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AN EQUALITY PERSPECTIVE ON THE ACCREDITATION OF TWU'S PROPOSED LAW FACULTY

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In considering whether to approve the proposed law faculty at Trinity Western University (TWU), members of the Law Society of British Columbia (LSBC) have the benefit of several legal opinions, many submissions received by the Benchers, the webcast and transcript of the Benchers' consideration of this matter on April 11, 2014, as well as documents generated by the consideration of this matter by the Federation of Law Society and several other law societies.

This perspective is not designed to summarize, synthesize, or weigh all of this material. Its purpose is to provide an equality-based analysis focused on the issues central to this decision:

(1) Is the TWU Covenant Discriminatory?
(2) What is the role of LSBC in this matter?
(3) Does the Supreme Court of Canada's decision in *TWU v. College of Teachers* [2001] 1 SCR 772 ("*BCCT*") determine the outcome of the LSBC's decision?

We conclude that the TWU Covenant is discriminatory and that LSBC has an overriding duty to promote equality in the legal profession rendering unreasonable the approval of TWU's proposed faculty of law. LSBC is not bound by *BCCT*. The LSBC's approval decision is distinguishable from the facts in *BCCT* and there have been significant changes in law since 2001 providing a foundation for a reconsideration of the outcome in that case.

The Community Covenant is a Discriminatory Practice

This issue centers on the impact of TWU's Covenant requiring students and faculty to agree that they will refrain from "sexual intimacy that violates the sacredness of marriage between a man and a woman". Violation of the Covenant can lead to discipline or expulsion from the university and faculty and students are required to take steps to uphold and "hold each other accountable" to the Covenant. 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. On its face, the TWU Covenant is discriminatory. It transgresses from discriminatory

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beliefs to discriminatory practice because it requires students and faculty members to be complicit in acts of discrimination. The Covenant constitutes discriminatory conduct in two distinct but related ways: by restricting admission to heterosexual applicants; and by policing and controlling intimate behaviour of those who are admitted. The message that this sends in and of itself is contrary to the public interest.

In *BCCT*, the Supreme Court of Canada found that an earlier version of the TWU Covenant raised equality concerns and would deter gays and lesbians from applying to and attending TWU.[2]

The admission policy, which includes a requirement of signing and abiding by the Covenant, is a discriminatory practice. It effectively excludes gays and lesbians. No further evidence of potential discriminatory effects is required. The concern is not that there is a perception or a risk at a future date, i.e. that a graduate of such a law school would act in a discriminatory manner. The effects of the policy are extant today. The violation to human dignity and the damage caused by pressure to change or deny sexual identity and of the failure to recognize same sex relationships as legitimate are well established in Canadian law.[3]

TWU argues that it is shielded from a finding of discrimination by s. 41 of the *Human Rights Code*,[4] in recognition of its status as a private faith-based institution. That issue need not be decided by the LSBC because the LSBC's role is not to make a legal finding of discrimination. LSBC's responsibility is to consider whether TWU's discriminatory practices and policies are contrary to the public interest pursuant to its statute.

LSBC Has a Responsibility to Promote Equality in the Legal Profession and the Justice System

As the self-regulatory body of the profession acting in the public interest, the LSBC fulfills the role of gatekeeper to the legal profession and is responsible for ensuring that its members meet the requisites for the practice of law in the province. Section 3 of the *Legal Profession Act*[5] requires LSBC "to uphold and protect the public interest in the administration of justice by inter alia "preserving and protecting the rights and freedoms of all persons". This is the statutory object and duty of the LSBC and must inform all LSBC actions including a decision under the rules made pursuant to the *Legal Profession* Act such as Rule 2-27(4.1) of the Law Society Rules to approve a faculty of law.

Equality is a shared value that is protected under our Constitution, human rights legislation and international treaties and covenants and equality-promotion

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[2] *TWU v. College of Teachers* [2001] 1 SCR 772, at para 25, 34. ("*BCCT*")
[3] See for example: *BCCT* at para. 96 (per L'Heureux-Dubé J., dissenting), *Halpern v. Canada (Attorney General)*, (2003) 65 O.R. (3d) 161 (C.A.) at para. 207; *Barbeau v. Canada (Attorney General)*, 2003 BCCA 251 at paras. 90-91.
[4] RSBC 1996, c.10
[5] SBC 1998, c.9

measures area a central component of the public interest. LSBC has an important policy making role vis-à-vis the legal profession and, in particular, has a positive duty to promote equality and work toward nondiscrimination in all aspects of the practice of law, including law schools. Lawyers are governed by the *Human Rights* Code and are expressly prohibited from discriminating.[6] The heightened duty to promote equality is recognized in LSBC policies and practices, including, for example, the Code of Professional Conduct for British Columbia, the Justicia Project, the establishment of an office of the Harassment and Equity Ombudsperson, the maternity leave benefit loan program, and model policies for workplace accommodation, workplace equality, workplace harassment, flexible work arrangements and maternity and parental leave.

The LSBC, as a regulator, is engaged in educating about, preventing and disciplining discriminatory conduct. As a regulator, the LSBC will be more effective if it prevents discrimination rather than disciplining it after it occurs. Among other reasons, discipline cannot cure the harm that occurs through discriminatory conduct. In addition, the very nature of discrimination is that it is often subtle and insidious, which it makes it difficult to discipline. Because of the humiliation, degradation and social and professional consequences of discrimination, complaints are rare. Investigations and discipline measures are complex, protracted and rarely effective.

The LSBC is required to consider and apply the Charter value of equality in its assessment of the effects of TWU's proposed law school on the legal profession and the justice system.[7] Institutions with discriminatory policies that are antithetical to fundamental legal values are not competent providers of legal education for the purpose of graduating law students who are accredited candidates ready for entry into the profession (as distinguished from the study of law more broadly).

Indeed, LSBC runs the risk of itself violating s.15 of the Charter by approving a faculty of law that has in place a discriminatory admissions policy. To do so would be to doing indirectly what it could not do directly: adopt criteria for admission to the bar that precluded eligibility for gays and lesbians. As Professor Elaine Craig states:

> When a law society approves a law degree program from an institution, it uses the admissions process of that institution to serve as a preliminary gatekeeper to the practice of law. It has in essence adopted the institution's admissions process. A law society that approves a law degree program from an institution that discriminates on the basis of sexual orientation in its admissions policies has adopted for itself a criteria for eligibility that violates section 15 of the Charter.[8]

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[6] Code of Professional Conduct for British Columbia, sections 6.3-1 and 6.3-5.

[7] *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817.

[8] 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.

It is no answer to say that gay and lesbian law students can go to a different, non-discriminatory, law school. The suggestion is obviously offensive to equality principles on its face.

While the TWU's is a private institution, LSBC is governed by the Charter and human rights legislation in undertaking its statutory decision-making power. Accreditation of law schools is a central aspect of the process leading to the licensing of lawyers, and LSBC has a responsibility to ensure that law schools admit student on a non-discriminatory basis. Pursuant to s.3, of the *Legal Profession Act* LSBC has a duty to require that the admission of students to accredited law schools be decided on a non-discriminatory basis. The Benchers cannot interpret rules, such as Rule 2-27(4.1), as sidestepping the overarching duty prescribed in the *Legal Profession* Act. Any law school that effectively bars prospective students from admission on the basis of immutable personal characteristics such as race, gender or sexual orientation, should not be approved by LSBC. TWU's proposed faculty of law cannot be approved while the Covenant is in place.

The SCC's 2001 TWU Decision Is Not Determinative

The LSBC has a responsibility to undertake its own consideration of the public interest. It is not a lower court bound by *stare decisis* to follow *BCCT*. LSBC must act reasonably and consistently with the rule of law, but this is quite different than slavishly following precedent. *BCCT* is not determinative because it was written at a different time and based on different facts. Both societal values and Charter jurisprudence have changed in significant ways in the intervening thirteen years.

The history of recognition, promotion and implementation of human rights is best described as a progressive realization. Today, it appears obvious that slavery is illegal and a profound violation of rights but this was not always the case. Women were not recognized as "persons" for the purposes of appointment to the Senate until 1929.[9] Adverse differentiation on the basis of pregnancy was deemed not to be discrimination in 1979 [10] but by 1989, the connection was recognized as "bespeaking the obvious".[11] Similarly, the enumerated grounds in s. 15 of the Charter did not include sexual orientation yet s. 15 and human rights protections have gradually been used to eradicate many of the barriers to equality faced by gays and lesbians.[12] Much progress has been made since 2001, notably the legal recognition of same sex marriage.[13]

In *BCCT*, TWU had had a teaching program for numerous years and graduating students were required to take additional training at a public university. Here, TWU is seeking to initiate a new program at a time when law is clear that same-sex couples have the same right to marry as do heterosexual couples.

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[9] *Edwards v. Canada (Attorney General)*, [1930] A.C. 124, 1929 UKPC 86 (J.C.P.C.)
[10] *Bliss v. Attorney General of Canada*, [1979] 1 S.C.R. 183.
[11] *Brooks v. Canada Safeway Ltd.*, [1989] 1 S.C.R. 1219.
[12] See for example: *Egan v Canada*, [1995] 2 S.C.R. 513; *Vriend v. Alberta*, [1998] 1 S.C.R. 493; *M. v. H.*, [1999] 2 S.C.R. 3; *Canada (Attorney General) v. Hislop*, [2007] 1 SCR 429; *R. v. Tran*, [2010] 3 SCR 350. 91.
[13] *Reference Re Same Sex Marriage* 2004 SCC 79; *Civil Marriage Act*, SC 2005. c.33

This latter development is central to this case. The TWU Covenant creates discriminatory practices in relation to lawfully married gay and lesbian couples. Although the *Civil Marriage Act* protects freedom of religion by permitting holding of religious beliefs that do not accord with same sex marriage and excusing marriage officials for refusing to perform marriage rituals based on religious beliefs, it does not permit the refusal to recognize such marriages. The Covenant, by prohibiting sexual intimacy between all non-married persons and by married persons who are not of the opposite sex, negates the lawful marriages of same sex couples.

The *BCCT* requirement to balance equality rights of lesbian and gay law students against freedom of religion must be undertaken given the current day societal norms and laws. Our view is that the progressive realization of the rights of gay and lesbian members of society is much more robust and than it was in 2001 and this difference is most profoundly demonstrated by the recognition of same sex marriages.

The balancing exercise requires full recognition and consideration of the religious freedoms at stake. Freedom of religion is infringed when a person's ability to act in accordance with his or her religious beliefs has been interfered with. The interference must be more than trivial or insubstantial, so that it threatens actual religious beliefs or conduct.[14] The question is whether the religious freedom of evangelical Christians who attend TWU depends on the Covenant's provisions precluding gay and lesbian students and faculty, including those who are married, from engaging in intimate relations.

If LSBC were to refuse to accredit TWU because of the Covenant, the first question would be whether this violates the freedom of religion of TWU students and faculty. If so, that rights violation must be balanced against the equality rights of gay and lesbian persons. The most recent Supreme Court of Canada jurisprudence confirms that the balancing must be done under s.1 of the Charter.[15]

BCCT does not directly answer the question of whether it is necessary for any TWU student or faculty to control the sexual relations of other students or faculty in order to fully realize their own religious beliefs on sexual relations. It is logically difficult to answer that question affirmatively. However, if we take *BCCT* as impliedly saying that freedom of religion depends on the ability to control the behavior of others in an educational religious community, the question becomes the balancing under s.1. *BCCT* does not provide any guidance on that because that analysis was not done by the majority.

In undertaking this balancing between religious freedom and equality rights, the LSBC must consider the public interest. It is not in the public interest to train lawyers in an institution with policies that are inconsistent with core professional

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[14] *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 11 at para. 154-155
[15] *Whatcott* at para. 154

values and fundamental legal principles. The limited intrusion on freedom of religion imposed by a decision not to approve TWU's application is necessary. LSBC is not "putting a religion on trial nor its exercise by individuals for themselves" rather it is examining the way a specific religious belief conflicts with the protection of equality.[16] As Professor Bruce MacDougall points out, it is possible and necessary "to separate the religious characterization from the issue of discrimination on the basis of sexual identity" making the issue much more straightforward.[17] In the factual context of law society's role and jurisprudential advances, the balance has shifted toward greater protection of gays and lesbians.

Given the evolution in equality rights jurisprudence, it is impossible to predict how a reviewing court would decide *BCCT* today. It is reasonable to conclude that a reviewing court would reach a substantially different conclusion in reviewing a decision by the LSBC to disapprove TWU's proposed faculty of law. *BCCT* does not determine the outcome of LSBC's consideration of this issue. LSBC must undertake its consideration in a manner which is faithful to its legislated mandate to uphold and protect the public interest in the administration of justice by preserving and protecting the rights and freedoms of all persons.

Conclusion

The TWU Covenant is discriminatory on its face. The LSBC has an overriding duty to promote equality in the legal profession pursuant to s. 3 of the *Legal Profession Act* and its own policies. LSBC is not bound by *BCCT*. The LSBC's approval decision is distinguishable from the facts in *BCCT* and there have been significant changes in law since 2001. These differences fully support a different outcome to the balancing of the rights of equality and freedom of religion at issue here. In light of all these factors, a decision to disapprove of the proposed law faculty is a reasonable one.

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[16] Here we are paraphrasing the Justice L'Heureux-Dubé's comments in *P. (D.) v. S. (C.)*, [1993] 4 S.C.R. 141 which involved the balancing of the best interests of the child with freedom of religion.

[17] B. MacDougall, "Silence in the Classroom: Limits on Homosexual Expression and Visibility in Education and the Privileging of Homophobic Religious Ideology" (1998), 61 Sask. L. Rev. 41, at p. 78.