

November 23, 2014

Re: Trinity Western University

To the members of the Law Society of Nunavut,

I am writing in reply to a request for submissions regarding the approval of the proposed law school at Trinity Western University by the Law Society of Nunavut.

As I will explain below, I do not believe that a law school such as the one at Trinity Western University should be approved by the Law Society of Nunavut due to the discriminatory practices of the university in imposing a Community Covenant that imposes differential treatment based on two protected grounds of discrimination: sexual orientation and marital status.

Rule of Law and the ability to change it

As stated by fellow member Geoffrey P. Wiest in his submission, any such decision must be made based on the rule of law. While he does properly illustrate the current state of the law based on *Trinity Western University v. College of Teachers*, [2001] 1 S.C.R. 772, 2001, I think he misses the point with respect to the nature of the Law Society and its organs.

The Executive of the Law Society, in approving or refusing to approve a law school, acts as a quasi-judicial body and must make a decision based on the state of the law at the time the decision is made. However, the Executive and the Law Society as a whole also constitute a regulatory body that may make its own rules under section 8 of the *Legal Profession Act*. Therefore, as a Law Society we may, to the extent allowed by the *Legal Profession Act*, change the state of the law.

Notably, the *Legal Profession Act*, section 8, provides us with the power to make rules “for the exercise of the powers conferred or the performance of duties imposed on the Society or the Executive” and to make rules “prescribing the terms and conditions on which approval for admission as members or as students-at-law may be given”.

It was based on the reading of the *Trinity Western University* case cited above and the reading of the *Legal Profession Act* and the Rules of the Law Society that I submitted a motion for the 2014 Annual General Meeting of the Law Society that would have required the Executive to approve only of law schools with curriculums that substantially align with the National Requirement and that provide equal opportunity and non-discriminatory treatment.¹ Without such an amendment to the

¹ This motion can be found in Appendix C of the Executive’s Memorandum found at <http://lawsociety.nu.ca/wp-content/uploads/2013/07/Memo-re-TWU-28-October-FINAL.pdf>

rules, the argument regarding the current state of the law as presented by Geoffrey P. Wiest in his submission is quite compelling.

Only students-at-law?

As the question of approval of law schools under the current Rules of the Law Society is, to my understanding, limited to the student-at-law process, I limited my proposed amendments to that approval process. While I would have personally preferred a wider scope that would have included transfers from other law societies, I was concerned about the effect on the Territorial Mobility Agreement, which is not clear as to whether or not a signatory to the agreement may require the submission of educational credentials from lawyers seeking a transfer under the Agreement.

I would welcome a discussion on the possibility of verifying educational credentials during the transfer process. If it is permitted under the Agreement, I would seek to make my proposed rule amendment apply to the legal education of all persons seeking admission to the Law Society of Nunavut, in accordance with the rule making power in the *Legal Profession Act*.

What's the problem?

Trinity Western University requires all students, faculty and staff to subscribe to a Community Covenant Agreement. While many of the values described in the Community Covenant are compatible with and espouse the virtues of Canadian social and legal norms, such as “liv[ing] exemplary lives characterized by honest, civility, truthfulness, generosity and integrity” and “treat[ing] all persons with respect and dignity”, there is one requirement which is troubling due to its discriminatory nature: **the requirement that members of the school community abstain from “sexual intimacy that violates the sacredness of marriage between a man and woman.”**

It should be noted that more than just a description of values, the Community Covenant Agreement is considered to be a binding agreement by Trinity Western University and violations can result in disciplinary procedures.

While Charter rights and human rights are reserved to natural persons, I do concede that to the extent a legal person can hold religious beliefs, Trinity Western University should be able hold, practice and encourage religious beliefs and practices. However, there is a difference between holding, practicing and encouraging religious beliefs and practices, on the one hand, and imposing those beliefs and practices on another under threat of sanction.

It is not in holding or sharing its discriminatory beliefs about sexual intimacy that Trinity Western University runs afoul of basic principles of human rights. Rather, it runs afoul of them by requiring faculty, staff and students to abide by those rules.

This submission represents solely the views of the author and does not necessarily reflect the views of any other person or organization.

I do not object to Trinity Western University banning activities that are otherwise perfectly legal – such as drinking alcohol and smoking on campus, drunkenness or the use of pornography. Those are blanket restrictions and apply in a non-discriminatory manner. Similarly, a blanket, non-discriminatory ban on sexual activity by anyone signing the community covenant would in my opinion be acceptable.

However, we are not faced with a non-discriminatory ban on sexual expression, but rather a restriction on who may or may not engage in sexual expression based on two prohibited grounds of discrimination: marital status and sexual orientation.

In informal discussions with members of this and other Law Societies, I have heard the argument that Trinity Western University welcomes homosexuals to study there and it's not the sexual orientation but rather the sexual act that is prohibited. As mentioned above, my issue is not with the ban but its discriminatory effect. Further, the Supreme Court of Canada has rejected the distinction between homosexual status and conduct:

Just as the *Charter* protects religious beliefs and religious practice as aspects of religious freedom, so too should it be recognized that sexual orientation encompasses aspects of "status" and "conduct" and that both should receive protection.²

In her dissent in the *Trinity Western University v. College of Teachers* case cited above, Justice L'Heureux-Dubé also dealt with this distinction (the majority did not address this question and decided the question on other grounds):

69 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. But, in the words of the intervener EGALÉ, “[r]equiring someone not to act in accordance with their identity is harmful and cruel. It destroys the human spirit. Pressure to change their behaviour and deny their sexual identity has proved tremendously damaging to young persons seeking to come to terms with their sexual orientation” (factum, at para. 34). The status/conduct or identity/practice distinction for homosexuals and bisexuals should be soundly rejected, as *per* Madam Justice Rowles: “Human rights law states that certain practices cannot be separated from identity, such that condemnation of the practice is a condemnation of the person” (para. 228). She added that “the kind of tolerance that is required [by equality] is not so impoverished as to include a general acceptance of all people but condemnation of the traits of certain people” (para. 230). This is

² Egan. v. Canada, [1995] 2 SCR 513 at page 518.

not to suggest that engaging in homosexual behaviour automatically defines a person as homosexual or bisexual, but rather is meant to challenge the idea that it is possible to condemn a practice so central to the identity of a protected and vulnerable minority without thereby discriminating against its members and affronting their human dignity and personhood.

70 As another preliminary matter, I would emphasize the relevance of the United States Supreme Court's decision in *Bob Jones University v. United States*, 461 U.S. 574 (1983). In that case, the court denied tax-exempt status to a religious institution that at the time prohibited interracial dating and marriage based on apparently sincerely held religious beliefs. Burger C.J. for the court wrote that "there can no longer be any doubt that racial discrimination in education violates deeply and widely accepted views of elementary justice" (p. 592). He added that "Bob Jones University . . . contends that it is not racially discriminatory. It emphasizes that it now allows all races to enroll, subject only to its restrictions on the conduct of all students, including its prohibitions of association between men and women of different races, and of interracial marriage" (p. 605). This American case provides an example, namely a ban on interracial dating and marriage, that is difficult to distinguish in a principled way from the ban on homosexual behaviour at issue here. In my view, to paraphrase Burger C.J., there can no longer be any doubt that sexual orientation discrimination in education violates deeply and widely accepted views of elementary justice.

The discussion by Justice L'Heureux-Dubé of the *Bob Jones University v. United States* case is helpful in the parallel it creates. Today, in Canada, should we accept a law school that, while admitting persons of all races, bans sexual expression between people of different races? I suspect the answer is no. Why then should we accept a law school that, while admitting persons of all sexual orientations and marital statuses, bans sexual expression for some based on their sexual orientation and marital status? Sexual orientation and marital status are prohibited grounds of discrimination to the same extent as race is – treating them differently creates a hierarchy of human rights, an approach that has been rejected by the Supreme Court.³

Non-discrimination is a fundamental Canadian value, and approving a law school such as the one at Trinity Western University that puts discrimination into practice is a threat to that value. As a Law Society, we have an obligation to protect the public interest in everything that we do. It is contrary to the public interest that the law be taught in a discriminatory environment and thus we should amend the Rules of the Law Society to allow us to refuse approval for law schools that practice discrimination.

³ See, for example, *Dagenais v. Canadian Broadcasting Corp.* [1994] 3 SCR 835

The ‘special objects’ or ‘primary purpose’ of Trinity Western University and the threat to the supremacy of the rule of law

One must also ask how exactly is Trinity Western University allowed to operate at all given its discriminatory practices. The answer lies in section 41 of British Columbia’s *Human Rights Code*:

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.

Note that the parallel provision in Nunavut’s *Human Rights Act* is much more limited and only applies to employment:

- 9 (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.

Were it based in Nunavut, Trinity Western University would run afoul of the *Human Rights Act*. As noted, the exception only applies with respect to employment. Therefore, any discrimination against students based on the prohibited grounds of discrimination would not be valid in any case.

Further, with respect to faculty and employees, it is necessary to look at the “special objects” in respect of which the law school at Trinity Western University is being established. The teaching of law is not in itself a special object. Trinity Western University’s Statement of Faith, signed by all faculty, however is instructive in describing the “special objects” of the university. The second object in particular is especially relevant:

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2. God's gospel is authoritatively revealed in the Scriptures.

We believe that God has spoken in the Scriptures, both Old and New Testaments, through the words of human authors. As the verbally inspired Word of God, the Bible is without error in the original writings, the complete revelation of His will for salvation, and the ultimate authority by which every realm of human knowledge and endeavour should be judged. **Therefore, it is to be believed in all that it teaches, obeyed in all that it requires, and trusted in all that it promises.** ⁴ [emphasis added]

While that is a valid religious belief, it is not a belief that a lawyer can always put into practice given contradictions between the Bible and Canadian law. However, having a law school that is allowed to discriminate in employment due to a 'special object' or 'primary purpose' that includes a Statement of Faith about the supremacy of scripture over Canadian law in theory and in practice is troubling – while the Canadian Constitution does recognize the supremacy of God, it does so in the generic and does not refer to any specific scripture, and goes on to recognize the rule of law.

The rule of law is a fundamental principle that must be upheld. It is even part of our oath as members of the Law Society of Nunavut: "I will uphold and maintain Her Majesty's interests and those of my fellow citizens **according to the laws in force in Nunavut**"⁵[emphasis added]. A law school that believes in and requires students to recognize the supremacy of scripture over the rule of law is a threat to the Constitution, the public and the profession. It is contradictory to state on the one hand that the new law school will teach Canadian law in a manner that is worthy of approval and then on the other hand requiring all faculty to sign a statement that they believe in the scriptures and that the scriptures must be obeyed in all that they require.

It is thus questionable whether or not Trinity Western University will *truly* provide a curriculum of study that substantially conforms with the National Requirement adopted by the Federation of Law Societies of Canada. To be conforming, in my opinion, the curriculum should not be tainted by a faculty that has signed on to a statement that scripture must be obeyed in all that it requires, with no exception for the rule of law.

Thus, to the extent that Trinity Western University could potentially discriminate in employment were it located in Nunavut, its special objects that would justify doing so offend a foundational principle of Canadian constitutional law: the rule of law.

⁴ Available at <http://twu.ca/divisions/hr/employee/documents/statement-of-faith.pdf>

⁵ *Legal Profession Act*, s. 20(2)

The Statement of Faith has also raised questions about academic freedom at Trinity Western.⁶

Conclusion

While reasonable people can debate about the extent of human rights, the universality of those rights is rarely up for debate. In Nunavut, the legislature has decided what the extent of human rights is. In making decisions about whether or not to approve a law school based on human rights concerns, the appropriate guide is our own *Human Rights Act*.

This is not a question of extra-territorial application of that Act, but rather applying it to the decisions that we make right here about law schools whose graduates want to practice right here.

Trinity Western University is in its rights to act how it wishes within the laws applicable to it in British Columbia, but once it requests for approval here, we need to scrutinize it through the lens of human rights that we as Nunavummiut have agreed upon through our Legislature: the *Human Rights Act*. If a law school, any law school, falls afoul of the principles of human rights as understood in Nunavut, it would be contrary to the public interest to approve such a university.

Note that, in principle, I am not opposed to a law school that is affiliated with a religious institution. However, that affiliation should not extend to practices which threaten the Constitution, the public interest or the profession.

As note above, Trinity Western has failed here due to

- discriminatory **conduct** based on two prohibited grounds of discrimination: marital status and sexual orientation
- only hiring staff that agree to recognize the **supremacy of scripture** that must be obeyed in all that it requires as opposed to **the rule of law**, thereby threatening the integrity of the curriculum

Therefore, I believe that the appropriate course of action for the Law Society is to adopt the principles of the motion that I presented at the 2014 Annual General Meeting and amend the rules accordingly, particularly only approving law schools that:

- provides a curriculum of study that is substantially in conformity with the “National Requirement” of adopted by the Federation of Law Societies of Canada; and

⁶ <http://www.macleans.ca/education/uniandcollege/academic-freedom-at-christian-universities/>

- provides equal opportunity and equal treatment without discrimination on the basis of any of the prohibited grounds of discrimination enumerated in subsection 7(1) of our *Human Rights Act*

Notes on procedure

With respect to the procedure chosen by the Executive of the Law Society for this approval process, I am somewhat disappointed.

When I agreed to postpone a vote on my motion during the 2014 Annual General Meeting, it was prompted by two statements from the Executive:

- the Federation of Law Societies of Canada was looking into the issue, and the Executive wanted a delay in order to see the outcome of those discussions
- the Executive would strike an ad hoc committee to study and report on the issue

The Memorandum from the Executive concerning the Roundtable Discussion in no way addresses the discussions of the Federation of Law Societies of Canada.

Further, no ad hoc committee was set up to study and report on the issue.

My motion was deferred until the 2015 Annual General Meeting. I believe it would be highly inappropriate for the Executive of the Law Society to make any decision with regard to the approval of Trinity Western University while a motion that would have an effect of that decision pending. The Executive should let the will of the members of the Law Society be heard regarding the rule amendment prior to making any decision.

Sincerely,
Thomas Ahlfors