Lawyers' Rights Watch Canada

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Promoting human rights by protecting those who defend them

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BY EMAIL(submission@lsbc.org; tmcgee@lsbc.org)

The Law Society of British Columbia
845 Cambie Street
Vancouver, BC V6B 4Z9

Attention: Timothy E. McGee, CEO and Executive Director

Dear Sirs/Mesdames:

Re: Trinity Western University – Covenant and a Law School

We write pursuant to the invitation of the Law Society of British Columbia (Law Society) posted January 24, 2014 inviting submissions to assist Benchers as they consider a proposal for a new law school at Trinity Western University (TWU).

It is commendable that the Law Society has invited submissions "in the interests of transparency and openness" with a view to "procedural fairness" and a "thorough, thoughtful, and fair process" notwithstanding the prior Final Report of the Special Advisory Committee to the Federation of Law Societies and the prior decision on accreditation by the BC Government shortly thereafter.

Lawyers' Rights Watch Canada

LRWC is a committee of lawyers and students who promote human rights and the rule of law internationally through education, legal research and advocacy for lawyers and other human rights defenders in danger because of their advocacy. LRWC has special consultative status with the Economic and Social Council of the United Nations. . More information about the work of LRWC is available at http://www.lrwc.org.

LRWC hopes these submissions assist the Benchers in their consideration of the complex and difficult issues posed by the TWU proposal.

Facts

LRWC assumes the reader will have had the benefit of numerous other summaries of the facts set out in earlier submissions and publications such as:

a) The submissions of the office of the President of the Canadian Bar Association covering the submissions of the Sexual Orientation and Gender Identity Conference and Equality Committee of the CBA, both dated March 18, 2013.

b) The memorandum of law by John B. Laskin of Torys LLP directed to the Federation of Law Societies of Canada dated March 21, 2013.

c) The submission of Kevin G. Sawatsky, Vice-Provost and University Legal Counsel for Trinity Western University dated April 24, 2013 and submitted to the Federation of Law Societies.

d) The published paper, *The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program,* by Elaine Craig, and published by the Canadian Journal of Women in the Law, Volume 25, No. 1 (2013) pp.148-170

e) The *Final Report of the Federation of Law Societies' Special Advisory Committee on Trinity Western's Proposed School of Law,* dated December 2013 (but published on December 16, 2013).

f) Various submissions of the British Columbia Civil Liberties Association.

g) Submissions of the Deans of Law dated November 20, 2012, and

h) Numerous other submissions and reports.

We are not aware of any significant disagreement in respect of any significant fact.

The Benchers will be aware that, as a condition of employment with the University or admission into one of its programs, TWU requires students, faculty and staff to sign its Community Covenant Agreement. The Covenant requires those who sign to limit "sexual intimacy" to the context of marriage between opposite genders. The Covenant applies both on and off campus and violations may lead to disciplinary sanctions including dismissal in the case of faculty and staff and removal in the case of students. The precise wording is "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 the students' readmission to the University" (at page 23). The Community Covenant Agreement is available online at http://twu.ca/studenthandbook/student-handbook-2012-2013.pdf.

Result Being Sought by LRWC

LRWC takes no position in respect of TWU's proposal for a new law school other than in respect of the Covenant. As a result of TWU's ambition to impose the Covenant, LRWC urges that the Law Society deny TWU support and that the Law Society actively pursue reversal of the

accreditation granted allowing TWU to issue Juris Doctorate (JD) degrees. For clarity, if TWU were to withdraw its requirement that faculty, staff and students sign the Community Covenant Agreement, then LRWC would take no position in respect of TWU's proposed law school.

The fact that the Federation of Law Societies has issued a Final Report, and the fact that it was rapidly followed by a decision of the BC Provincial Government poses special challenges for the Law Society.

In the event that TWU does not withdraw its requirements in respect of the Covenant, it is submitted that it is appropriate for the Law Society to invite the British Columbia Government to rescind its accreditation in order to allow for appropriate consultation with, among others, the Law Society, the body responsible for the qualifications of lawyers. Rescinding the BC Government's grant of accreditation will avoid the circumstance that now prevails, that students might and probably will enroll in the law school for the purpose of being called to the Bar but find themselves in limbo if the Law Society should decide, as it is invited to do, that TWU's discriminatory intentions and practices are inconsistent with accreditation. Given that the process leading to the Final Report of the Special Advisory Committee of the Federation of Law Societies was both secretive and otherwise flawed, it is submitted the Law Society should, in the first instance, make its own decision without taking the Final Report into account. Then, if the Law Society denies TWU's application, it is submitted the Law Society should seek withdrawal of the requirements respecting the Covenant from TWU. If that is not forthcoming, the Law Society should invite the British Columbia Government to rescind its accreditation of TWU's program. If that is not forthcoming, the Law Society, likely in concert with others, should seek judicial review of the decision by the BC Government to grant TWU the authority to issue JDs.

Argument

Application of the Charter

The difficulty with this case stems primarily from the fact that an earlier decision failed, as have advocates and decision-makers, for various reasons, to apply the *Canadian Charter of Rights and Freedoms* (Charter) to the question of suitable criteria for admission to law school in all of the circumstances. Strangely, neither advocates nor decision-makers appear to have recognized that the Charter must apply. For example, page 3 of the submission to the Federation of Law Societies of Canada by the Sexual Orientation and Gender Identity Community (SOGIC) states:

> "As a private institution, Trinity Western is not subject to the *Charter*."

It is absolutely correct to state that TWU is a private institution. However, that is not the end of the matter. There is a line of Supreme Court of Canada decision in respect of matters to which the Charter applies, interpreting Section 32 of the Charter*:* starting with the decision in *R.W.D.S.U. v. Dolphin Delivery Ltd.*, [1986] 2 SCR 573 (Dolphin Delivery) and including the decision in *McKinney v. University of Guelph* [1990] 3 SCR 229 (McKinney) and the decision in *Douglas/Kwantlen Faculty Association v. Douglas College* [1990] 3 SCR 570 (Douglas College). Those three decisions, which are all good law, serve to support the appropriate analysis. The Supreme Court of Canada in Douglas College decided, after reviewing the

governance of Douglas College in detail, that Douglas College was an arm of Government such that Douglas College was subject to the Charter in all it does. Effectively, Douglas College was found to be part of the fabric of Government and the Charter was held to apply to it. In contrast, on the same day, McKinney decided that the University of Guelph, was not sufficiently governmental to warrant application of the Charter to all the activities of the University. However, that said, the University of Guelph was still subject to the Charter in respect of its governmental functions. Similar issues have arisen with hospitals and transit authorities. The Supreme Court of Canada decided that the Charter applies to a Law Society in *Black v. Law Society of Alberta* [1989] 1 SCR 591. In that case, mobility rights were at issue and the constitutional questions were whether rules limiting partnerships serving to restrict national firms infringed mobility rights guaranteed under Section 6(2)(b) of the Charter and secondly, whether those rules could be justified under Section 1 of the Charter. The Law Society's decisions respecting who could or should be a member of the Law Society of Alberta (whether they were disqualified if they formed partnerships with Toronto law firms) was an issue that was subject to the Charter and the Court applied the Charter to the Law Society's decision.

Here, the Law Society has, as an integral part of its duty to protect the public interest, the authority and duty to determine who is qualified to practice law and who is not, as set out in Part 2 of the *Legal Professions Act* R.S.B.C. 1998, c. 9. Clearly, in exercising that jurisdiction, the Law Society must consider and apply the *Charter*.

For practical purposes, the question of who will be admitted to the practice of law depends on who graduates from an accredited law school. For practical purposes, "the gate" to becoming a member of the bar in BC is admission to law school. As a practical matter, very few students admitted to law school fail to graduate and very few graduates from BC law schools who seek admission to the Bar in BC are ultimately denied admission. The small percentage of students who fail the Professional Legal Training Course (PLTC) are permitted to reapply. For practical purposes, the Law Society has delegated its jurisdiction in respect of the suitability of candidates for admission to the Bar, and has entirely delegated it to the law schools almost as much as the Courts have delegated their gate-keeping role which is now vestigial. To our knowledge, no judge presiding over a "Call to the Bar" ceremony in British Columbia has actually exercised any criterion or discretion whatsoever for many many decades. The question of qualifications to practice law, as a matter of statutory authority resides with the Law Society, but, as a matter of practical convenience resides with the law schools on any functional analysis. As a result of the foregoing, when exercising the delegated statutory power of decision that is a practical matter, resides with law schools, the question arises whether the law schools are subject to the Charter. It is not an answer to say the party to whom the statutory power of decision has been delegated, the law school, is a private entity. Neither Government nor the Law Society can escape Charter scrutiny by the simple expedient of delegating its authority to a private entity. That entity to which the statutory duty is delegated remains subject to the Charter, whether or not it is private, if that entity is performing a governmental function.

As a result of the foregoing, the Benchers must consider whether the decision to admit some candidates to law school and deny others admission is a sufficiently governmental function to attract Charter scrutiny. If the answer is yes then the question becomes whether requiring compliance with the Community Covenant is a breach of the Charter and it plainly is a breach of

Section 15 and others. The question is then whether the breach is a “limit prescribed by law that is demonstrably justified in a free and democratic society” so as to be "saved" i.e., qualify as an exception under Section 1 of the Charter.

The Benchers are aware of the vital importance of adequately qualified lawyers in the operation of a legal system. Equally, the Benchers are aware of the crucial importance of suitably qualified lawyers to the existence and operation of the Rule of Law. It is submitted that a suitably qualified independent Bar is absolutely necessary to the Rule of Law. Such a Bar is as important, it is submitted, as suitable qualified independent judiciary, not least because the judiciary is made up of candidates selected from the Bar. The importance of a suitable and independent Bar cannot be overemphasized. The question of suitability is a matter entirely delegated (because of the necessity of independence) by the government to the Law Society. The Law Society cannot, by further delegating that responsibility, shirk or avoid Charter scrutiny. It is hard to imagine a more quintessentially “governmental” function than "quality control" respecting the necessary elements to the Rule of Law to which our profession is and must be entirely dedicated.

Breach of the Charter

Once it is established that the Charter applies to the gatekeeper function proposed to be shouldered by TWU, and assuming TWU persists in requiring adherence to the Covenant, the question arises whether the TWU bar preventing admission or graduation of applicants unable to adhere to the Covenant constitutes a breach of the Charter, in particular Section 15. In *Law v. Canada (Ministry of employment and Immigration)* [1999] 1 SCR 497, Iacobucci J. speaking for the Court held that determination of discrimination under Sub-Section 15(1) should involve the following three broad inquiries:

1) Does the impugned law draw distinction between the claimant and others on the basis of one or more personal characteristics or fail to take into account the claimant’s already disadvantaged position resulting in substantively differential treatment on the basis of one or more personal characteristics?

2) Is the claimant subject to differential treatment based on one or more enumerated and analogous grounds?

3) Does the differential treatment discriminate by imposing a burden upon or withholding a benefit from the claimant in a manner that reflects the stereotypical application of presumed group or personal characteristic or that otherwise has the effect of perpetuating or promoting the view that the individual is less capable or worthy of recognition or value as a human being or as a member of Canadian society, equally deserving of concern, respect, and consideration?

Sexual orientation is such a characteristic and that the effect, if not the purpose, of the Covenant is the very sort of discrimination identified by Mr. Justice Iacobucci’s three inquiries.

LRWC adopts the SOGIC submission of March 18, 2013 in the following terms:

> The fact that no student may ever be expelled for breaching the Covenant's sexual intimacy rules is not determinative. As acknowledged by the Supreme Court of Court in *Vriend v. Alberta* [1998] 1 SCR 493 ("Vriend"), the mere fear of discrimination may in and of itself cause serious psychological harm: "Fear of discrimination will logically lead to concealment of true identity and this must be harmful to personal confidence and self-esteem [...] The potential harm to the dignity and the perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination" [*Vriend* paragraph 102 emphasis added by SOGIC]
>
> The same may be said of the fact that the Covenant reportedly targets sexual behaviour as opposed to sexual orientation as Justice L'Heureux-Dubé wrote in her dissenting opinions in *TWU* which was just endorsed by the unanimous court in the *Saskatchewan (Human Rights Commission) v. Whatcott* 2013 SCC 31 ("*Whatcott*").
>
> > '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 [...] The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected' [...] [emphasis added] [*Whatcott* paragraph 123]"

To bar entry to, or graduation from, law school on the basis of sexual orientation is a breach of Section 15 of the Charter as that section has been interpreted by the Supreme Court of Canada.

Are the Breaches Saved Under Section 1?

Section 1 of the Charter provides:

> The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.

The first requirement that comes to be considered is whether the imposition of the Covenant can be seen to be a "limit prescribed by law." Here there would be a host of serious problems for TWU seeking to save their Covenant from the consequences of a Charter breach by invoking Section 1. A "limit prescribed by law" must be a definite and defined pre-existing "law". Imposition of the Covenant would be vulnerable to the argument that it is not a "law" but rather a contract, at best, hopelessly vague. Further, the proponent of such a "limit" would have to be a great deal more specific about what is meant by "sexual intimacy" to have the restriction qualify as a written "limit prescribed by law". It is not clear exactly what is meant. Sexual intimacy takes many forms. The appropriate scrutiny will not allow vagueness or generalizations, out of shyness or some perverse decency. What exactly is prohibited? The proponent can't raise the subject and then fail to be clear, as has been required by the Courts in their construction of the term "limit."

Even if the Benchers were to give the stipulation the benefit of the doubt in respect of being a "limit prescribed by law", the limit must also meet the criteria of being "demonstrably justified in a free and democratic society," established by the Supreme Court of Canada in *R. V. Oakes*, [1986] 1 S.C.R. 103 (the Oakes test).

The *Oakes* test has four branches and it is submitted that, to the extent we can determine, they are not met. The first branch is the requirement that the limit on the Charter right serve a "real and substantial need". Law schools admit homosexuals, lesbians, bisexuals and transgendered individuals and accept such persons as staff and teachers without any difficulty whatsoever. The Covenant clearly cannot be said to fill a real and substantial need or a public interest in limiting such people from graduation and practice.

It does not seem that the "need" arises from the operation of a law school. If the "need" were argued to arise from the desire of persons adhering to Evangelical Christian doctrine to associate only with adherents to their religion, why would the law school welcome Hindus and Buddhists and even Christians and Jews who do not share TWU's interpretation of religious beliefs? It is submitted that there is no "real and substantial need."

The second branch is that there be a rational connection between the limit and the objective, i.e., the real and substantial need. It is difficult to imagine how a rational connection could be argued but it will depend on the "real and substantial need" identified as the objective by the proponent of the Covenant. Under the third branch, the "law" must impair the Charter freedoms to the minimum extent consistent with pursuit of the real and substantial objective. This branch fails for lack of such an objective. The final branch is the proportionality branch whereby the benefits of the limit are weighed against the deleterious effects of abridgement of the fundamental freedom. It is submitted that the imposition of the Covenant does not pass the Oakes test.

Failure to Apply the Charter

Since this argument departs from other advocacy by relying directly on the Charter, we pause in our argument to explain why other advocates' arguments have not relied on the Charter breaches. Much of the discussion leading to the "Final Report" of the Special Advisory Committee of the Federation of Law Society has focused on the decision in *TWU v. B.C. College of Teachers* [2001] 1 SCR 772 (Teachers'). While the Supreme Court of Canada considered Charter values in that case, the case was not directly a Charter case. This is apparent from paragraphs 26 to 27 of the Reasons. There, Charter values came into play but it is noted that the B.C. College of Teachers "...was not directly applying either the *Charter* or the province's Human Rights legislation when making its decision,..." [paragraph 27, page 808]

As a result, there was no Constitutional Question defined by the Supreme Court of Canada, in accordance with its practice in Charter cases. Presumably, notice to Attorneys General under the *Constitutional Questions Act* was not provided. Here, we apply for an order, by the Law Society, foreshortening to non-existence the notice requirements under the *Constitutional Questions Act* and ruling this submission constitutes the required notice to the Attorney's General/Minister of Justice of Canada and B.C. as required under the *Constitutional Questions Act.* Copies of this submission are being forwarded to both Attorneys General. It is submitted that it is appropriate to

treat this present submission as appropriate notice under the *Constitutional Questions Act* and we invite Benchers to entertain any input from Federal or Provincial Attorneys General that may be forthcoming.

It is submitted it is precisely because the matter was not considered as a Charter case by the Supreme Court of Canada that an appropriate Charter analysis was not conducted in the Teachers' case. Further, it is submitted the opinion prepared for the Federation of Law Societies by John Laskin of Torys LLP in the form of a memorandum was explicitly only addressing the application of the Teachers' decision to TWU's application for the Federations' "blessing".. The opening words of his memorandum make it clear he is limited by his instruction to an assessment of the effect of the Teachers' decision. His opening paragraph reads as follows:

> You have asked for my advice on the extent to which the decision of the Supreme Court of Canada in Trinity Western University v. British Columbia College of Teachers, rendered in 2001, applies to consideration of the Trinity Western University School of Law proposal, which TWU has submitted to the Canadian Common Law Approval Committee.

And this limitation carries through to the Final Report of the Special Advisory Committee of the Federation of Law Societies, perhaps based upon the Laskin Memorandum.

Balancing Charter Rights and Freedoms

The finding that TWU's Covenant creates a discriminatory bar to one route through the "gate" to become a member of the Bar is a breach of Section 15 equality rights that is not saved by Section 1 of the *Charter*, is not the end of the matter. TWU claims that disallowing the Covenant as a prerequisite would also be a "governmental action" attracting Charter scrutiny under Section 2(a) of the Charter, "freedom of conscience and religion".

The nature of the Charter right and freedom under Section 2(a) of the Charter will be discussed in the next section. For present purposes, LRWC acknowledges that TWU raises a separate Charter section and that, if more than one Charter section applies and might superficially be seen to mandate or direct different or opposite outcomes, then the Charter rights must be balanced and reconciled.

Various commentaries have pointed out that the leading Supreme Court of Canada case on reconciling separate Charter rights arose in *Dagenais v. Canadian Broadcasting Corporation*, [1994] 3 S.C.R. 835 (Dagenais). In that case, the fair trial rights of Mr. Dagenais and three other Christian Brothers under Sections 7-11 of the Charter came into collision with the freedom of expression rights of CBC wishing to broadcast the *Boys of St. Vincent* fictional drama, which rights were under Section 2(b) of the Charter. Lamer CJC for the majority, under heading "Rejecting a Clash Model", set out, in detail, numerous considerations raised by a publication ban on fair trial rights, and freedom of expression (at page 882-4).

On the authority of Dagenais, it is submitted that the Benchers should seek to reconcile and balance the dictates of any apparently competing Charter rights, in a manner similar to that undertaken by Chief Justice Lamer.

Freedom of Religion

The essence 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. This section also affords protection against governmental coercion in matters of conscience and religion. Whatever else freedom of conscience and religion may mean, it means at the very least that the government may not coerce individuals to affirm a specific religious belief or to manifest a specific religious practice for a sectarian purpose. The Charter protects not only the right to hold and manifest beliefs, but also the right to express and manifest religious non-belief and to refuse to participate in religious practice (*R. v. Big M Drug Mart Ltd.*, [1985] 1 S.C.R. 295).

In his paper *Freedom of Religion Under the Charter of Rights: The Limits of State Neutrality*, (2012) vol. 45:2 U.B.C. L. Rev. 497, Richard Moon addresses freedom of religion under the Charter.

At the outset of his paper, Professor Moon discusses change in the course of dealing with freedom of religion over time. He states:

> Freedom of religion, understood as a liberty, precludes the state from compelling an individual to engage in a religious practice and from restricting his or her religious practice without a legitimate public reason. In later judgments, however, there has been a shift in the courts' description of the interest protected by the freedom – from liberty to equality. According to the courts, the freedom does not simply prohibit state coercion in matters of religion or conscience; it also requires that the state treat religious belief systems or communities in an equal or even-handed manner. The state must not support or prefer the religious practices of one group over those of another 9religion or at least religious contest should be excluded from politics), and it must not restrict the practices of a religious group, unless this is necessary to protect a compelling public interest (religion should be insulated from politics). (pgs. 497-8) [Footnotes omitted]

However, Professor Moon finds that the state cannot be neutral in respect of some items of belief. He says:

> The state's commitment to sexual-orientation equality, even though framed in secular or civic terms, must be understood as a rejection of the belief that homosexuality is wrong.
>
> The problem is that the state cannot remain neutral on important issues of values. While the state may avoid passing direct judgment on the truth of a particular religious belief (as religious truth), it cannot avoid doing so indirectly when determining public policy. When the legislature decides that corporal punishment is wrongful and should be prohibited, it does not frame its judgment in terms of what God has or has not

> commanded. But unless we maintain an entirely artificial separation of law and religion, or of public and religious morality, the legislature's judgment must be understood as a rejection of the religious view that corporal punishment is right or moral. To use another example, if the state is committed to gender equality and affirms this value in anti-discrimination and other laws, it must be understood as rejecting the view, religious or otherwise, that women are not equal to men or should be treated differently from men in contexts such as employment. As noted in the previous section, laws sometimes include exemptions from their ordinary application for the practices of religious institutions or communities – for example, when a religious school is permitted to engage in a practice that would ordinarily breach anti-discrimination laws, such as dismissing a teacher who is divorced or gay; but even when the law exempts the "internal" operations of a religious community from the application of a public norm, it is not adopting a stance of neutrality towards the particular religious belief, but is simply creating space for private judgment or creating a zone for autonomous action by the community.
>
> The second problem with the courts' formal commitment to neutrality is that they may sometimes try to avoid finding a conflict between a religious value or practice and a public value or practice by adopting a narrow or distorted interpretation of one or the other. The courts have sought to avoid finding that a widely accepted religious practice is contrary to public policy, in some cases by interpreting narrowly the religious value or practice so that it does not conflict with the law, and in other cases (or at the same time) by narrowing the scope of the law or public value so that it does not interfere with the religious value or practice. Notably, both approaches have been used to deal with the tension in public or publicly funded schools between the commitment to sexual-orientation equality and respect of deeply held religious beliefs. (at pg. 542) [Footnotes omitted]

In respect of the decision in *TWU v. B.C. College of Teachers*, Professor Moon states:

> The Court in the *TWU* case seemed to rely on a narrow conception of sexual-orientation equality and a limited view of the role and impact of teachers.
> …
>
> The Court in *TWU* appeared to be unwilling to confront the anti-homosexual content of the TWU program. The most obvious explanation for this is that the Court wanted to avoid rejecting, directly, the religious view that homosexuality is sinful, or at least to avoid excluding from the schools teachers who held this view. But even if the general community must tolerate the expression of a wide range of views, including some that are sexist, racist, or homophobic, it does not follow that the schools should remain neutral on these issues, or that all individuals, regardless of their religious beliefs, can effectively perform the role of teacher, and even more obviously, that a teacher-training program that affirms anti-gay views should be accredited. The Court downplays the teacher's role and describes sexual-orientation equality in narrow terms (narrower than that relied on in other judgments), as a matter of toleration rather than affirmation, to avoid the conclusion that a particular religious teaching program does not adequately prepare its graduates to serve as teachers in the public school system. They do this, I

> suspect, because they think that the state fails to treat religious believers with equal respect when it explicitly rejects their beliefs. (pgs. 546-547) [Footnotes omitted]

LRWC adopts the arguments of Professor Moon. LRWC proposes that the Benchers consider:

(a) that they cannot be neutral in respect of the issue of whether homosexuality is wrong;

(b) that the *TWU v. College of Teachers* decision relied on a narrow conception of sexual-orientation equality; and

(c) the Supreme Court of Canada appeared, in that case, to be unwilling to confront the anti-homosexual content of the Covenant

The academic papers of Richard Moon have repeatedly been acknowledged to have influenced the Supreme Court of Canada's Charter jurisprudence.

Balancing

The classic reconciliation of competing rights, in our culture, was well expressed by John Stuart Mill. Essentially, the individual should have liberty up to the point at which his or her liberty impinges on the rights and interests of others in the society. The Covenant is intended to limit sexual intimacy as the price for admission to TWU`s proposed law school. The effect of imposition of the Covenant is to limit the liberty. It deserves repetition that there is no necessary connection between operation of a law school and a limitation of sexual intimacy to opposite genders during marriage.

It is instructive to see how the question of balancing, on one hand, discrimination with respect to sexual orientation, with, on the other hand, freedom of association and of religion, is addressed in *2012-2013 ABA Standards and Rules of Procedure for Approval of Law Schools.* Standard 211 prohibits discrimination with respect to sexual orientation, but it also raises the possibility that private religious-based institutions may be exempt from this requirement. One of the best analyses of this section is contained in a somewhat dated but incisive paper, Gerdy, Kristin B. *Irresistible Force Meets the Immovable Object: When Antidiscrimination Standards and Religious Belief Collide in ABA-Accredited Law Schools*, OR. L. Rev. 85 (2006): 943. Gerdy poses the question whether religious-based law schools in the U.S. qualify for an exemption to anti-discrimination standards, where the criteria for exemption are those in the Boy Scouts of America case. Of special note is the discussion of the third criterion where the test is whether objection to discrimination based on sexual orientation has reached a "compelling level":

> But in the end, rightly or wrongly, an interest in eliminating discrimination based on sexual orientation and homosexual conduct has not yet reached the compelling level that the elimination of racial discrimination had reached at the time of the *Bob Jones University* decision – the level sufficient to overcome the religious expressive association rights. Although the majority of Americans likely believe that discrimination based on sexual orientation is wrong and even morally reprehensible, such discrimination has not yet been recognized by the Supreme Court as the type that "violates deeply and widely

> accepted view of elementary justice." And it is not the case that there is "a firm national policy to prohibit...discrimination [based on sexual orientation] in public education." As a result, the interest in eliminating discrimination based on sexual orientation and homosexual conduct is not sufficiently compelling to overcome religiously based expressive association rights. [Footnotes omitted]

Accordingly, the question resolves to whether, now, in Canada, the interest in eliminating discrimination based on sexual orientation is sufficiently compelling to overcome religiously-based expressive association rights.

It is submitted this is a moving target. As recently as 1967, in *Klippert v. The Queen*, [1967] S.C.R. 822, the Supreme Court of Canada dismissed an appeal by Mr. Klippert from a finding that he was a dangerous sexual offender worthy of indefinite incarceration where there was no violence or coercion, but simply admittedly consistent homosexuality. The Canadian interest in eliminating discrimination has radically increased at an accelerating rate since then.

Application of Human Rights Legislation

While the principal argument of LRWC is based upon the Charter, that does not detract from the argument that the proposed imposition of the Covenant constitutes a breach of *Human Rights Code* (R.S.B.C. 1996) ch. 210. The breach is of Section 8 of that act. It reads as follows:

> 8 (1) A person must not, without a bona fide and reasonable justification,
> (a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or
> (b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public
> because of the ... sexual orientation ... of that person or class of persons.

Some commentators have suggested that the Covenant is saved from contravention of Section 8(1) by Section 41(1) of the *Human Rights Code*. That section reads:

> 41 (1) If a charitable, philanthropic, educational, fraternal, religious or social organization or corporation that is not operated for profit has as a primary purpose the promotion of the interests and welfare of an identifiable group or class of persons characterized by a physical or mental disability or by a common race, religion, age, sex, marital status, political belief, colour, ancestry or place of origin, that organization or corporation must not be considered to be contravening this Code because it is granting a preference to members of the identifiable group or class of persons.

LRWC stresses two aspects of Section 41. Firstly, the "primary" purposes of TWU cannot reasonably be said to be the promotion of married heterosexuals. The primary purpose is education in general. The primary purposes of the law school are to teach law and to advance law reform and the academic study of law and to prepare students to practice law. TWU does not discriminate among religions or among denominations within religions, notwithstanding that the impetus for discrimination against persons on the basis of sexual orientation or gender

identity would seem to be an interpretation of bible passages, which interpretation is apparently shared by the evangelical founders of the university.

The second basis for asserting that Section 41 does not rescue TWU's proposed Covenant is that "sexual orientation" is not listed in Section 41 as an analogous ground from which the section might save the Covenant, whereas that very analogous ground, "sexual orientation", is a prohibited as a basis on which to withhold any service ordinarily available to the public under Section 8(1).

It is a standard method of statutory interpretation to assume that the legislative drafter who "gives and then takes away" lists of items is aware of the difference between the lists. So, for example, in *Zanetti v. Bonniehon Enterprizes Ltd.,* 2003 BCCA 507, the B.C. Court of Appeal dealt with the *Limitation Act* then in force which listed causes of actions subject to a two year limitation including "defamation", but then went on to list causes of action subject to postponement under Section 6 of the then *Limitation Act* for a list of causes of action which did not include defamation with a result that defamation was held statute barred after two years irrespective of the postponement section which would have applied to discovery principles.

The answer to this argument, based on discrepancies of listed analogous grounds, cannot be that the decision maker (in this case the Law Society) should read-in "sexual orientation" into Section 41. Under *Vriend v. Alberta*, [1998] 1 S.C.R. 493, the rational for "reading-in" sexual orientation into Alberta's *Human Rights Act* in that case would not be made out in the present circumstances so as to afford TWU the immunity suggested by some commentators. The "serious discriminatory effects of exclusion of sexual orientation" in the *Vriend* case would simply not apply to under-inclusion of those wishing to discriminate on the basis of sexual orientation under Section 41 of the Code.

Conclusion

The Benchers should decide that imposition of the Covenant as a condition of admission to the proposed law school would constitute a breach of the applicants' Charter rights to equality. Embedded in that declaration is a finding that the gatekeeper role is governmental, sufficiently to attract Charter scrutiny. The Benchers should also declare that the breach is not saved by Section 1. Rejecting the clash model, the Benchers should reconcile and balance TWU`s unchallenged right to exist and its unchallenged freedom of religion, but require that TWU not impose the Covenant on admissions to law school. If TWU will not withdraw insistence on the Covenant, then the Law Society should request the British Columbia government to rescind the accreditation. If that accreditation is not rescinded, then the Law Society should initiate judicial review of that decision.

The president of TWU, Bob Kuhn, very recently posted an open letter regarding the issues. Below are two of his statements (numbered by us) and our indented responses.

1. In short, asking law societies to reject graduates of a TWU law school because of its religious nature is discriminatory on the basis of religion.

    This is not what is being asked of Law Societies. What is being asked is that the

organizations delegated by government to regulate the legal profession not permit discrimination based on sexual orientation to be built into the system, even when that discrimination is based on some religious views and is practiced by a private, sectarian institution.

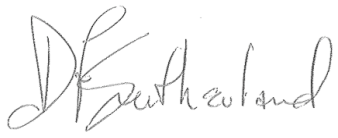
2. There is no question of TWU's constitutional and legal right to exist as a religious educational community. It is regrettable that much of the public debate and dialogue within the bar about discrimination at TWU has completely ignored any balancing of rights or even considered the religious freedom issues that were so critical to the Supreme Court of Canada's decision.

   TWU certainly has a right to exist and the balance of equality and religious (association) rights needs to be respected and addressed. In Canada today, national concern against SGOI discrimination is compellingly strong and overrides the right of private institutions to discriminate when that discrimination operates within the government mandated process of entering the legal profession.

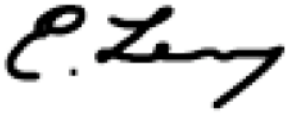
LRWC is willing to assist the benchers with any aspect of this issue.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

LAWYERS RIGHTS WATCH CANADA
Per:



David F. Sutherland



Dr. Ed Levy

DFS/vc

cc: Attorney General, Ottawa
cc: Attorney General, Victoria
cc: Kevin G. Sawatsky
cc: Bob Kuhn