law Society, and the *Human Rights Code*.

Conclusion

We submit that Law Society of BC should, in accordance with the Federation's decision, approve TWU's application for accreditation. The question is not whether the Benchers, individually or as a group, agree with TWU's Community Covenant or would choose to abide by it themselves. The question is whether the acceptance by law students attending TWU of the Community Covenant should bar TWU graduates from joining the ranks of the legal profession in British Columbia. Our commitment to a society in which LGBTQ people are free from unlawful discrimination on the basis of sexual orientation does not give us licence to discriminate against others on the basis of their conscientiously held religious beliefs, not to deny them their fundamental freedoms. There is no basis for believing that accreditation of TWU's law school will lead to unlawful discrimination against LGBTQ people, or would otherwise be contrary to the public interest. To the contrary, for the Law Society to deny TWU's application for accreditation would itself be contrary to law, as established by the Supreme Court of Canada, and would result in unlawful discrimination against and infringement of the fundamental freedoms of those who seek only to be able to study law and be allowed entry to the legal profession without discrimination based on their religious beliefs.

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All of which is respectfully submitted on behalf of the British Columbia Civil Liberties Association.

Yours truly,

Lindsay M. Lyster



President