

# *An Argument Against Accreditation of Trinity Western University's Proposed Law School*

**Dianne Pothier\***

TO: J. René Gallant, President, Nova Scotia Barristers' Society

FROM: Dianne Pothier

RE: Trinity Western University's proposed Law School

DATE: Consolidation of written submissions to the NSBS Executive Committee made January 18, 2014, oral submissions made February 13, 2014, and written submissions made March 5, 2014 in response to TWU President's Kuhn's presentation on March 4, 2014

I am writing in response to your invitation for comment on whether the proposed Law School at Trinity Western University should be recognized as conferring a common law Canadian law degree for the purposes of admission to the Nova Scotia Barristers' Society.

## **TWU's Community Covenant**

Trinity Western University is a private, faith-based university affiliated with the Evangelical Free Church of Canada. Faculty and staff are required to sign an annual faith statement. Faculty, staff and students are required to sign a "Community Covenant" that commits them, *inter alia*, to "treat all persons with respect and dignity" and to abstain from "sexual intimacy

that violates the sacredness of marriage between a man and a woman" (Community Covenant, s 3). Students need not be adherents of the Evangelical Free Church faith, or any other Christian faith, but are nonetheless required to abide by the religiously-based code of conduct. The Community Covenant not only commits signatories in respect of their own personal conduct, but also incorporates accountability for the conduct of others within the TWU community:

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. (Community Covenant, s 5).

Signatories of the Community Covenant further "understand that ... I have also become an ambassador of this community and the ideals it represents" (Community Covenant, penultimate paragraph).

Although analogies between TWU and other faith-based educational institutions in Canada have been drawn, none of those other institutions has or had a Community Covenant like TWU's. It is only the Community Covenant that has given rise to the question of whether a TWU Law School should be accredited. Faith-based institutions as such are not at issue.

Even if done in a way that respects the “sinner,” TWU’s Community Covenant creates an unwelcoming environment for those involved in same-sex intimacy of any kind (whether within or outside marriage) and opposite-sex intimacy outside marriage. This is blatant discrimination on the basis of sexual orientation and marital status. However, most of the criticism directed at TWU, as well as TWU’s response, has been focused on sexual orientation. Why? Although there is some history of discrimination against those in common law heterosexual relationships, it is not nearly as extreme or extensive as the history of discrimination based on sexual orientation. Sexual orientation discrimination at TWU thus hits a very raw nerve. In terms of TWU’s employment and admission policies, however, both marital status discrimination and sexual orientation discrimination are permitted under British Columbia human rights legislation because TWU is exempt as a religiously-based private institution.<sup>1</sup> Nonetheless, the implications of taking a TWU degree into the public realm raise very different questions

In his March 4 main presentation to the NSBS Executive Committee, TWU President Kuhn asserted that nothing in the TWU Community Covenant is offensive. Such a claim is untenable. TWU can argue that, in accordance with their religious beliefs, they are entitled to give offense because sexual intimacy outside marriage between a man and a woman is immoral according to their interpretation of the Bible. But to claim no offense accepts no accountability for the positions they take, and shows a fundamental lack of understanding of equality principles by failing to come even remotely close to appreciating the perspective of those excluded. Furthermore, President Kuhn’s assertion that the only thing offensive in this situation is the criticism directed at TWU demonstrates a misunderstanding of freedom of religion. Freedom of religion gives adherents the freedom to hold and express beliefs, but does not exempt those beliefs from critical assessment.

During questioning from the Executive Committee on March 4, President Kuhn said it would violate TWU’s freedom of religion for an

outside body to dictate what can be in its Community Covenant. I agree with President Kuhn on this point, but it has further implications that President Kuhn did not acknowledge. TWU has the right to determine the content of its Community Covenant, but that means it also has to accept the consequences of its choice. The real question is: what are those consequences? When asked if TWU’s Covenant was discriminatory, President Kuhn at first gave a flat no, but then qualified that answer and eventually acknowledged that it was discriminatory, just lawful discrimination. The premise that, because of a religious exemption, the discrimination is lawful within the private realm of TWU does not mean it has no consequences outside TWU.

The Federation of Law Societies split the assessment of the proposed TWU Law School into two issues: (1) whether the proposed TWU Law School meets the “national requirements” for knowledge and skills requisite for admission to a bar in a Canadian common law jurisdiction – mandate of the Approval Committee; and (2) whether there are other public interest issues that should preclude approval of the TWU Law School as a basis for admission to a bar – mandate of the Special Advisory Committee, and the subject of John B. Laskin’s legal opinion. In my assessment, such a splitting of issues is artificial. In both contexts, the issue is the same. Does the discriminatory context of TWU as a private institution taint reliance on a TWU degree in the public realm?

The TWU Community Covenant is more than a statement of religious beliefs. It is a commitment to enforcing a religiously-based code of conduct, not just in respect of one’s own behaviour, but also in respect of other members of the TWU community, including non-believers (either because they are not adherents of the faith or are general adherents of the faith who do not accept all of the tenets of the faith). The Community Covenant is also a commitment to being an ambassador of TWU’s ideals. The extent to which the TWU Community Covenant is actually enforced is not the point. TWU cannot rely on non-enforcement when the issue is admission to the practice of law where compliance

with legal undertakings is sacrosanct. The TWU Community Covenant incorporates discrimination as a fundamental aspect of the culture of the institution, which pervades much more than course content.

The Federation of Law Society's Approval Committee limited itself to course content of a TWU Law School:

51 Although the course outlines for TWU's proposed Ethics and Professionalism and Constitutional Law courses are consistent with what one would expect for such courses, the members of the Approval Committee see a tension between the proposed teaching of these required competencies and elements of the Community Covenant. In particular, the Approval Committee is concerned that some of the underlying beliefs reflected in the Community Covenant, which members of faculty are required to embrace as a condition of employment, may constrain the appropriate teaching and thus the required understanding of equality rights and the ethical obligation not to discriminate against any person. This tension appears to be reflected in the description of the mandatory Ethics and Professionalism course (LAW 602), which states that the course "challenges students to reconcile their personal and professional beliefs within a framework of service to clients and community while respecting and performing professional obligations and responsibilities".

52 Based on the proposed course outlines and TWU's commitments and undertakings noted above, the Approval Committee concluded that the issue of whether students will acquire the necessary competencies in both Ethics and Professionalism, and Public Law is, at this stage, a concern, rather than a deficiency. (Approval Committee Report)

The Federation's Approval Committee relied on assurances from TWU that it appreciated such tensions, and would reconcile them. But the assurances were simple assertions, without any explanation as to how this would be done. Similarly, when asked about academic freedom, President Kuhn on March 4 gave a very general answer. He did not specifically address the question of how to reconcile the TWU Com-

munity Covenant with Canadian constitutional and statutory principles of equality. He did not explain how it would be possible, consistent with the Community Covenant, to teach Canadian equality law as anything but fundamentally flawed because of its lack of conformity to their interpretation of the Bible. President Kuhn did not explain how, consistent with the Community Covenant, professional ethics could supersede personal beliefs about sexual intimacy outside heterosexual marriage affirmed in the Covenant. In Canada no one is required to believe in same-sex marriage. No one is required to believe in marriage at all. And anyone is free to try to get legal and/or constitutional change respecting marriage or discrimination. But absent such change, they are required to abide by current law.

In its submissions to the Federation of Law Societies, TWU said only that key cases on sexual orientation equality would be taught, and standard texts relied upon. (May 13, 2013 letter from Kevin G. Sawatsky, p. 4, Appendix to Approval Committee Report). That could be done by teaching simply that Canadian equality law is inconsistent with their particular perspective on Christianity. The real question is not what will be taught, but how it will be taught, i.e. will it be taught in a way that accepts that constitutional and legal equality dictates prevail over religious judgment. TWU has not confronted that issue. President Kuhn's presentation to the Executive Committee on March 4 offered no illumination on this point. TWU is presumably not in a position to address that question without yet knowing who will be teaching the courses. In ordinary circumstances, it would not be appropriate for the Federation's Approval Committee or any bar society to probe deeply into the pedagogy of a Law School course. But where there is such a stark tension between an institutional culture of discrimination and legal obligations of equality and non-discrimination, more than a statement of concern is warranted.

Most lawyers probably face some degree of tension between their personal beliefs and the legal order, and must find a way to reconcile them in a way that respects the law. Lawyers may be called upon to advance or defend causes they

do not personally believe in. To do so, lawyers may need to compartmentalize themselves to be able to take professional stances at odds with their personal beliefs. That may not always be easy to do, but it is possible when the lawyer is unconstrained by a community covenant committing the signatory unequivocally to mores about sexual intimacy inconstant with the law. For example, consider this situation revealed by Justice Jim MacPherson, of the Ontario Court of Appeal. Justice MacPherson sat on the panel that decided *Halpern v Canada (Attorney General)*<sup>2</sup> which ruled that s 15 of the *Charter* required same-sex marriage. They also ruled, unlike courts from other provinces, that the declaration of invalidity should not be suspended. That meant marriages pursuant to the ruling could be performed right away. The Court of Appeal judges decided among themselves that they should not do so personally in the immediate aftermath of the decision. That left the first marriage under the ruling to be performed, that day, by a lower court judge. It was done by a judge who personally did not believe in same-sex marriage, but who reacted on the basis that if the Ontario Court of Appeal had ruled that same-sex marriage was mandated by the Constitution, it was his responsibility to perform such marriages. He understood how to live and let live. He was able to separate his personal views from his professional responsibility. How could such compartmentalization be consistent with the TWU Community Covenant? Given the depth of opposition to same-sex sexual intimacy, and opposite-sex sexual intimacy outside marriage, incorporated into the TWU Community Covenant, the challenge to reconcile such deeply felt beliefs, and the commitment to enforcing them with public responsibilities respecting equality is especially acute. That should place a particularly high onus on TWU to explain, which it has not even begun to meet.

## The SCC decision in *BCCT v TWU*

Much of the discussion of TWU's proposed Law School has involved debate over the impact of the Supreme Court of Canada's decision in *British Columbia College of Teachers v Trinity West-*

*ern University*<sup>3</sup> (*BCCT v TWU*). I think a strong argument could be made that this case would be decided differently today by the Supreme Court of Canada. That Court has not been averse to reversing itself, particularly in the area of constitutional and human rights law: e.g. *Health Services and Support – Facilities Subsector Bargaining Association v British Columbia*<sup>4</sup> incorporating a right to collective bargaining within constitutional protection of freedom of association, reversing the 1987 Labour Trilogy; *British Columbia (Public Service Employee Relations Commission) v British Columbia Government and Service Employees' Union*<sup>5</sup>, adopting a unified approach to direct and adverse effects discrimination, reversing the earlier bifurcated approach; *Saskatchewan Human Rights Commission v Whatcott*<sup>6</sup>, modifying in part the definition of hatred in the context of human rights legislation prohibitions of hate speech. However, it is quite speculative to contend that the SCC would be ready to reverse itself in *BCCT v TWU*. I am prepared to proceed on the basis that *BCCT v TWU* remains good and binding law. On that assumption, I respectfully disagree with the view of the Federation's Special Advisory Committee, and the opinion of John Laskin on which it relied, that the *BCCT v TWU* decision is determinative. I disagree with President Kuhn's assumption, expressed in his presentation on March 4, that the *BCCT* decision makes TWU's discrimination unassailable in relation to the use of a TWU degree in any context. In my assessment, the SCC decision in *BCCT* can be distinguished.

*BCCT v TWU* involved an application by TWU for certification of its teacher training program. The BCCT rejected the certification application, a decision that was held invalid by the majority of the Supreme Court of Canada. The SCC recognized that the TWU Community Covenant raised serious concerns, but concluded it was improper to deny certification in the absence of specific evidence that TWU graduates as a group would actually discriminate against students. To avoid a conflict between religious freedom and equality, the majority of the SCC drew a "line ... between belief and conduct"<sup>7</sup> leaving individual discriminatory teacher conduct liable to disciplinary proceedings<sup>8</sup>. It is

important to note the context of TWU's application. The *status quo ante*, which already had certification, was four years of education at TWU followed by a final year at Simon Fraser. TWU's new proposal was to replace the final year at Simon Fraser with one at TWU. The majority of the SCC relied on the nature of that fifth year at Simon Fraser, where "[o]n the evidence, it is clear that the participation of Simon Fraser University never had anything to do with the apprehended intolerance from its inception to the present",<sup>9</sup> questioning: "[a]fter finding that TWU students hold fundamental biases, based on their religious beliefs, how could the BCCT ever have believed that the last year's program being under the aegis of Simon Fraser University would ever correct the situation?"<sup>10</sup> In the *BCCT* context, given the already in place accreditation, an effort was being made to lock the barn door long after the horse had escaped. There is no such issue of prior approval history in relation to accreditation of a TWU Law School that does not yet exist.

The Simon Fraser teacher training curriculum did not have any anti-discrimination component. In contrast, Law Schools are mandated to teach legal principles of equality, in the constitutional and statutory context. Furthermore, while public school teachers carry only the obligation of all members of the populace not to discriminate in the provision of public services, lawyers have an extra level of responsibility. Lawyers are potentially involved in the administration of constitutional and statutory equality and anti-discrimination provisions. The practice of law means being involved in enforcing legally enshrined codes of conduct distinct from any personal code of conduct of the lawyer. That takes the issue beyond personal belief protected by freedom of religion, and involves a responsibility carried by lawyers very different from that of the general populace. Thus there is good reason to impose a higher bar than in *BCCT v TWU*, i.e. good reason for going beyond looking for specific evidence that TWU Law School graduates will, as a group, engage in discriminatory conduct.

The extra step of a year at Simon Fraser was neither designed for, nor effective in, address-

ing the discrimination issues raised by the TWU Community Covenant. In contrast, Law Societies are in a position to address those issues by adding an extra step to the bar admission process. If a law degree from TWU were treated as in a category parallel to those from foreign law schools,<sup>11</sup> the National Committee on Accreditation requirements, or some provincial counterpart, could be used to fill the gap in requirements for admission to a Canadian bar. The gap is rooted not in the personal beliefs of TWU graduates, but in an institutional culture of discrimination that imposes a religiously-based code of conduct on others, and excludes on that basis.

TWU argues that such an extra step would run contrary to the freedom of religion of its graduates. In addressing the justified limits on freedom of religion in order to promote equality, it must be remembered that there is more latitude in limiting freedom of religion outside a penal context, where instead what is involved is access to benefits or privileges: *Alberta v Hutterian Brethren of Wilson County*<sup>12</sup>. Admission to a bar clearly falls into the latter category. The *Hutterite* case recognized inevitable "conflicts with individual beliefs",<sup>13</sup> setting the essence of a *Charter* s 1 inquiry as: "whether the limit leaves the adherent with a meaningful choice to follow his or her religious beliefs and practices"<sup>14</sup>.

A decision by a provincial bar society to deny recognition to a TWU law degree would not preclude anyone from conducting themselves in their own sexual activities in accordance with their religious beliefs. It would ultimately only address the inability to impose, in the public sphere, such a code of conduct on others. It would add an extra step, through the National Committee on Accreditation or a comparable provincial process, but would not preclude admission to the practice of law. Moreover, there is much that can be done with a legal education apart from entering the legal profession. Although Carleton's law program is a world apart from TWU, it is an example of an academic study of law with utility not connected to admission to a bar. The limits on freedom of religion involved in a bar society decision not to recognize a TWU law degree are quite minimal.

## Conclusion

In his presentation to the Executive Committee on March 4, President Kuhn invoked the lengthy history behind the “traditional” definition of marriage as being between a man and a woman. As far back as that history goes, it simultaneously represents a legacy of discrimination on the basis of sexual orientation in relation to marriage and much more. It is only very recently that such discrimination in the public realm has become unlawful, but the tension between dominant norms of opposite-sex intimacy oppressing same-sex intimacy is not remotely novel. Although legal protection against sexual orientation discrimination is relatively recent, it is not much more recent than legal protection against discrimination at all. For most of our history, all discrimination was lawful discrimination. Recall *Christie v York*<sup>15</sup>, when, at the start of the second world war against Nazi Germany, the majority of the Supreme Court of Canada ruled there was no valid legal claim against explicit racial discrimination in refusing to serve a black customer at a bar; freedom of contract was the only operative legal principle then acknowledged. The weight of history is a many-edged sword.

TWU caters primarily to British Columbia residents. Thus there may be very few graduates of a TWU Law School interested in admission to the NSBS. But that does not make the matters of principle any less important. The TWU Community Covenant does not admit of compromise with their interpretation of the Bible. Both in its teaching and in its institutional culture of discrimination represented by the Community Covenant, a TWU Law School cannot be counted on to separate out an individual’s personal code of conduct from the inability to impose a religiously-based code of conduct on others, a separation crucial to the practice of law. TWU graduates do not need to change their personal beliefs to become lawyers. But they need to move beyond the institutional culture of discrimination enshrined in the TWU Community Covenant. That discriminatory culture excludes from the TWU community based on not sharing its values on sexual intimacy, and commits community members not only in their own personal

conduct but also to enforcing the religiously-based code of conduct on others.

Beyond the numbers of how many TWU Law School graduates would seek recognition in Nova Scotia, what matters is the anti-equality message that would be conveyed by a decision by the NSBS to recognize the TWU Law School as qualifying for bar admission. Such a decision would undermine the message conveyed by the annual pride reception held by the NSBS. Such a decision would undermine the message conveyed by the fact that the Society has an Equity Officer. Such a decision would undermine the message conveyed by the *ad hoc* committee, chaired by Emma Halpern as Equity Officer, on Employment Equity in the Legal Profession. I strongly urge the NSBS not to undermine those equality messages. Instead the NSBS should show leadership in denying approval to the proposed TWU Law School.

## Notes

- \* I am writing as a member of the NSBS continuously since 1982 (mostly with non-practicing status) and as a Professor Emeritus of the Schulich School of Law. In most years during my time on the Dalhousie Law Faculty, from 1986-2012, I taught either Public Law (with a focus on human rights law and *Charter* equality) or Constitutional Law or both. I have also published extensively in these areas.
- 1 Given that TWU has existed in some form, with this type of Community Covenant throughout, for more than half a century, I am prepared to assume that, even if British Columbia adopted a more restricted religious exemption in its human rights legislation, TWU would need to be grandfathered as a matter of freedom of religion.
- 2 (2003) 65 OR (2d) 161, [2003] OJ No 2268 (Ont CA).
- 3 2001 SCC 31, [2001] 1 SCR 772.
- 4 2007 SCC 27, [2007] 2 SCR 391.
- 5 [1999] 3 SCR 3, [1999] SCJ No 46 (*sub nom Re Meiorin*).
- 6 2013 SCC 11, [2013] 1 SCR 467.
- 7 *Supra* note 3 at para 36.
- 8 *Ibid* at para 37.
- 9 *Ibid* at para 38.

- 10 *Ibid.*
- 11 A student with a degree from a TWU Law School cannot be in a worse position than someone with a degree from a law school outside Canada. There are undoubtedly foreign law schools with a worse record than TWU on discrimination.
- 12 2009 SCC 37 at paras 37, 95, [2009] 2 SCR 567.
- 13 *Ibid* at para 90.
- 14 *Ibid* at para 88.
- 15 [1940] SCR 139 (available on CanLII).

