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Commentary/Commentaire

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Elaine Craig

L'Université Trinity Western (l'UTW), une école chrétienne privée en Colombie-Britannique, pourrait devenir la première faculté de droit chrétienne du Canada. Trinity Western pratique la discrimination fondée sur l'orientation sexuelle tant dans sa politique d'embauche que dans sa politique d'admission. On a aussi constaté qu'elle entrave la liberté académique. Les établissements dont les politiques discriminatoires vont à l'encontre des valeurs juridiques fondamentales ne sont pas compétents pour procurer une formation juridique. La Fédération des ordres professionnels de juristes du Canada, l'organisme national qui coordonne les 14 ordres professionnels du Canada, ne devrait pas approuver des programmes d'établissements qui ont des politiques discriminatoires. La décision de ne pas approuver la demande de l'UTW résisterait à une contestation judiciaire de celle-ci. Le contexte juridique dans lequel une décision de la Fédération ferait l'objet d'un examen judiciaire a changé depuis que la Cour suprême du Canada a tranché en faveur de Trinity Western dans l'arrêt Université Trinity Western c B.C. College of Teachers. La décision de la Fédération serait examinée selon la norme de la décision raisonnable plutôt que de la décision correcte. Considérant la mission, le mandat et les exigences académiques actuelles de la Fédération, une décision de rejeter la demande de l'UTW serait confirmée par les tribunaux parce qu'elle est raisonnable. L'UTW devrait être libre de faire de la recherche et de l'enseignement conformément à ses engagements religieux. L'UTW ne devrait cependant pas être autorisée à imposer au public un programme fondé sur la religion qui ne peut pas être en mesure de fournir une formation juridique conforme à ce que les organismes de réglementation de

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la profession juridique au Canada ont reconnu comme nécessaire pour protéger le public.

Trinity Western University (TWU), a private Christian school in British Columbia is posed to become Canada's first Christian law school. Trinity Western discriminates on the basis of sexual orientation in both its hiring and admissions policies. It has also been found to violate academic freedom. Institutions with discriminatory policies that are antithetical to fundamental legal values are not competent providers of legal education. The Federation of Law Societies of Canada, the national coordinating body for Canada's fourteen law societies, should not approve programs from institutions with discriminatory policies. A decision not to approve TWU's application would survive a court challenge by TWU. The legal framework within which a decision of the Federation would be judicially reviewed has changed since the Supreme Court of Canada ruled in favour of Trinity Western in Trinity Western v B.C. College of Teachers. The Federation's decision would be reviewed on a standard of reasonableness rather than correctness. Based on the Federation's mission, mandate, and current academic requirements, a decision to deny TWU's application would be upheld as reasonable by the courts. TWU should be free to pursue research and education in a manner in keeping with its religious commitments. TWU should not be permitted to impose upon the public a religiously grounded program that is incompetent to deliver a legal education consistent with what the regulators of the law profession in Canada have identified as necessary to protect the public.

“Never admit more than five Jews, take only two Italian Catholics, and take no blacks at all.”¹

Trinity Western University Applies for Law School

Should a self-regulating legal profession require that the institutions that educate its members not discriminate on the basis of irrelevant personal characteristics in their hiring and admissions policies? Should the organization charged with protecting the public interest by serving as the gatekeeper to the profession of law concern itself with whether the institutions that it accredits are consistent with the fundamental tenets of Canada's legal system? In regulating the law schools that produce this country's next generation of lawyers, should the governing bodies of the legal profession require that the policies of these institutions respect equality? The Federation of Law Societies of Canada (the Federation), the national coordinating body for Canada's fourteen law societies, will provide its answers to these

1. These were the dean of medicine's instructions to the admissions committee at Yale Medical School in 1935. David M Oshinsky, *Polio: An American Story* (New York: Oxford University Press, 2005) at 98.

important questions when it decides whether to approve a law degree program proposed by Trinity Western University (TWU).

The *Canadian Charter of Rights and Freedoms* and the human rights regimes in every province of Canada prohibit discrimination on the basis of sexual orientation.² Respect for, and protection of, vulnerable minorities is a fundamental principle of constitutional law in Canada.³ Embedded in this aspect of supreme Canadian law is respect for equality and the rejection of discrimination on the basis of factors such as sexual orientation (or race or physical disability). In short, equality is one of the fundamental legal values on which Canada's system of law and governance is based.⁴ TWU, which has announced its intention to launch a law school pending approval by the government of British Columbia and the Federation, discriminates on the basis of sexual orientation.⁵ Hiring and admissions policies at TWU require all student and staff applicants to sign a community code of conduct pledging not to engage in same-sex sexual intimacy.⁶ According to the Supreme Court of Canada, these hiring and admissions policies discriminate against gays and lesbians.

The Court in *Trinity Western v British Columbia College of Teachers* suggested that TWU's discriminatory policies were not unlawful because of the exemption provided to religious organizations under section 41 of British Columbia's human rights legislation.⁷ However, the Court recognized that if a government

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2. *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 15. See, for example, *Human Rights Code*, RSBC 1996, c 210; *Human Rights Code*, RSO 1990, c H 19.
 3. *Reference re Secession of Quebec*, [1998] 2 SCR 217, 161 DLR (4th) 385.
 4. *Vriend v Alberta*, [1998] 1 SCR 493 at para 67, 156 DLR (4th) 385.
 5. Trinity Western University (TWU), "Proposed School of Law at Trinity Western University" (18 June 2012), online: TWU <<http://twu.ca/academics/proposed-school-of-law/default.html>>.
 6. TWU community members are required to pledge that they will abstain from "sexual intimacy that violates the sacredness of marriage between a man and a woman." TWU, *Community Covenant Agreement: Our Pledge to One Another* (nd) at 3, online: TWU <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>> [*Covenant Agreement*]. The covenant's bar on same-sex sexual activity was revised in 2009. In its earlier version, the version at issue in *Trinity Western University*, *infra* note 7, the community standards document specifically named "homosexual behavior" as a biblically condemned practice (at 4). In its current version, the covenant bars "homosexual behavior" by requiring members of the TWU community to promise that sexual intimacy will be limited to marital relationships between a man and a woman. It then cites scripture biblically condemning same-sex sexual intimacy in support of this covenant. TWU's community covenant today, just as it did in its previous incarnation, imposes unfavourable differential treatment on the basis of sexual orientation. TWU is neither apologetic about, nor (despite the re-wording of its covenant) does it try to conceal, this discrimination. The university has a non-discrimination policy that purports to protect against discrimination based on every protected ground of discrimination except sexual orientation (and, of course, religion). TWU, "Employment Opportunities," online: TWU <<https://twu.ca/divisions/hr/join/>> ["Employment Opportunities"].
 7. *Trinity Western University v British Columbia College of Teachers*, [2001] 1 SCR 772, 199 DLR (4th) 1 [*Trinity Western University*]. The Court found that TWU policies create "unfavourable differential treatment" on the basis of sexual orientation (at para 34). Section 41(1) of British Columbia's *Human Rights Code*, *supra* note 2, reads: "If a charitable, philanthropic,

actor adopted TWU's policies it would violate section 15 of the *Charter* and that if a public university adopted TWU's policies it would violate human rights legislation. By requiring as a condition of admission or employment that students and staff pledge not to engage in same-sex sexual behaviour that would be acceptable for opposite-sex couples, TWU policies create "unfavourable differential treatment" on the basis of sexual orientation.⁸ Applicants who refuse to make this pledge will not be hired by, nor admitted to, the university.⁹ According to TWU's policies, a breach of this covenant can result in dismissal from the university.¹⁰ As the Supreme Court of Canada found, the impact of TWU's mandatory code of conduct excludes applicants to the university on the basis of sexual orientation.¹¹

In addition to its discriminatory practices, according to the Canadian Association of University Teachers (CAUT), TWU also violates academic freedom.¹² An ad hoc investigatory committee established by the CAUT to inquire into TWU's policies and practices¹³ concluded that "there is no question that Trinity Western University violates the commitment to academic freedom that is the foundational bedrock of the university community in Canada and internationally."¹⁴ The committee based its findings on a review of TWU's mandate, policies, and core values as reflected in the university calendar and human resource documents such as TWU's mandatory statement of faith. The committee found that "unwarranted and unacceptable constraints on academic freedom" were revealed by TWU's own statement of academic freedom, the requirement that all academic staff members annually sign TWU's statement of faith, and the institution's articulated mandate and core

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." The applicability of section 41 to TWU was not directly at issue in this case nor was it examined in any great detail.

8. *Trinity Western University*, *supra* note 7 at para 34.
9. *Covenant Agreement*, *supra* note 6.
10. Trinity Western University, *2012-2013 Student Handbook* (nd) at 23, online: TWU <<http://twu.ca/studenthandbook/student-handbook-2012-2013.pdf>> [*Student Handbook*]. Whether a student has yet been expelled from TWU on this basis is not relevant. The handbook makes clear that students who cannot or will not comply with this covenant are not welcome at TWU. As the Supreme Court of Canada determined in *Vriend v Alberta*, [1988] 1 SCR 493, fear of discrimination itself constitutes harmful and unfavourable treatment. (I am grateful to Mathieu Bouchard and Amy Sakalaskous for drawing this point to my attention.)
11. *Trinity Western University*, *supra* note 7 at paras 25, 34.
12. In 2009, the Canadian Association of University Teachers (CAUT) placed TWU on a list of institutions in Canada that violate academic freedom. "Trinity Western Added to CAUT's Faith Test List," *CAUT Bulletin* (8 September 2009), online: Canadian Association of University Teachers <http://www.cautbulletin.ca/en_article.asp?ArticleID=2926>.
13. *Ibid.*
14. William Bruneau and Thomas Friedman, *Report of an Inquiry Regarding Trinity Western University* (October 2009) at 4, online: CAUT <http://www.caut.ca/uploads/TWU_Report.pdf>.

values.¹⁵ In sum, the Federation has been asked to give approval to a new law degree program at an institution with policies that discriminate on the basis of sexual orientation (according to the Supreme Court of Canada) and that violate academic freedom (according to the CAUT).

The purpose of this article is threefold. First, it discusses the Federation's authority to approve new law schools and argues that it should not approve programs from institutions with discriminatory policies. Institutions with discriminatory policies that are antithetical to fundamental legal values are not competent providers of legal education.

Second, it demonstrates that a law program delivered by TWU would not comply with the Federation's academic requirements for Canadian law schools. TWU's violation of academic freedom and its discriminatory policies make it incapable of delivering a law program in compliance with the Federation's academic requirements on ethics and professionalism. The impact of TWU's discriminatory admission and hiring practices jeopardizes its ability to competently deliver a program that develops an appreciation of the ethical duty not to discriminate. The impact of TWU's requirement that all teaching and research occur from a stated religious perspective jeopardizes its ability to competently deliver a program that teaches critical thinking about ethical issues in law.

Third, the article explains why a decision not to approve TWU's application would likely survive a court challenge by TWU (despite TWU's successful challenge of the denial of an application by TWU for approval of a fully accredited teacher education program in 1996). The legal framework within which a decision of the Federation would be judicially reviewed has changed since the Supreme Court of Canada ruled in *Trinity Western v B.C. College of Teachers*.¹⁶ The Federation's decision would be reviewed on a standard of reasonableness rather than correctness. Based on the Federation's mission, mandate, and current academic requirements, a decision to deny TWU's application would be upheld as reasonable by the courts. In fact, given TWU's policies, it would be unreasonable for the Federation to approve a law degree program from TWU.

The teaching and study of law within religious institutions and universities has a long history. The arguments advanced in this article do not seek to limit or oppose religiously based teaching and study of law in a private religious institution. The Federation's mandate concerns the professional attributes required of a program of legal study. The learning environment and intellectual commitments at TWU are incompatible with preparation in the competencies required by the Federation for the practice of law. TWU should be free to pursue research and education in a manner in keeping with its religious commitments. TWU should not be permitted to impose upon the public a religiously grounded program that is incompetent to deliver a legal education consistent with what

15. *Ibid* at 10.

16. *Trinity Western University*, *supra* note 7.

the regulators of the law profession in Canada have identified as necessary to protect the public.

The Federation Has the Authority to (Dis)Approve New Law Degree Programs

In response to concerns about a possible TWU law school raised by the Canadian Council of Law Deans, the Federation implied that it lacked the authority to approve new law programs: “[L]aw societies have no jurisdiction to approve law schools, which is within provincial government authority and responsibility.”¹⁷ It is true that provincial governments have the authority and responsibility to decide whether to allow a university to confer a bachelor of laws degree.¹⁸ However, each of the fourteen law societies in Canada is authorized by statute to determine the licencing criteria for lawyers in its province or territory.¹⁹ This includes the authority to decide whether to accept applicants to the bar with law degrees from a particular program.²⁰ In other words, provincial governments decide whether their universities can offer a law degree program. Law societies decide whether graduates of a particular law degree program will be eligible for admission to the practice of law.

The fourteen law societies have delegated authority to the Federation to review and make recommendations to them with respect to whether they should accept applicants to the bar from new Canadian law schools.²¹ The Federation is the coordinating body for the fourteen law societies in Canada. In a sense, the Federation is the fourteen law societies. Perhaps another way to think of it is as a committee comprised of each of the fourteen law societies. It is a committee with delegated authority including the authority to make recommendations (which will be treated as determinative²²) on whether the law societies should accept applicants to the bar from new Canadian law degree programs. The ultimate responsibility for the

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17. Letter from President of the Federation Gérald Tremblay to William Flanagan, President of the Council of Canadian Law Deans (3 December 2012) [Letter from President] [on file with author].
 18. This article does not take a position on whether the BC government should allow TWU to grant law degrees. That is a separate issue requiring a different analysis, different parties, and different considerations.
 19. See, for example, *Legal Profession Act*, SBC 1998, c 9, ss 19, 20(1)(a), and 21(1)(b).
 20. *Ibid.* See, for example, section 21(1)(b): “The benchers may make rules to do any of the following: (b) establish requirements, including academic requirements, and procedures for call to the Bar of British Columbia and admission as a solicitor of the Supreme Court.”
 21. Federation of Law Schools of Canada (FLS), *Report of the Ad Hoc Committee on Approval of New Canadian Law Degree Programs on Applications by Lakehead University and Thompson Rivers University* (January 2011) at 2, online: FLS <http://www.flsc.ca/_documents/Task-Force-Report-new-law-schools.pdf>.
 22. Letter from President, *supra* note 17, confirming that the Approval Committee is to make the final determination on compliance with the FLS’s academic requirements. Whether, as a matter of administrative law, this delegation is legitimate is a separate issue. Regardless, the ultimate responsibility for these decisions falls to the member law societies.

decision to approve a new law degree program resides with each individual law society. Each law society could, at any time, change its approval process such that it no longer delegates responsibility for this decision to the Federation.

In this sense, each of the member law societies in Canada is responsible for a decision by the Federation to approve a TWU law degree. If the Federation fails to live up to the expectations of its member law societies by not exercising its delegated authority in a manner that protects the public interest and reflects the academic requirements that the law societies have agreed upon, then its authority to approve new programs should be withdrawn. Given that the ultimate responsibility for approval falls on them, an individual law society that does not want to be attributed with approving a law school that discriminates on the basis of sexual orientation will need to withdraw authority from the Federation if it accepts the TWU's proposal. However, at this point, it is the Federation (through delegation from its member law societies) that is charged with approving new law degree programs in Canada for the purposes of admission to the bar. The Federation has in turn created a Canadian Common Law Program Approval Committee (Approval Committee). The Approval Committee has a mandate to make recommendations to the Council of the Federation in respect of applications by Canadian universities for approval by the Federation of new academic programs.²³

In addition to its assertion to the Canadian Council of Law Deans that the law societies do not have jurisdiction to approve new law schools, the Federation also stated that it has not been given a mandate by the law societies to consider a proposed law school's hiring and admissions policies.²⁴ In its response to the law deans, the Federation has asserted that the scope of its inquiry is limited to determining a law school program's compliance with the current national requirement. The national requirement is the Federation's newly adopted national standard for academic requirements of a Canadian law degree. The standards are expressed in terms of "competencies in basic skills, awareness of appropriate ethical values and core legal knowledge."²⁵ According to the Federation, "[t]he national requirement . . . does not contemplate or authorize an inquiry into the admission philosophy of a law school program . . . or an investigation into whether the admissions policies of an educational institution are consistent with federal or provincial law."²⁶ The Federation has suggested that "the Approval Committee has no authority to go beyond the specific provisions of its mandate. It is not a policy-

23. FLS, *National Requirement for Approving Canadian Common Law Degree Programs* (nd), online: FLS <<http://www.flsc.ca/en/national-requirement-for-approving-canadian-common-law-degree-programs>>.

24. Letter from President, *supra* note 17.

25. FLS, *Task Force on the Canadian Common Law Degree: Final Report* (October 2009) at 4, online: FLS <[http://www.flsc.ca/_documents/Common-Law-Degree-Report-C\(1\).pdf](http://www.flsc.ca/_documents/Common-Law-Degree-Report-C(1).pdf)> [*Task Force*].

26. Letter from President, *supra* note 17.

making committee. Its primary stated function is to ‘determine law school program compliance with the national requirement’.”²⁷

These responses by the Federation are insufficient. First, there is no legal impediment to the Federation, through its member law societies, changing the mandate of the Approval Committee. This reality is discussed in the paragraphs to follow. Second, as discussed in the third part of this article, even under this purportedly limited authority described by the Federation, the TWU’s application should be denied. The TWU’s proposed program would not meet the national requirement as currently articulated by the Federation.

In *Trinity Western University*, the majority found that section 4 of the *Teaching Profession Act*, in giving the British Columbia College of Teachers jurisdiction to set standards for admission to the profession of teaching, authorizes the college to consider discriminatory practices in assessing a teacher education program.²⁸ The Court found that “[s]chools are meant to develop civic virtue and responsible citizenship, to educate in an environment free of bias, prejudice and intolerance. It would not be correct . . . to limit the scope of s. 4 to a determination of skills and knowledge.”²⁹ The law societies would be given at least as broad an authority under their enabling statutes to inquire into discriminatory practices by the law schools that they (through the Federation) regulate.

The Federation is the gatekeeper to the profession of law in Canada. As the Federation notes, the responsibility for determining who is admitted to the profession of law is enormously significant: “[E]ach decision to admit an applicant tells the public that the newly licensed lawyer has met high standards of learning, competence and professional ethics.”³⁰ In order to determine the appropriate authority for its Approval Committee, the Federation need only look to its own vision, mission, and value statements. The Federation describes its mission as acting in the public interest by, in part, “[p]romoting the cause of justice and the Rule of Law.”³¹ It purports to pursue this mission in a manner that is “[f]ocused on the public interest,” “[r]esponsive and accountable,” and “[c]onsistent with the highest standards of professionalism, excellence, ethics and good governance.”³² The Federation takes this mandate from the statutes governing the law societies in each province.³³

To abdicate its gatekeeping responsibility respecting admission to the profession by hiding behind the self-imposed limits it describes in its response to the Council of Canadian Law Deans is inconsistent with the Federation’s own mission to act in

27. *Ibid.*

28. *Teaching Profession Act*, RSBC 1996, c 449 (as replaced by the *Teachers Act*, SBC 2011, c 19, s 99(2) (effective 9 January 2012).

29. *Trinity Western University*, *supra* note 7 at para 13.

30. *Task Force*, *supra* note 25 at 15-16.

31. FLS, *Mission Statement*, online: FLS <<http://www.flsc.ca/en/our-mission/>> [*Mission Statement*].

32. FLS, *Values Statement*, online: FLS <<http://www.flsc.ca/en/our-mission/>>.

33. See, for example, *Legal Profession Act*, *supra* note 19.

the public interest in a responsive and accountable fashion. It is not in the public interest to train lawyers in an institution with discriminatory policies. It is true that TWU, as a privately funded, religious institution, may be exempted from certain of the protections against discrimination created by British Columbia's *Human Rights Code*.³⁴ Without this exemption, its policies would certainly violate human rights law protections. More importantly, the wording of the religious exemption granted to TWU under section 41 of British Columbia's human rights legislation is particular to that province.³⁵ The Supreme Court of Canada found that TWU's discrimination is not unlawful in British Columbia. However, it may be unlawful in other Canadian jurisdictions. The majority of provinces do not have religious exemption clauses parallel to the one found in the British Columbia legislation. The human rights legislation in provinces such as Alberta and Manitoba do not include an exemption provision analogous to the BC provision. In other provinces, such as Saskatchewan and Nova Scotia, the exemption that is included is limited to employment.³⁶ Presumably, an exemption limited to employment contracts would not apply to student admission policies such as the one found in TWU's covenant. Given the variance in human rights codes and the scarcity of case law interpreting exemption clauses, it would be ill-advised for the Federation to assume that TWU's discriminatory policies are exempted under legislation such as the *Alberta Human Rights Act*, the *Saskatchewan Human Rights Code*, or the *Nova Scotia Human Rights Act*. Presumably, none of these law societies would accept a Federation decision to approve a law degree from an institution whose policies would be unlawful if it were situated in any of their provinces. Responsive and accountable service in protection of the public interest requires the Federation to examine whether TWU's discrimination would be exempted in the province of every law society it represents. This is particularly true given its role in stewarding the national mobility agreement between law societies in Canada. Before accepting a decision by the Federation to approve a TWU law degree, each of the member law societies in Canada would certainly want to ascertain whether TWU's discriminatory policies violate human rights legislation in their jurisdictions.

The law societies should also consider the possibility that a decision by them to approve a program from an institution that discriminates in its admissions policies would violate section 15 of the *Charter*. The *Charter* applies to a law society's policies and regulations regarding eligibility for admission to the bar.³⁷ A law society that adopted criteria for admission to the bar that precluded eligibility for gays and lesbians would violate the *Charter*. By adopting a Canadian common law degree as

34. *Human Rights Code*, *supra* note 2.

35. *Ibid*, s 41. See also *Trinity Western University*, *supra* note 7.

36. *Human Rights Act*, RSNS 1989, c 214, *Alberta Human Rights Act*, RSA 2000, c A-25.5, *Saskatchewan Human Rights Code*, SS 1979, c s-24.1, *Human rights Code*, CCSM, c H175.

37. *Black v Law Society of Alberta*, [1989] 1 SCR 591.

a criteria for eligibility, the law societies have delegated part of their gatekeeping authority to Canada's law schools. The admissions process at approved law schools serves a gatekeeping function for the law societies. In this sense, the law societies have downloaded to the law schools part of their statutorily authorized discretion to establish criteria for admission to the practice of law. Law societies, as is the case with government actors, cannot avoid their *Charter* obligations by doing indirectly (through delegation) what they are not permitted to do directly. Think of it this way. The government of Canada is not permitted to discriminate on the basis of sexual orientation in its hiring policies. Assume a particular government department outsourced its hiring process to a private human resource firm. The exercise of hiring discretion by that private firm would be subject to *Charter* scrutiny. The government cannot avoid the application of the *Charter* by using private third party entities to carry out some of its activities.³⁸ The same is true for law societies. When a law society approves a law degree program from an institution, it uses the admissions process of that institution to serve as a preliminary gatekeeper to the practice of law. It has in essence adopted the institution's admissions process. A law society that approves a law degree program from an institution that discriminates on the basis of sexual orientation in its admissions policies has adopted for itself a criteria for eligibility that violates section 15 of the *Charter*. Presumably, the member law societies would be disinclined to accept a Federation decision to approve it if it could result in a *Charter* violation on their part.

The Federation should also consider the fact that if any of Canada's current law schools, which are neither private nor religiously based, adopted the policies employed by TWU they would violate the human rights legislation in their respective provinces. To approve a new law school with policies that would violate human rights legislation if adopted by any of the current Canadian law schools is not to "promote the cause of justice and the Rule of Law."³⁹

There is much controversy within the legal academy regarding the decision of Canada's law societies to articulate the academic criteria required of Canadian law degree programs.⁴⁰ The advisability of the Federation's decision to impose upon Canadian law schools program requirements for eligibility to the bar is not at issue in this article. The fact is that the law societies have stepped into a regulatory capacity in relation to Canadian legal education. Given this decision, it is incumbent upon them to conduct this regulation in a principled and coherent manner. Nor do the arguments advanced in this article advocate for an expanded intrusion by the Federation into the delivery of legal education in Canada. First, the Federation could justifiably be more rigorous in approving new law degree

38. *Eldridge v British Columbia (Attorney General)*, [1997] 2 SCR 624.

39. *Mission Statement*, *supra* note 31.

40. See, for example, Canadian Association of Law Teachers and Canadian Law and Society Association, "Response to the Consultation Paper of the Task Force on the Canadian Common Law Degree of the Federation of Law Societies of Canada, December 15, 2008" (2009) Canadian Legal Education Annual Review 151.

programs than in its review of Canadian law schools with decades or centuries of experience and reputation educating law students. Second, if any of Canada's current law schools were to adopt policies that violate human rights legislation, then they too should be considered non-compliant with the Federation's requirements for approval. Third, rejecting a law degree program on the basis that it is offered by an institution with discriminatory policies does not demand significant, substantive scrutiny of a law school's curriculum or pedagogical approaches. The Federation is not well positioned, nor would it be desirable for it, to inquire into the particular pedagogical practices of a specific course or law teacher. The arguments advanced here relate specifically to institutional policies. Within an institutional environment that protects academic freedom and that rejects discriminatory policies, all manner of diversity of perspective, background, and pedagogical approach should be permitted to flourish or not, based on its own merits. However, it is reasonable to conclude that concepts of justice, equality, non-discrimination, inclusivity, and anti-oppression—foundational tenets of Canada's legal system⁴¹—cannot properly be taught, from whatever pedagogical approach, in a learning environment created by an institution with policies that are explicitly (and unapologetically) discriminatory.

For the Federation's purposes, the issue is not only whether TWU's discriminatory practices contravene human rights code regimes. The concern, from the Federation's perspective, should also be with the impact TWU's policy will have on TWU's ability to competently deliver a program that develops an appreciation and understanding of fundamental legal principles and values such as the concept of non-discrimination. The untenable nature of the Federation's initial response to this question can be illustrated by reference to a plausible hypothetical. What if instead of a policy prohibiting same-sex sexual intimacy TWU required its members to refrain from mixed-race sexual intimacy? Would the Federation approve a law degree from an institution with an anti-miscegenation policy that excluded applicants to its law school on the basis of race? Imagine that the Approval Committee was presented with an application to approve a law school program from an institution with a covenant identical in all respects to that of TWU except that wherever the TWU's text reads "the sacredness of marriage between a man and a woman," the institution's text instead read "the sacredness of marriage between a man and a woman of the same race." And wherever references to Bible text are made with respect to homosexuality, additional references to Biblical passages are made with respect to interracial sexual relationships.⁴² If the Council of

41. *Reference re Secession of Quebec*, *supra* note 3.

42. The analogy here is apt. It is not an implausible analogy. Bob Jones University, a private Christian university in South Carolina, ended its ban on interracial dating as recently as 2000. (I am grateful to Jocelyn Downie for bringing this analogy to my attention.) See "Bob Jones University Ends Ban on Interracial Dating," *CNN US* (30 March 2000), online: CNN <http://articles.cnn.com/2000-03-04/us/bob.jones_1_racist-school-ends-ban-bushs-visit?_s=PM:US>. See Serena Mayeri, *Reasoning from Race: Feminism, Law and the Civil Rights Revolution* (Cambridge, MA:

Canadian Law Deans wrote to the Federation to raise concerns about the discriminatory nature of an anti-miscegenation covenant, would the Federation respond that it cannot refuse to approve the program because to consider the covenant lies outside the Approval Committee's authority? A religiously based anti-miscegenation policy is analogous to TWU's anti-gay policy. Discrimination based on racist religious beliefs would also be exempted under section 41 of British Columbia's *Human Rights Code*. There is no principled foundation upon which to approve a law school program delivered by a private institution with religiously based homophobic policies and practices but not one delivered by a private institution with religiously based racist policies and practices.

Similarly, the Federation should ask itself what it would do if TWU's covenant discriminated on the basis of sex. Would a faculty with religious opposition to women's participation in public life be able to competently train men for entry into the legal profession? If the Federation is of the opinion that its current mandate to approve new law schools does not allow for an inquiry into an institution's admissions and human resource policies for the purposes of identifying discrimination, then it should seek approval from the law societies to change its mandate. Again, there is no legal impediment to the law societies making this change. Rather, it is their responsibility, as the gatekeepers to the profession, to ensure that the process they adopt for approving new law degrees is sufficiently rigorous and reflects, protects, and promotes the core values of the profession and the legal system, most notably, in this instance, anti-discrimination.

A TWU Law Degree Would Not Comply with the National Requirement

As described earlier, as a second line of defence in responding to the Council of Canadian Law Deans' expressions of concern about the TWU application, the Federation made reference to the national requirement. However, contrary to the implication of the Federation's letter, TWU's policies are highly relevant to the assessment of capacity to meet the national requirement. It is precisely on this requirement that the TWU proposal fails. In particular, because it has policies that discriminate on the basis of sexual orientation and that violate academic freedom, a TWU law school program would not meet the Federation's national requirement on ethics and professionalism.

The Federation has articulated a greater concern with ensuring competency on ethics and professionalism than with any other subject matter addressed by law schools: "Ethics and professionalism lie at the core of the legal profession."⁴³

Harvard University Press, 2011), for a discussion of the challenges with relying on race-based analogies to advance sexual minority rights arguments.

43. *Task Force*, *supra* note 25 at 4. The Federation concluded that the emphasis and focus of the national requirement should be on learning outcomes—that a focus on learning outcomes

As such, the Federation “places particular emphasis on the need for law school graduates who seek entry to law society admission programs to have an understanding of ethics and professionalism.”⁴⁴ According to the Federation, “the earlier in a lawyer’s education that inculcation in ethics and professionalism begins, the better.”⁴⁵

The ethics and professionalism competency requirement established by the Federation stipulates that an “applicant must have demonstrated an awareness and understanding of the ethical dimensions of the practice of law in Canada and an ability to identify and address ethical dilemmas in a legal context.”⁴⁶ In addition to knowledge and understanding of the ethical dimensions of practising law (such as the duty not to discriminate), the national requirement also establishes skills-based competencies in the area of ethics and professionalism. One of the skills required by the Federation is the ability to “identify and engage in *critical thinking* about ethical issues in legal practice.”⁴⁷ The statement of faith and community covenant required of its faculty, staff, and students reveal that TWU would be unable to provide a learning environment that could satisfy the ethics and professionalism competency required by the Federation. There are at least two reasons why this is the case. First, it is reasonable to conclude that an academic institution with policies that create “unfavourable differential treatment” on the basis of sexual orientation⁴⁸ is not a learning environment capable of developing an adequate understanding of the ethical duty not to discriminate. Second, TWU’s statement of faith violates academic freedom and is incommensurate with a program aimed at developing the skill to think critically about ethical issues.

TWU Is Not a Learning Environment Capable of Developing an Adequate Understanding of the Ethical Duty Not to Discriminate

One vital aspect of ethics and professionalism relates to the ethical duty not to discriminate and to the importance of human rights principles. Rule 6.3-5 of the Federation’s *Model Code of Professional Conduct* stipulates that “[a] lawyer must not discriminate against any person.”⁴⁹ The *Model Code of Professional Conduct*

“represents the appropriate regulatory approach” (*ibid* at 4). In keeping with this conclusion, the task force recommended that the Federation leave it to law schools to determine how graduates accomplish the competencies identified in their report. However, they made one exception to this approach for competencies related to professionalism and ethics.

44. FLS, *Common Law Degree Implementation Committee: Final Report* (August 2011) at 15, online: FLS <http://www.flsc.ca/_documents/Implementation-Report-ECC-Aug-2011-R.pdf> [Implementation Committee Report].

45. *Task Force*, *supra* note 25 at 35.

46. *Implementation Committee Report*, *supra* note 44 at 17.

47. *Ibid* [emphasis added].

48. *Trinity Western University*, *supra* note 7 at 34.

49. FLS, *Model Code of Professional Conduct* (as amended 12 December 2012), Commentary Rule 6.3-5 at 100, online: FLS <http://www.flsc.ca/_documents/ModelCodeRevDec2012TDBL.pdf>.

emphasizes that “[a] lawyer has a special responsibility to respect the requirements of human rights laws in force in Canada, its provinces and territories and, specifically, to honour the obligations enumerated in human rights laws.”⁵⁰ A key question in relation to an institution’s capacity to meet the national requirement with respect to ethics and professionalism is whether the institution is capable of developing students’ understanding of the ethical duty not to discriminate. To answer this question with respect to TWU’s application, the Federation should consider some of the scriptural passages that TWU compels all members of its community to comply with.⁵¹ Particularly noteworthy are those scriptural passages cited to support the covenant that TWU students, staff, and faculty not engage in same-sex sexual intimacy.⁵² These include the following: Romans 1:26: “For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature”; Romans 1:27: “In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed shameful acts with other men, and received in themselves the due penalty for their error.”⁵³

As discussed earlier, the requirement that members of the TWU community not engage in same-sex sexual intimacy either on or off campus was found by the Supreme Court of Canada to create “unfavourable differential treatment” on the basis of sexual orientation.⁵⁴ The Court recognized that such treatment, if engaged in by a public institution, would violate the human rights of gays and lesbians under section 15 of the *Charter* (if the *Charter* applied) and under Canadian human rights code regimes.⁵⁵ The Court rejected the formalistic argument that the covenant does not constitute discrimination because it prohibits sexual acts between people of the same sex rather than gay and lesbian people themselves. The Court agreed that instead the question is whether TWU’s community standards mean

50. *Ibid*, Commentary Rule 6.3 at 100.

51. All TWU programs are established and implemented according to the edict that scripture “must be the final and ultimate standard of truth, the reference point by which every other claim to truthfulness is measured.” TWU, *Core Values Statement Series No. 1: Obeying the Authority of Scripture* (5 January 1999) at 3, online: TWU <<http://twu.ca/divisions/hr/about/twu-core-values.html>> [*Core Values Statement*].

52. “[C]ommunity members voluntarily abstain from . . . sexual intimacy that violates the sacredness of marriage between a man and a woman.” *Covenant Agreement*, *supra* note 6 at 3. As discussed later in this article, it misrepresents the implications of the commitment required of members to insert the word voluntarily into the agreement. The agreement itself is not optional, and a breach of the agreement can result in suspension or expulsion. To argue that it is voluntary because sexual minorities can simply choose not to apply to TWU is to engage in the most obvious and objectionable formal equality reasoning. Women can choose not to become pregnant. Sikhs can choose to abandon their headwear. For a discussion of the inequality of formal equality reasoning, see Dianne Pothier, “Equality as a Comparative Concept: Mirror, Mirror, on the Wall, What’s the Fairest of Them All?” (2006) 33 *Supreme Court Law Review* (2d) 135.

53. *Covenant Agreement*, *supra* note 6 at n 16.

54. *Trinity Western University*, *supra* note 7 at para 34.

55. *Ibid* at para 25.

that a gay or lesbian student who signed the covenant would consider themselves accepted by the TWU community on an equal basis.⁵⁶ The majority concluded that “a homosexual student would not be tempted to apply for admission, and could only sign the so-called student contract at a considerable personal cost.”⁵⁷ The majority confirmed that the same would be true for gay and lesbian job applicants.⁵⁸

Sexual orientation is conspicuously absent from the lengthy list of grounds upon which TWU declares itself not to discriminate.⁵⁹ Other than religion, sexual orientation is the only prohibited ground of discrimination under British Columbia’s human rights legislation that is not protected by TWU’s anti-discrimination policy.⁶⁰ The fact that the discrimination perpetuated by TWU’s policies may not be unlawful in British Columbia should not be relevant to a decision as to whether a TWU law school would be in compliance with the Federation’s national requirement on ethics. In the context of this assessment, the Federation’s concern should be with the impact that TWU’s policies will have on TWU’s ability to competently deliver a program that develops students’ understanding of the ethical duty not to discriminate.

While the Federation ought not to inquire into specific course content and pedagogical approach, it should (given the regulatory role it has assumed) apply the national requirement to an institution’s policies in a manner that is cognizant of the fact that a proper legal education is multi-dimensional, textured, and contextual. It is so much more than the rote learning of doctrine and legal text. It includes relationships, role modelling, critical discussion, and experiential learning. Knowledge and understanding of an ethical rule are not the same. The Federation’s national requirement stipulates that students demonstrate a competency in both awareness and understanding of the ethical dimensions of practice.⁶¹ By including both knowledge and understanding, the national requirement must intend something more than just a competent knowledge of the actual rules of professional conduct. An understanding of the ethical dimensions of lawyering is broader than just a knowledge of the professional rules of conduct. Understanding the ethical dimensions of the practice of law must mean something like grasping the significance, implications, and importance of ethical duties such as the duty not to discriminate.

Consider then the learning environment in which TWU proposes to deliver a law program with the capacity to develop a competent understanding of a lawyer’s duty

56. *Ibid* at para 23.

57. *Ibid* at para 25; see also para 23.

58. *Ibid* at para 34.

59. “We do not discriminate on the basis of race, colour, national or ethnic origin, age, sex, marital or family status, pardoned conviction, nor physical or mental disabilities.” “Employment Opportunities,” *supra* note 6.

60. *Ibid*; *Human Rights Code*, *supra* note 2.

61. *Implementation Committee Report*, *supra* note 44 at 17.

not to discriminate. TWU discriminates against gays and lesbians in its hiring policy by stipulating that compliance with the covenant not to engage in same-sex sexual intimacy serves as a condition of employment.⁶² TWU discriminates against gays and lesbians in its admissions policy by requiring that applicants sign the community covenant and by advising applicants that those “who find themselves unable to maintain the integrity of their commitment should seek a living-learning situation more acceptable to them.”⁶³ TWU policies require students to be complicit in acts of discrimination against gays and lesbians by requiring that they sign the covenant in order to attain membership in the community and by encouraging them to “challenge one another and hold each other accountable to the *Community Covenant*.”⁶⁴ Again, TWU’s admissions and hiring policies would constitute unlawful discrimination if adopted by any of the universities currently offering law degrees in Canada.⁶⁵

An institution with policies that discriminate on the basis of sexual orientation does not have the competency to deliver a law program consistent with the national requirement on ethics and professionalism. The institutional setting at TWU, because of TWU’s community covenant, is simply not consistent with the national requirement that law programs have the capacity to develop an understanding of the ethical duty not to discriminate. The Federation should conclude that the proposed TWU law degree program does not meet the national requirement because of the institution’s discriminatory policies. This conclusion does not require the Federation to request information about, or scrutinize, the substance of any proposed course or pedagogical approach. The failure to comply with the national requirement is at an institutional level.

TWU’s Policies Violate Academic Freedom and Are Incommensurate with a Program Aimed at Developing the Skill to Think Critically about Ethical Issues

Academic criteria for approval of a law degree program under the Federation’s current national requirement includes the “skills to . . . identify and engage in critical thinking about ethical issues in legal practice.”⁶⁶ TWU’s policies are incommensurate with this requirement. TWU describes itself “as an arm of the church” and identifies its primary mandate as “first and foremost, a community of people passionately

62. *Covenant Agreement*, *supra* note 6.

63. *Student Handbook*, *supra* note 10 at 24.

64. *Ibid* at 25.

65. Human rights code regimes do apply to public universities and do prohibit discrimination on the basis of sexual orientation. See, for example, the *Canadian Human Rights Act*, RSC 1985, c H-6; Ontario’s *Human Rights Code*, *supra* note 2.

66. *Implementation Committee Report*, *supra* note 44 at 17.

committed to Jesus Christ and to God's purposes."⁶⁷ It is a disciple-making community. The university confirms that "[d]iscipleship for members of the TWU community is not an option."⁶⁸ It is mandatory. TWU's core value statements stipulate that scripture must be the "final authority for all Christian faith and life."⁶⁹ TWU's programs are established and implemented according to the edict that scripture "must be the final and ultimate standard of truth, the reference point by which every other claim to truthfulness is measured. In other words, Scripture must be our lens by which we view and evaluate our lives and the world."⁷⁰ Core to its mission, the university maintains that "[a]ll that Scripture teaches in regard to . . . ethical commitments must be wholeheartedly embraced."⁷¹

These commitments are not voluntary for members of the TWU community. The university requires that this assertion of scriptural doctrine as the final and authoritative source of truth be expressed in all teaching.⁷² Compliance with teaching from this perspective is obligatory.⁷³ Academic staff at TWU are required annually to sign a statement of faith.⁷⁴ The statement of faith requires faculty to "agree with . . . and agree to support . . . *at all times*" the position that the Bible is "the ultimate authority by which every realm of human knowledge and endeavor 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."⁷⁵ All students, faculty, and staff are required to pledge "acceptance of the Bible as the divinely inspired, authoritative guide for personal and community life."⁷⁶ In other words, academic staff are required to teach students that the Bible is the ultimate, final, and authoritative guide by which ethical decisions are to be made. Students are required to pledge acceptance of the scripture as the ultimate source of authority by which to judge every aspect of their lives, including ethical decision making.

To teach that ethical issues must be perceived of, assessed with, and resolved by a pre-ordained, prescribed, and singularly authoritative religious doctrine is not to teach the skill of critical thinking about these issues. In fact, to limit ethical inquiry in this manner is hostile to the process of critical thinking. Critical thinking

67. TWU, *Introductory Statement to TWU Core Values Series: Trinity Western University as an "Arm of the Church"* (4 October 1997) at 2, online: TWU <<http://twu.ca/divisions/hr/about/twu-core-values.html>>.

68. TWU, *Core Values Statement Series No 6: Growing as Disciples in Community* (12 July 2001) at 1, online: TWU <<http://twu.ca/divisions/hr/about/twu-core-values.html>>.

69. *Core Values Statement*, *supra* note 51 at 3.

70. *Ibid.*

71. *Ibid* at 4.

72. TWU, *Statement of Faith* (6 November 2009), online: TWU <<http://twu.ca/divisions/hr/employee/documents/default.html>> [*Statement of Faith*].

73. *Ibid*; see also Bruneau and Friedman, *supra* note 14.

74. *Statement of Faith*, *supra* note 72; see also Bruneau and Friedman, *supra* note 14 at 7.

75. *Statement of Faith*, *supra* note 72 [emphasis added].

76. *Covenant Agreement*, *supra* note 6 at 1.

involves deliberation, reasoning, reflection, and logic in order to decide what to believe or what to do. It requires the ability to discern hidden values and unstated assumptions, to consider and evaluate the reason and logic of competing statements of truth, to observe and evaluate evidence, and to assess context and the reliability of sources of information in order to arrive at a finding of truth. Critical thinking does not start with a conclusion of truth. Certainly, one might, through critical-thinking processes, arrive at the conclusion that an ethical decision should be guided by, or based on, religious doctrine. However, to teach that all judgment must be guided by the Bible—to teach that the source of truth for all ethical decision making is the scripture—is not to teach the skill of critical thinking about ethical issues.

As the CAUT has concluded, a guarantee of academic freedom from a stated religious perspective is inconsistent with a commitment to academic freedom: “[T]he right, *without restriction by prescribed doctrine*, to freedom of teaching and discussion.”⁷⁷ So too, it is antithetical to the development of the skill of critical thinking about ethical issues in law to require that it be taught from one particular, and purported to be singularly authoritative, perspective. It would be unreasonable for the Federation to conclude that TWU, given its current policies, could offer a learning environment competent to develop critical thinking skills about ethical issues in law. Based on the national requirement for ethics and professionalism established by the Federation, TWU’s application for approval of a new common law degree should be denied.

A Decision Not to Approve TWU’s Application Would Be Upheld

In 1996, the British Columbia College of Teachers (BCCT) denied an application by TWU for approval of a fully accredited teacher education program. The college denied the application on the basis that it would not be in the public interest because of the discriminatory practices engaged in by the institution. The BCCT found that TWU did not meet its criteria for accreditation because of its prohibition of same-sex sexual activity. TWU sought judicial review of this decision, and, ultimately, the BCCT was ordered to fully accredit TWU’s teacher education program.⁷⁸

There are two interrelated reasons why a decision by the Federation not to approve a TWU application would be treated differently by the courts than was the decision of the BCCT. First, the legal context has changed. Second, the Federation’s justifications for denying an application differ from the arguments made on behalf of the BCCT.

77. Bruneau and Friedman, *supra* note 14 at 10 [emphasis in the original].

78. *Trinity Western University*, *supra* note 7.

The Legal Context Has Changed since Trinity Western University Was Decided

The legal context has changed in two ways since *Trinity Western University* was decided. First, the legal standard by which a decision of the Federation would be judicially reviewed has changed. The Federation's decision would be treated with deference by the courts.⁷⁹ The BCCT's decision did not receive deference. It was reviewed by the Court on a standard of correctness. The BCCT argued that it could not accredit TWU because of a concern that its graduates could have a detrimental effect on the learning environment in public schools. Having no evidence before them to demonstrate that the public school system would be harmed by teachers who received all of their training at TWU, the Supreme Court of Canada concluded that the BCCT's decision was not correct. According to the majority, the BCCT did not properly take into account the impact of its decision on the right to freedom of religion of TWU members.⁸⁰ In making its decision, the Federation will be required to balance freedom of religion and equality (as was the BCCT). However, unlike in *Trinity Western*, the balance struck by the Federation would be reviewed on a standard of reasonableness. Provided the Federation achieves a reasonable balance between protecting freedom of religion and protecting equality, its decision will be upheld.

As was just suggested, in deciding whether to approve a new law degree program, the Federation must strike a reasonable balance between freedom of religion, equality, and its mandate to protect the public interest.⁸¹ The Federation's decision on whether to approve a law degree from TWU must be consistent with *Charter* values.⁸² In making its decision, the Federation must ask how to pursue its objectives in a way that will best protect the *Charter* values at issue.⁸³ If the decision is judicially reviewed, the question will be whether "in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing" of the *Charter* rights and values at play.⁸⁴ Again, this question will be approached with deference. The Federation's decision will be unreasonable if, in pursuing its objectives, it disproportionately impairs a *Charter* guarantee—in this case, either freedom of religion or equality.⁸⁵

79. *Doré v Barreau du Québec*, 2012 SCC 12, [2012] 1 SCR 395 [*Doré*]. I am grateful to my colleague Sheila Wildeman for originally bringing this point to my attention.

80. *Trinity Western University*, *supra* note 7 at para 33.

81. *Doré*, *supra* note 79.

82. In *Doré*, *supra* note 79, the Supreme Court of Canada determined that the exercise of individualized administrative discretion—like a decision by a professional regulator as to whether to approve a program—are to reflect *Charter* values.

83. *Ibid.*

84. *Ibid* at para 57.

85. *Ibid* at para 7.

A decision by the Federation not to approve a law degree from TWU would affect the interests of TWU law graduates (presuming the government of British Columbia decides to accredit a TWU law degree). Unlike graduates from other Canadian law schools, TWU law graduates would not be eligible for licensure to practise law in Canada immediately following graduation and completion of a provincial bar exam and articles. Instead, like foreign-trained lawyers, TWU graduates would presumably have to meet certain entrance requirements determined by the National Committee on Accreditation.⁸⁶

The question is whether this impact on freedom of religion is unreasonable in light of the Federation's mandate. The answer is no. The Federation must take into consideration the impact of its decision on freedom of religion.⁸⁷ However, it must do so in a way that balances the impact on freedom of religion with both its mandate to protect the public interest and competing *Charter* values such as equality.⁸⁸ A proper balance of the Federation's mandate with all of the *Charter* rights and values at issue requires that the Federation not approve a law degree from TWU. Not only is it reasonable for the Federation to reject TWU's application, but it would actually be unreasonably dismissive of equality protections for them to do otherwise.

The Federation is charged with protecting the public interest by ensuring that those who are licensed to practise law in Canada have received an education that will position them to protect and promote the fundamental legal principles upon which Canada's systems of law and governance are to operate. It is not in the public interest to train lawyers in an institution with policies that are inconsistent with core professional values and fundamental legal principles. TWU, given its discriminatory policies and violation of academic freedom, is not equipped to provide the kind of legal education that Canadians expect of their practising lawyers. Lawyers enjoy a uniquely independent system of self-regulation. With this privilege comes a heightened need to empower the profession's regulating bodies to protect the public interest. The intrusion on freedom of religion imposed by a decision not to approve TWU's application is necessary and drives at the core of the Federation's

86. The National Committee on Accreditation (NCA) is a standing committee of the Federation. It assesses the legal education and professional experience of individuals who obtained their credentials outside of Canada. Based on its assessment of the applicant's education and experience, the NCA requires individuals to meet particular requirements before they can apply for admission to a law society in Canada. Federation, "About the NCA," online: FLS <<http://www.flsc.ca/en/nca/about-the-nca/>>. A regulator's decision not to approve an educational program is separate from a provincial government's decision on whether to accredit a university's degree. If the government of British Columbia gives TWU permission to confer law degrees, the Federation could adopt a process for TWU law graduates similar to what it currently requires of foreign trained lawyers. Of course, much would need to be done by the Federation to ensure that an alternative process of accreditation for TWU-trained lawyers was sufficiently rigorous, thorough, and substantive to compensate for the deficiencies in a TWU law program.

87. *Doré*, *supra* note 79.

88. *Ibid.*

mandate. In arriving at a reasonable balance, it is important to remember that a decision by the Federation not to approve TWU's proposed program is distinct from the institution's ability to offer its students the opportunity to study law in its specifically Christian environment. A different matter still, one in the hands of the BC government, is whether such study leads to the conferral of a law degree.

When viewed in light of the Federation's overarching objectives, the competing equality interests, the lack of impact on the university's ability to offer a law degree, and the potential for accommodation of TWU law graduates through the NCA process, the limit on religious freedom imposed by a refusal to approve TWU's law degree is proportionate and therefore reasonable.

The second and related change to the legal context since *Trinity Western University* was decided involves the relationship between evolving societal values and evolving *Charter* jurisprudence. As societal values change, what constitutes a reasonable balance between protecting freedom of religion and protecting against discrimination on the basis of sexual orientation also changes. The Court's evolving jurisprudence on gay and lesbian equality clearly reflects this position.⁸⁹ For example, in *R. v Tran*, the Court rejected the same gay panic defence it had accepted for decades on the basis that "the ordinary person standard must be informed by contemporary norms of behaviour, including fundamental values such as the commitment to equality provided for in the *Canadian Charter of Rights and Freedoms*."⁹⁰ In *Canada (Attorney General) v Hislop*, the Court explicitly recognized that despite constitutional recognition in 1995, equal protection under the law has been achieved gradually for gays and lesbians as social, legal, and political norms have become more tolerant of sexual minorities.⁹¹

Today's decision makers are expected to be much more protective of gay and lesbian equality than were the decision makers of ten, fifteen, or twenty years ago.⁹² *Trinity Western University* was decided twelve years ago. The majority in that case found that the equality interests of gays and lesbians were not sufficiently jeopardized by a public school system with teachers educated in a university that discriminates on the basis of sexual orientation: "While homosexuals may be discouraged from attending TWU, a private institution based on particular religious beliefs, they will not be prevented from becoming teachers."⁹³ Societal values have evolved. The Court in *Trinity Western University* addressed the inequality towards sexual minorities by concluding that the discriminatory policy was okay

89. Consider also the evolving recognition of equality protection for same-sex couples under section 15 of the *Charter* revealed by the Court's decisions in *Canada (Attorney General) v Mossop*, [1993] 1 SCR 554, 100 DLR (4th) 658; *Egan v Canada*, [1995] 2 SCR 513, 124 DLR (4th) 609; *Reference re Same-Sex Marriage*, [2004] 3 SCR 698, 246 DLR (4th) 193.

90. *R v Tran*, 2010 SCC 58 at para 34, [2010] 3 SCR 350.

91. *Canada (Attorney General) v Hislop*, 2007 SCC 10, [2007] 1 SCR 429.

92. *Ibid.*

93. *Trinity Western University*, *supra* note 7 at para 35.

because “TWU is not for everybody.”⁹⁴ A reasonable balance between freedom of religion and equality for gays and lesbians based on contemporary standards requires ascribing more weight to the equality interest than what is attributed to it by resolving the tension with the conclusion that no one is saying that gays cannot be teachers.⁹⁵

The Federation’s Basis for Denying Approval Is Different

In addition, the justification for denial relied on by the Federation would be different than the argument made by the BCCT. The BCCT argued that teachers trained in an institution that discriminates on the basis of sexual orientation might perpetuate discriminatory attitudes in the public school classroom. The Court concluded that the BCCT decision was incorrect because there was no concrete evidence that this scenario would occur. The Federation’s decision not to approve would be justified on a different basis. First, it is reasonable to conclude that principles of equality, non-discrimination, and the duty not to discriminate—requirements of the Federation’s accreditation framework—cannot competently be taught in a learning environment with discriminatory policies. Second, it is reasonable to conclude that the skill of critical thinking about ethical issues cannot adequately be taught by an institution that violates academic freedom and requires that all teaching be done from the perspective that the Bible is the sole, ultimate, and authoritative source of truth for all ethical decision making. This is a different argument than the one made by the BCCT. It is not a prediction that in the future TWU law graduates would discriminate. It is not a conclusion that requires empirical evidence of discrimination by TWU graduates. Nor, as noted earlier, is it a conclusion that would be reviewed on a correctness standard.

Conclusion

June 2003 was a triumphant month for the equality interests of gays and lesbians in North America. Two landmark court decisions were released that month. On 26 June 2003, the Supreme Court of the United States finally declared anti-sodomy laws to be an unconstitutional violation of the rights of gay men in America.⁹⁶ Sixteen days earlier, the Ontario Court of Appeal had concluded that a legal definition of marriage that excluded same-sex couples violated the equality guarantees under the *Charter*.⁹⁷ This decision was a watershed moment in the successful bid to achieve same-sex marriage rights across Canada. Anti-sodomy laws were repealed in Canada more than thirty years earlier on 27 June 1969—without a

94. *Ibid* at para 25.

95. *Ibid* at para 35.

96. *Lawrence v Texas*, 539 US 558 (2003), 123 S Ct 2472.

97. *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161, 225 DLR (4th) 529.

court battle and before equality guarantees were even constitutionally entrenched in this country.⁹⁸ Interestingly, the legislation repealing anti-sodomy laws in Canada came into force one day before gay, lesbian, and transgender men and women in New York City were pushed to the point of uprising during the famous Stonewall Riots, which are often credited with kicking off the sexual minority rights movement in America.

It has always seemed striking that in the same month that Canada was granting same-sex marriage, the United States was finally rejecting criminal law prohibitions aimed at gay sex—something Canada had done thirty-four years prior. Canada has often been at the vanguard of ensuring constitutional and human rights protection for the equality interests of gays and lesbians. Given our legal tradition in this regard, it seems all the more striking that the Federation might abdicate its gatekeeping responsibilities by approving a law school with discriminatory policies, when its American counterpart, despite a legal culture much less protective of sexual minority rights, has recognized in its standards of approval for law schools that the distinction between lawful and unlawful discrimination against sexual minorities based on religious justification is not relevant.⁹⁹ Under the American Bar Association's standards, law schools with a religious affiliation can prefer persons who adhere to the religious affiliation or purpose of the school, provided such preference is "protected by the United States Constitution" and provided the institution does "not use admission policies or take other action to preclude admission of applicants . . . on the basis of . . . sexual orientation."¹⁰⁰ In deciding whether to approve a law degree from TWU, the Federation and its member law societies will need to choose on which side of legal history they wish to stand.

98. *Criminal Law Amendment Act*, SC 1968-9, c 38.

99. American Bar Association (ABA), *2012–2013 ABA Standards and Rules of Procedure for Approval of Law Schools* (Chicago: ABA, 2012), Standard 211 at 12-13, online: ABA <http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/Standards/2012_2013_aba_standards_and_rules.authcheckdam.pdf>. See, in particular, the Interpretation to Standard 211 at 13. For the purposes of law degree program approval, the ABA does not distinguish between lawful and unlawful discrimination on the basis of sexual orientation. Conversations with the ABA reveal that there has not yet been controversy regarding this section of the ABA standards. It remains to be seen how the ABA will apply this section in its assessment of religiously affiliated American law schools with homophobic policies. Nevertheless, just by revising its standards in this way, the ABA has demonstrated a commitment to equality for sexual minorities that far exceeds the FLS's initial response to this issue.

100. *Ibid.*