



Le 18 mars

[TRADUCTION]

Par courriel : grtremblay@mccarthy.ca

Monsieur Gérald R. Tremblay, C.M., O.Q., c.r., Ad.E.
Président
Fédération des ordres professionnels de juristes du Canada
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Objet : Demande d'agrément d'un nouveau programme d'études pour l'obtention d'un diplôme en droit de l'Université Trinity Western

Monsieur,

Je vous écris au nom de l'Association du Barreau canadien au sujet de la demande de l'Université Trinity Western pour une évaluation visant à déterminer si la proposition de celle-ci d'ouvrir une faculté de droit répond aux normes de la Fédération des ordres professionnels de juristes du Canada pour l'agrément de nouveaux programmes d'études en droit.

L'ABC est une association nationale regroupant quelque 37 000 avocats, notaires, professeurs de droit et étudiants en droit de toutes les régions du Canada. Elle a notamment pour mandat la défense de la primauté du droit, l'amélioration du droit et l'administration de la justice, et la promotion de l'égalité devant la loi et dans la profession juridique.

Nous appuyons le rôle de vérification de la Fédération pour déterminer si un nouveau programme d'études en droit respecte les normes nationales afin de pouvoir s'inscrire à un programme de formation professionnelle d'un ordre professionnel de juristes au Canada. Avec la mobilité accrue des avocats et avocates dans le pays, l'élaboration et l'application des exigences nationales sont indispensables pour assurer la cohérence en matière de connaissances, de compétences et de déontologie sur l'ensemble du territoire national.

Nous félicitons la Fédération pour les consultations et délibérations réalisées en vue de l'établissement des normes nationales. Lorsqu'elle détermine si une demande respecte ces normes, la Fédération est en mesure de :

- a) recevoir à sa discrétion les arguments des personnes, des organismes ou des établissements autres que les demandeurs;
- b) demander des renseignements additionnels concernant la demande et exiger un complément d'information écrit, si elle le juge opportun; et

- c) contrôler son processus d'évaluation des demandes de nouveaux programmes d'études en droit¹.

Nous avons pu prendre connaissance de la lettre du Conseil des doyens et doyennes des facultés de droit du Canada et de votre réponse. Nous avons des doutes concernant les limites qu'on prête au rôle de la Fédération dans l'application des normes nationales, et nous vous exhortons à reconsidérer votre position compte tenu de la responsabilité des barreaux de réglementer la profession juridique dans l'intérêt de la population.

À notre avis, la Fédération et le Comité auquel incombe la responsabilité d'approuver les nouveaux programmes d'études en droit au Canada doivent trouver un juste équilibre entre la liberté de religion et l'égalité, et tenir pleinement compte de leur mandat d'intérêt public et les valeurs consacrées par les lois relatives aux droits de la personne au Canada.

S'appuyant sur les pouvoirs qui lui sont délégués par les barreaux qui la composent, la Fédération se doit d'aller au-delà de la stricte évaluation de la conformité d'un nouveau programme d'études en droit aux normes nationales. Elle doit déterminer si l'établissement et son programme sont conformes à la loi canadienne, respectent également les protections offertes par la *Charte canadienne des droits et libertés* et les lois sur les droits de la personne en Colombie-Britannique, et dans chaque province et territoire où un programme d'études en droit proposé pourrait être reconnu par les ordres professionnels de juristes aux fins d'admission au Barreau.

Nous demandons à la Fédération d'accorder toute l'attention nécessaire à ces préoccupations lors de l'évaluation de la demande de l'Université Trinity Western.

Il s'agit là de questions complexes. D'ailleurs, les membres de l'ABC ont des avis très différents au sujet de l'agrément de ce programme d'études en droit tout particulier. La Conférence sur l'orientation et l'identité sexuelles (COIS) et le Comité sur l'égalité de l'ABC ont d'ailleurs exprimé un point de vue que vous trouverez dans la lettre ci-jointe.

L'ABC se fera un plaisir de collaborer avec vous dans le cadre de ce dossier.

Je vous prie d'agréer, Monsieur, l'expression de mes sentiments les meilleurs.

(original signée par Robert C. Brun)

Robert C. Brun, c.r.

c. c : Voir l'Annexe A - uniquement en anglais

¹ Voir le *Rapport final du Groupe d'étude sur le diplôme canadien en common law*, la Fédération des ordres professionnels de juristes du Canada (octobre 2009), en ligne : [http://www.flsc.ca/documents/Rapport-final-groupe-detude-diplome-Common-Law-2009-C\(1\).pdf](http://www.flsc.ca/documents/Rapport-final-groupe-detude-diplome-Common-Law-2009-C(1).pdf), et les rapports sur les demandes du Comité spécial de la Fédération par l'Université Lakehead (janvier 2011), l'Université Thompson Rivers (janvier 2011), et l'Université de Montréal (janvier 2012).



March 18, 2013

Via email: grtremblay@mccarthy.ca

Mr. Gérald R. Tremblay, C.M., O.Q., Q.C., Ad.E.
President
Federation of the Law Societies of Canada
World Exchange Plaza
1810-45 O'Connor Street
Ottawa, ON K1P 1A4

Dear Mr. Tremblay:

Re: Trinity Western University School of Law Proposal

We write on behalf of the Sexual Orientation and Gender Identity Conference (SOGIC) and the Equality Committee of the Canadian Bar Association concerning the application of Trinity Western University for an assessment of whether its proposed law degree meets the Federation's National Standards for Approving New Law Degree Programs.

The CBA is a national association representing approximately 37,000 jurists, including lawyers, notaries, law teachers and students across Canada, with a mandate that includes seeking improvements in the law and the administration of justice, and promoting equality in the law and the legal profession. SOGIC provides a forum for the exchange of information, ideas and action on legal issues relating to sexual orientation and gender identity. The Equality Committee is dedicated to achieving equality in the legal profession.

We support the role of the Federation in determining whether new law degree programs meet national standards for entry to law society licensing programs across Canada. With the increased mobility of lawyers in this country, the development and application of national requirements is critical for cross-border consistency in knowledge, skills, abilities and ethics.

A. SOGIC and the Equality Committee's Concerns

We have reviewed your December 4, 2012 response to a November 20, 2012 letter from the Council of Canadian Law Deans on Trinity Western's application and the university's discriminatory treatment of lesbian, gay, bisexual, transsexual and transgender (**LGBTT**) students. We question the perceived limitations on the Federation's role in enforcing the National Standards and approving new law degrees.

Even on a strict reading of the National Standards, Trinity Western's application raises concerns, in particular for the National Standards' ethical, constitutional and human rights components, as will be explained in greater detail below.

Moreover, as determined by the Supreme Court of Canada in *Trinity Western University v. College of Teachers*,¹ the Federation's assessment of Trinity Western's application must go beyond "a determination of skills and knowledge" and take into account a broader range of factors.² Indeed, just a year ago, the Supreme Court reiterated in *Doré v. Barreau du Québec*³ that law societies "must act consistently with the values underlying the grant of discretion, including Charter values."⁴ like other administrative decision-makers exercising delegated authority,

Based on the delegations of power from its constituent law societies, the Federation has not only the power, but the duty to go beyond a strict determination of a proposed law school's compliance with the National Standards. It must assess whether the institution and its program complies with Canadian law, including the protections afforded by the *Canadian Charter of Rights and Freedoms* and the human rights legislation in B.C., and in every province and territory where a proposed law degree may be recognized by the law societies for the purpose of admission to the local bar.

We therefore ask the Federation and its members to give due consideration to these concerns when assessing Trinity Western's application.

One word at the outset on the 2001 Supreme Court decision in *TWU*, which Trinity Western appears to rely on to justify discriminatory treatment of LGBTT students. Although a majority of the judges in that case found in Trinity Western's favour, their analysis was limited to B.C. law. In the present case, given the national scope of its mandate, the Federation must consider the proposed program's compliance with other provincial and territorial human rights legislation. Further, the B.C. College of Teachers "was not directly applying either the *Charter* or the province's human rights legislation when making its decision,"⁵ *Doré* now imposes that obligation on law societies. Finally, recent Supreme Court jurisprudence demonstrates a higher degree of deference to administrative decision-makers when dealing with *Charter* and human rights issues.⁶

As a result, were the Federation to follow the proposals found in our letter's conclusions, its decision would most likely be subject to a lower level of scrutiny than was that of the B.C. College of Teachers at the time. Coupled with the increased recognition of same-sex relationships in Canadian law and society, and the fact that teaching future lawyers may call for the application of different norms in terms of ethics and basic respect for human rights, we submit that a another result could be expected in the present case.

B. Trinity Western's Discriminatory Rules and Practices

As a condition of employment with the university as well as admission into one of its programs, Trinity Western requires students, faculty and staff to sign its Community Covenant Agreement.⁷ The Covenant notably proscribes "sexual intimacy", except between married, opposite-sex spouses,

1 [2001] 1 S.C.R. 772 (*TWU*). In that case, the Supreme Court weighed in on the B.C. College of Teachers' refusal to recognize Trinity Western's teacher education program.

2 *Ibid.*, at para 13. For a detailed legal analysis of this question, see: Professor Elaine Craig, "The Case for the Federation of Law Societies Rejecting Trinity Western University's Application for Approval of a New Law School Program", *Canadian Journal of Women and the Law*, vol. 25(1) (2013).

3 [2012] 1 S.C.R. 395 (*Doré*).

4 *Ibid.*, at para 24.

5 *TWU*, *supra* note 2, at para 27.

6 See in particular *Doré*, *supra* note 4.

7 See Trinity Western's Student Handbook, online: <http://twu.ca/studenthandbook/university-policies/community-covenant.html>.

and numerous footnotes to the Covenant's rules on sexual intimacy refer to biblical passages interpreted by some as prohibiting sexual intercourse between members of the same gender.⁸

The Covenant is meant to apply 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.⁹

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 Canada in *Vriend v. Alberta*,¹⁰ 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 perceived worth of gay and lesbian individuals constitutes a particularly cruel form of discrimination."¹¹

The same may be said of the fact that the Covenant purportedly targets sexual behaviour as opposed to sexual orientation. As Justice L'Heureux-Dubé wrote in her dissenting opinion in *TWU*, which was just endorsed by a unanimous Court in *Saskatchewan (Human Rights Commission) v. Whatcott*:¹²

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]¹³

C. Trinity Western Covenant Incompatible with Human Rights Legislation

As a private institution, Trinity Western is not subject to the *Charter*. Trinity Western's President Dr. Jonathan S. Raymond claimed in a recent interview that the issue of the Covenant's conformity with the B.C. *Human Rights Code*¹⁴ has been resolved since the 2001 Supreme Court of Canada decision of *TWU*,¹⁵ based on s. 41(1) of the *BCHRC*. That provision reads as follows:

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. [Emphasis added]

⁸ Community Covenant Agreement, online: <http://twu.ca/studenthandbook/student-handbook-2012-2013.pdf> pp. 19-23.

⁹ *Id.* As outlined in the Student Handbook, "[i]f 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 a student's re-admission to the University" (p. 23).

¹⁰ [1998] 1 S.C.R. 493 (*Vriend*).

¹¹ *Ibid.*, at para 102 [emphasis added].

¹² 2013 SCC 11 (*Whatcott*).

¹³ *Ibid.*, at para 123, citing *TWU*, *supra* note 2, para 69.

¹⁴ RSBC 1996, c. 210 (*BCHRC*). See *TWU*, *supra* note 2, at paras 13 and 35.

¹⁵ See Sarah Boesveld, "Canadian deans accused of 'anti-religious bias' over attempt to block Christian law school", in *National Post*, January 18, 2013 edition, online: <http://life.nationalpost.com/2013/01/18/canadian-deans-accused-of-anti-religious-bias-over-attempt-to-block-christian-law-school/>.

The legality of Trinity Western's Covenant in light of the *BCHRC*'s prohibition of discrimination based on sexual orientation was not directly at issue in *TWU*, nor was it analyzed at any length by the lower courts and the Supreme Court of Canada. The Covenant's compliance with the *BCHRC* remains an open question, especially in light of evolving notions of human rights and the increased legal and societal recognition afforded to LGBTTT individuals and their relationships.

Given the national scope of the Federation's mandate and the increased mobility of lawyers between Canadian jurisdictions, any analysis of these issues cannot be limited to Trinity Western's compliance with B.C. legislation. Since the Federation's recommendation will be applied in every Canadian common law jurisdiction, consideration must be given to the Covenant's compatibility with other provincial and territorial human rights laws.

Provisions analogous to s. 41(1) of the *BCHRC* are found in 10 of 13 provincial and territorial human rights statutes, with great variations in language and scope.¹⁶ For instance, the religious organization's "exemption" applies, subject to conditions, to all types of services and contracts in four provinces and one territory.¹⁷ It is limited to employment contracts in five other jurisdictions.¹⁸ As such, there appears to be no legal justification for Trinity Western's discriminatory rules and practices in at least eight out of thirteen Canadian jurisdictions.¹⁹

As for the five jurisdictions where human rights laws include a more general exemption for religious organizations, jurisprudence interpreting the clauses is scarce and, in some respects, dated, at least at the Supreme Court of Canada level. The predecessor to s. 41 of the *BCHRC* was considered by the Supreme Court in the 1984 case of *Caldwell v. Stuart*,²⁰ while *Brossard v. Québec (Comm. des droits de la personne)*,²¹ issued in 1988, dealt with s. 20 of the Quebec *Charter of Human Rights and Freedoms*.²²

In both judgments, the last to substantially consider the scope of exemptions for religious organizations at the Supreme Court level, the Court outlined their close connection to the protection of freedom of association. In *Brossard*, the Court held that in order to qualify for the exemption, a non-profit organization "must have, as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons characterized by a common [enumerated] ground..."²³ The Court then added that "the distinction, exclusion or preference practised by the non-profit institution to which the second branch applies must be justified in an objective sense by the particular nature of the institution

¹⁶ The relevant provisions of provincial and territorial statutes are reproduced in Schedule A.

¹⁷ Namely British Columbia, Ontario, Quebec, Prince Edward Island and Yukon.

¹⁸ Namely Saskatchewan, Nova Scotia, Newfoundland and Labrador, Northwest Territories and Nunavut. In the case of Newfoundland and Labrador, the exemption also covers membership in a religious organization; see s. 11(3)(d) of the *Human Rights Act, 2010*, S.N.L. 2010, c. H-13.1.

¹⁹ Namely Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador, Northwest Territories and Nunavut.

²⁰ [1984] 2 S.C.R. 603 ("*Caldwell*").

²¹ [1988] 2 S.C.R. 279 ("*Brossard*").

²² R.S.Q., c. C-12. That provision reads: "A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory."

²³ *Supra* note 23, at para 130.

in question."²⁴ We submit that Trinity Western's ban on sexual intimacy outside of marriage between a man and a woman is not so *objectively* justified.

Pursuant to the *Trinity Western University Act*,²⁵ it is recognized as a Christian institution affiliated with the Evangelical Free Church of Canada. Yet the university does not purport to have "as a primary purpose, the promotion of the interests and welfare of an identifiable group of persons", nor to exclude individuals who do not share its religious beliefs. On the contrary, under its legislative mandate, it must welcome students of all faiths. Subsection 3(2) of the Act, as amended, provides:

(2) The objects of the University shall be to provide for young people of any race, colour, or creed university education in the arts and sciences with an underlying philosophy and viewpoint that is Christian. [Emphasis added]

It appears that the B.C. legislature has *not* authorized the institution to grant "a preference to members" of any particular church or religion, or to individuals who hold beliefs similar to those of the Evangelical Free Church of Canada, but rather has specified that its public mandate must be exercised to be inclusive of people of *all* races and creeds. This should include individuals who do *not* share Trinity Western's views on sexual intimacy, notably members of the LGBTT communities. One is hard pressed to see how purporting to exclude LGBTT students, or force them to conceal their true identity, could amount to an objectively justifiable purpose rationally connected to Trinity Western's educative mandate, irrespective of that school's worldview.

D. Following these recommendations would not hamper freedom of religion

Some, including the British Columbia Civil Liberties Association, have argued that denying Trinity Western's application would violate the freedom of religion and freedom of association of the school's community.²⁶ We respectfully disagree.

As recently noted by the Supreme Court of Canada in *Whatcott*, relying on its jurisprudence post-*TWU*, freedom of religion is only infringed where: "(1) the claimant sincerely holds a belief or practice that has a nexus with religion; and (2) the provision at issue interferes with the claimant's ability to act in accordance with his or her religious beliefs."²⁷ The interference must be so serious as to "[threaten] actual religious beliefs or conduct."²⁸

Although we do not question the sincerity of the religious beliefs of those forming the Trinity Western community on sexual mores, removing or modifying the school's Covenant and other rules, practices and policies, as we suggest in the conclusion to this letter, would fall short of threatening the beliefs or conduct of these individuals. Trinity Western's Christian character and affiliation to the Evangelical Free Church of Canada could be maintained. Those who share the school's views on sexual intimacy would still be welcomed as faculty and students, the same way they are at every other university in Canada, and they would be free to express their beliefs and to try to convince others to abide by the same moral standards. What would be forbidden is the creation of a "LGBTT-

²⁴ *Ibid.*, at para 138. According to the B.C. Court of Appeal in *Vancouver Rape Relief Society v. Nixon*, 2005 BCCA 601 (CanLII) (leave application denied, February 1, 2007, S.C.C. No. 31633), at paras 52-53, the *BCHRC* is not so limitative. Be that as it may, the Court, based on *Caldwell*, accepted that there had to be a "rational connection" between the discriminatory practice and the institution's objects: "All of this is to say that, in my view, the reviewing judge was correct in following the guidance of *Caldwell* and concluding that a group can prefer a subgroup of those whose interests it was created to serve, given good faith and provided there is a rational connection between the preference and the entity's work, or purpose" (para. 58).

²⁵ S.B.C. 1969, c. 44,

²⁶ Letter from BCCLA to the Federation, January 31, 2013, online: <http://bccla.org/wp-content/uploads/2013/01/2013-BCCLA-Letter-to-Herman-Wolfe-TWU.pdf>.

²⁷ *Whatcott*, *supra* note 13, at para 155.

²⁸ *Ibid.* [emphasis added].

free” school environment, which is no more of a right guaranteed by freedom of religion than a “women-free” or “Jew-free” campus would be.

Even if a violation of freedom of religion could be demonstrated, s. 1 of the *Charter* would require that it be reconciled with the right to equality accorded to all Canadians.²⁹ One would have to account for the fact that the exercise of freedom of religion by Trinity Western’s members denies LGBTT’s faculty and students respect for their dignity and equality, as protected by s. 15(1) of the *Charter*. As the Supreme Court held in *Ross v. New Brunswick School District No. 15*,³⁰ “[w]here the manifestations of an individual’s right or freedom are incompatible with the very values sought to be upheld in the process of undertaking a s. 1 analysis, then, an attenuated level of s. 1 justification is appropriate.”³¹ For these reasons, we believe that Trinity Western’s exclusion of LGBTT individuals would not meet this test.

To sum up, we believe that freedom of religion does not allow one group of individuals to exclude another group of identifiable individuals from access to a public service, such as a university education, on the ground of race, colour, religion, national origin, gender, sexual orientation, gender identity, age or disability, except of course when academically justified based on admission and eligibility criteria.³² In our view, institutional rules that discriminate against identifiable groups of people, which for too long restricted or denied access to some professions to certain racial and religious minorities,³³ have no place in today’s Canada.

E. The U.S. Experience

These issues may be informed by the U.S. experience and approach.

In *Bob Jones University v. United States*,³⁴ the U.S. Supreme Court was called on to determine whether the Internal Revenue Services (IRS) could deny tax-exempt status to two non-profit private schools that prescribed and enforced racially discriminatory admission standards on the basis of religious doctrine.³⁵ The IRS had removed the schools’ charitable status on the ground that their admission policies and rules of conduct violated federal anti-discrimination laws.

The Court confirmed the IRS’s decision, holding that it was justified under the circumstances. The Chief Justice noted that “racial discrimination in education violates deeply and widely accepted views of elementary justice”³⁶ and the “governmental interest [in eradicating racial discrimination in education] substantially outweighs whatever burden denial of tax benefits places on petitioners’ exercise of their religious beliefs.”³⁷

²⁹ *Whatcott*, *supra* note 13, at para 161.

³⁰ [1996] 1 S.C.R. 825.

³¹ *Ibid.*, para 94, cited in *Whatcott*, *supra* note 13, at para 162.

³² *University of British Columbia v. Berg*, [1993] 2 S.C.R. 353.

³³ For example, up to the 1960s, McGill University and U of Toronto imposed “quotas” on the admission of Jewish students to medical school and restrictions on hiring Jewish faculty members; see Gerald Tulchinsky, *Canada’s Jews: A People’s Journey*, Toronto: University of Toronto Press (2008), pp. 132-133, 319-321, 410 and 415.

³⁴ 461 U.S. 574 (1983) (“*Bob Jones University*”).

³⁵ *Bob Jones University* was dedicated to the teaching and propagation of fundamentalist Christian religious beliefs, requiring its teachers to be devout Christians, with all courses being taught according to the Bible. Entering students were screened on their religious beliefs and their public and private conduct was regulated by standards promulgated by university authorities, including a complete ban on interracial dating and marriage, which was genuinely believed to be forbidden by scriptures. Goldsboro Christian Schools also gave special emphasis to the Christian religion and the ethics revealed in the Bible. The school maintained a racially discriminatory admission policy based upon its interpretation of scripture. It accepted mostly Caucasians and, on occasion, children from racially mixed marriages in which one of the parents was Caucasian.

³⁶ *Bob Jones University*, *supra* note 42, at p. 592.

³⁷ *Ibid.*, at p. 604.

The same may be said of discrimination on the basis of sexual orientation in Canada, which is prohibited under the *Charter* as well as federal, provincial and territorial human rights laws. That was the question at issue in *Christian Legal Society of University of California, Hastings College of Law v. Martinez*³⁸, where the U.S. Supreme Court had to determine whether a public law school, part of the state government's network of universities, could refuse to officially recognize a student group that denied membership to students who did not share the organization's core beliefs about religion and sexual orientation, but instead require that it open its membership to all students irrespective of their religious beliefs or sexual orientation.³⁹

The Court found that although the group's core beliefs enjoyed protection under the First Amendment of the U.S. Constitution, (which guarantees freedom of speech, association and religion) the university's refusal to recognize organizations that practiced discrimination fulfilled "reasonable educational purposes."⁴⁰ The group had argued that the university held no legitimate interest in urging "religious groups not to favor coreligionists for purposes of their religious activities." The Court's response was:

[...] CLS's analytical error lies in focusing on the benefits it must forgo while ignoring the interests of those it seeks to fence out: Exclusion, after all, has two sides. Hastings, caught in the crossfire between a group's desire to exclude and students' demand for equal access, may reasonably draw a line in the sand permitting all organizations to express what they wish but no group to discriminate in membership. [Footnote omitted] [Emphasis added]⁴¹

In concurring reasons, Stevens J. noted that the constitutional protection afforded to freedom of religion and speech does not impose on a government agency the obligation to officially recognize every religious organization, irrespective of their discriminatory beliefs and conduct:

[...] Other groups may exclude or mistreat Jews, blacks, and women—or those who do not share their contempt for Jews, blacks, and women. A free society must tolerate such groups. It need not subsidize them, give them its official imprimatur, or grant them equal access to law school facilities. [Emphasis added]⁴²

In August 2012, the American Bar Association adopted new *Standards and Rules of Procedure for Approval of Law Schools*.⁴³ Standard 211, "Non-discrimination and Equality of Opportunity", stipulates that "[a] law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability."⁴⁴ Although law schools may have a religious affiliation or purpose, adopt and apply admission and employment policies that directly relate to their affiliation or purpose, and prefer persons adhering to same, the policies must not interfere with academic freedom and "shall not be applied to use admission policies or take other action to

³⁸ 561 U.S. __ (2010) ("*CLS*").

³⁹ Christian Legal Society's chapters had to adopt bylaws that required members and officers to sign a "Statement of Faith" and to conduct their lives in accord with prescribed principles. Among those tenets was the belief that sexual activity should not occur outside of marriage between a man and a woman, thereby excluding LGBTTT students and those who did not share the group's religious views on such issues.

⁴⁰ *CLS*, *supra* note 46, at p. 2 of the Court's opinion, written by Ginsburg J.

⁴¹ *Ibid.*, at p. 28 of the Court's opinion, written by Ginsburg J.

⁴² *Ibid.*, at p. 6 of Steven J.'s concurring opinion.

⁴³ Available online at: http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf.

⁴⁴ *Ibid.*, at p. 12.

preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, gender, sexual orientation, age or disability.”⁴⁵

F. Conclusions

Lawyers are viewed as leaders in their communities. Lawyers rely on law societies to offer leadership and regulation in the public interest, including on issues relating to equality. SOGIC and the Equality Committee believe that the Federation must consider the educational philosophy and environment of a law school and how that impacts the institution’s ability to teach law, to properly perform its function of assessing compliance with the National Standards. As the U.S. Supreme Court held in *Norwood v. Harrison*,⁴⁶ “a private school—even one that discriminates—fulfills an important educational function; however, [...] [that] legitimate educational function cannot be isolated from discriminatory practices. [...] [D]iscriminatory treatment exerts a pervasive influence on the entire educational process.”⁴⁷

Our members are your members. They have voiced concerns about Trinity Western’s proposal to us, and we agree. We have seen Canadian law societies work to protect and encourage diversity in law and in the practice of law and we view them as allies in this regard. Whether via an Equity Office or Officer, Equity Ombudsman, or a like representative, our law societies have done our members proud. We are asking them, and the Federation, to honour and continue that tradition. We urge you to reconsider your stance in pursuance of the law societies’ duty to regulate the legal profession in the public interest.

The Federation must strike a balance between freedom of religion and equality, and give full consideration to its public interest mandate and to the values embodied in our human rights instruments. In that respect, we invite the Federation to seek inspiration from the ABA’s August 2012 *Standards and Rules of Procedure for Approval of Law Schools*.

Finally, Trinity Western’s application does not necessarily call for an “all or nothing” response. For example, short of rejecting it, the Federation could ask Trinity Western to remove or modify its Covenant and other rules, practices and policies which detract from its ability to meet the National Standards and to comply with human rights laws across the country as well as minimum norms guaranteeing academic freedom. This could be achieved while maintaining the Christian character of the school, yet ensuring that it is truly open to “young people of any race, colour, or creed,” in accordance with its statutory mandate.

We hope this letter is the beginning of an open dialogue on this very important issue. SOGIC and the Equality Committee would be pleased to assist in whatever way you believe would be appropriate.

Yours truly,

(signed by Rebecca Bromwich for Amy Sakalauskas, Robert Peterson and Level Chan)

Amy Sakalauskas
Co-chair, CBA Sexual
Orientation and Gender
Identity Conference

Robert Peterson
Co-chair, CBA Sexual
Orientation and Gender
Identity Conference

Level Chan
Chair, CBA Equality
Committee

cc: See Appendix A

⁴⁵ *Ibid.*, at pp. 12-13 [emphasis added].

⁴⁶ 413 U.S. 455 (1973). The Court held in that case that a state could not constitutionally give or lend textbooks to students who attended a private school that discriminated on the basis of race.

⁴⁷ *Ibid.*, at pp. 468-469 [emphasis added].

SCHEDULE
PROVINCIAL AND TERRITORIAL HUMAN RIGHTS PROVISIONS GRANTING EXEMPTIONS TO
PRIVATE OR RELIGIOUS ORGANIZATIONS

I. PROVINCIAL AND TERRITORIAL STATUTES WITH A GENERAL EXCEPTION FOR RELIGIOUS ORGANIZATIONS

British Columbia - *Human Rights Code*, R.S.B.C. 1996, c. 210

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.

Ontario - *Human Rights Code*, R.S.O. 1990, c. H.19

18. The rights under Part I to equal treatment with respect to services and facilities, with or without accommodation, are not infringed where membership or participation in a religious, philanthropic, educational, fraternal or social institution or organization that is primarily engaged in serving the interests of persons identified by a prohibited ground of discrimination is restricted to persons who are similarly identified.

Quebec - *Charter of Human Rights and Freedoms*, R.S.C., c. C-12

20. A distinction, exclusion or preference based on the aptitudes or qualifications required for an employment, or justified by the charitable, philanthropic, religious, political or educational nature of a non-profit institution or of an institution devoted exclusively to the well-being of an ethnic group, is deemed non-discriminatory.

Prince Edward Island - *Human Rights Act*, R.S.P.E.I. 1988, c. H-12

6. (1) No person shall refuse to employ or to continue to employ any individual

- (a) on a discriminatory basis, including discrimination in any term or condition of employment; or
- (b) because the individual has been convicted of a criminal or summary conviction offence that is unrelated to the employment or intended employment of the individual.

(4) This section does not apply to

[...]

- (c) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin as the case may be, if age, colour, creed, ethnic or national origin, family status, marital status, disability, political belief, race, religion, sex, sexual orientation or source of income is a reasonable occupational qualification.

10. (1) No person or agency carrying out a public function, including fire protection or hospital services, through the use in whole or in part of functions volunteers, shall exclude, expel or limit any volunteer applicant on a discriminatory basis.

(2) This section does not apply to an exclusively religious or ethnic organization that is not

operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be.

Yukon - *Human Rights Act*, R.S.Y. 2002, c. 116

11. (1) It is not discrimination for a religious charitable, educational, social, cultural, or athletic organization to give preference to its members or to people the organization exists to serve.

II. PROVINCIAL AND TERRITORIAL STATUTES WITH A RELIGIOUS ORGANIZATION EXCEPTION LIMITED TO EMPLOYMENT AND MEMBERSHIP IN THE ORGANIZATION

Newfoundland and Labrador - *Human Rights Act*, 2010, S.N.L. 2010, c. H-13.1

11. (1) A person shall not, on the basis of a prohibited ground of discrimination,
(a) deny to a person or class of persons goods, services, accommodation or facilities that are customarily offered to the public; or
(b) discriminate against a person or class of persons with respect to goods, services, accommodation or facilities that are customarily offered to the public.

[...]

(3) Subsection (1) does not apply

[...]

- (d) to a restriction on membership on the basis of a prohibited ground of discrimination, in a religious, philanthropic, educational, fraternal, sororal or social organization that is primarily engaged in serving the interests of a group of persons identified by that prohibited ground of discrimination; or
- (e) to other situations where a good faith reason exists for the denial of or discrimination with respect to accommodation, services, facilities or goods.

14. (1) An employer, or a person acting on behalf of an employer, shall not refuse to employ or to continue to employ or otherwise discriminate against a person in regard to employment or a term or condition of employment on the basis of a prohibited ground of discrimination, or because of the conviction for an offence that is unrelated to the employment of the person.

[...]

(8) This section does not apply to an employer

- (a) that is an exclusively religious, fraternal or sororal organization that is not operated for private profit, where it is a reasonable and genuine qualification because of the nature of the employment; or

[...]

III. PROVINCIAL AND TERRITORIAL STATUTES WITH A RELIGIOUS ORGANIZATION EXCEPTION LIMITED TO EMPLOYMENT

Saskatchewan - *Saskatchewan Human Rights Code*, S.S. 1979, c. S-24.1

16. (1) No employer shall refuse to employ or continue to employ or otherwise discriminate against any person or class of persons with respect to employment, or any term of employment, on the basis of a prohibited ground.

[...]

(10) This section does not prohibit an exclusively non-profit charitable, philanthropic, fraternal, religious, racial or social organization or corporation that is primarily engaged in serving the interests of persons identified by their race, creed, religion, colour, sex, sexual orientation, family status, marital status, disability, age, nationality, ancestry, place of origin or receipt of public assistance from employing only or giving preference in employment to persons similarly identified

if the qualification is a reasonable and *bona fide* qualification because of the nature of the employment.

Nova Scotia - *Human Rights Act*, R.S.N.S. 1989, c. 214

5. (1) No person shall in respect of

- (a) the provision of or access to services or facilities;
- [...]
- (d) employment;
- (e) volunteer public service;
- [...]

discriminate against an individual or class of individuals on account of

- (h) age;
- (i) race;
- (j) colour;
- (k) religion;
- (l) creed;
- (m) sex;
- (n) sexual orientation;
- (o) physical disability or mental disability;
- (p) an irrational fear of contracting an illness or disease;
- (q) ethnic, national or aboriginal origin;
- (r) family status;
- (s) marital status;
- (t) source of income;
- (u) political belief, affiliation or activity;
- (v) that individual's association with another individual or class of individuals having characteristics referred to in clauses (h) to (u).

6. Subsection (1) of Section 5 does not apply

- [...]
- (c) in respect of employment, to
- [...]
- (ii) an exclusively religious or ethnic organization or an agency of such an organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be, with respect to a characteristic referred to in clauses (h) to (v) of subsection (1) of Section 5 if that characteristic is a reasonable occupational qualification, or
- (iii) employees engaged by an exclusively religious organization to perform religious duties;
- (d) in respect of volunteer public service, to an exclusively religious or ethnic organization that is not operated for private profit and that is operated primarily to foster the welfare of a religious or ethnic group with respect to persons of the same religion or ethnic origin, as the case may be;
- [...]

Northwest Territories - *Human Rights Act*, S.N.W.T. 2002, c. 18

7. (1) No person shall, on the basis of a prohibited ground of discrimination,

- (a) refuse to employ or refuse to continue to employ an individual or a class of individuals;
- or
- (b) discriminate against any individual or class of individuals in regard to employment or

any term or condition of employment.

[...]

(5) It is not a contravention of subsection (1) for an organization, society or corporation to give preference in employment to an individual or class of individuals if the preference is solely related to the special objects in respect of which the organization, society or corporation was established and the organization, society or corporation

- (a) is not operated for private profit; and
- (b) is
 - (i) a charitable, educational, fraternal, religious, social or cultural organization, society or corporation, or
 - (ii) an organization, society or corporation operated primarily to foster the welfare of a religious or racial group.

Nunavut - *Human Rights Act*, S.Nu. 2003, c. 12

9. (1) No person shall, on the basis of a prohibited ground of discrimination

- (a) refuse to employ or refuse to continue to employ an individual or a class of individuals; or
- (b) discriminate against any individual or class of individuals in regard to employment or any term or condition of employment, whether the term or condition was prior to or is subsequent to the employment.

(6) It is not a contravention of subsection (1) for an organization, society or corporation to give preference in employment to an individual or class of individuals if the preference is solely related to the special objects in respect of which the organization, society or corporation was established and the organization, society or corporation

- (a) is a not for profit organization, society or corporation; and
- (b) is
 - (i) a charitable, educational, fraternal, religious, athletic, social or cultural organization, society or corporation, or
 - (ii) an organization, society or corporation operated primarily to foster the welfare of a religious or racial group.

IV. PROVINCIAL AND TERRITORIAL STATUTES WITH NO SPECIFIC EXCEPTION FOR RELIGIOUS ORGANIZATIONS

Alberta - *Alberta Human Rights Act*, R.S.A. 2000, c. A-25.5

7. (1) No employer shall

- (a) refuse to employ or refuse to continue to employ any person, or
- (b) discriminate against any person with regard to employment or any term or condition of employment,

because of the race, religious beliefs, colour, gender, physical disability, mental disability, age, ancestry, place of origin, marital status, source of income, family status or sexual orientation of that person or of any other person.

[...]

(3) Subsection (1) does not apply with respect to a refusal, limitation, specification or preference based on a *bona fide* occupational requirement.

Manitoba - *The Human Rights Code*, C.C.S.M., c. H175

13. (1) No person shall discriminate with respect to any service, accommodation, facility, good, right, licence, benefit, program or privilege available or accessible to the public or to a section of the

public, unless *bona fide* and reasonable cause exists for the discrimination.

New Brunswick - *Human Rights Act*, R.S.N.B. 2011, c. 171

4. (1) No employer, employers' organization or other person acting on behalf of an employer shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity,

- (a) refuse to employ or continue to employ any person, or
- (b) discriminate against any person in respect of employment or any term or condition of employment.

(5) Despite subsections (1), (2), (3) and (4), a limitation, specification or preference on the basis of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity shall be permitted if the limitation, specification or preference is based on a *bona fide* occupational qualification as determined by the Commission.

6. (1) No person, directly or indirectly, alone or with another, by himself, herself or itself or by the interposition of another, shall, because of race, colour, religion, national origin, ancestry, place of origin, age, physical disability, mental disability, marital status, sexual orientation, sex, social condition or political belief or activity,

- (a) deny to any person or class of persons any accommodation, services or facilities available to the public, or
- (b) discriminate against any person or class of persons with respect to any accommodation, services or facilities available to the public.

(2) Despite subsection (1), a limitation, specification, exclusion, denial or preference because of sex, social condition, political belief or activity, physical disability, mental disability, marital status or sexual orientation shall be permitted if the limitation, specification, exclusion, denial or preference is based on a *bona fide* qualification as determined by the Commission.

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