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TWU Law: A Reply to Proponents of Approval

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Trinity Western University has a Community Covenant that only permits sexual minorities to attend at considerable personal cost to their dignity and sense of self-worth. All student and staff applicants to TWU are required to sign this covenant, pledging not to engage in same-sex intimacy. The purpose of this article is to offer a reply to the arguments advanced by proponents of granting law society accreditation to TWU's proposed program. The paper rejects six of the central claims that proponents of approval have advanced. First it responds to the claim that TWU does not actually discriminate against the LGBTQ community. Second it speaks to the assertion that the Community Covenant represents a voluntary choice not to engage in same-sex sexual intimacy. Third it rejects the contention that TWU welcomes gay and lesbian students. Fourth it challenges the distinction TWU supporters draw between a code of conduct that prohibits same-sex intimacy and a policy that excludes gays and lesbians. Fifth it rejects the proposition, broadly accepted by the Benchers of the Law Society of BC, that the Supreme Court of Canada's decision in BCCT is dispositive of the issue faced by law societies today. Sixth, it rejects the claim that opposition to public accreditation of TWU can be equated with opposition to a Christian worldview or the desirability of a faith-based university. The final section of the paper argues that the decision in some provinces not to accredit TWU's law degree is reasonable and will be respected by reviewing courts.

Il existe, à l'Université Trinity Western, un document appelé Community Covenant qui énonce des normes communautaires n'autorisant les minorités sexuelles à fréquenter l'Université qu'à un coût personnel considérable pour leur dignité et leur estime de soi. Toutes les personnes qui souhaitent étudier ou travailler à l'Université doivent signer ce document et s'engager à ne pas avoir de rapports sexuels avec des personnes du même sexe. Cet article a pour objectif de répliquer aux arguments avancés par ceux et celles qui souhaitent que l'accréditation du barreau soit octroyée au programme proposé par l'Université. L'auteure réfute six des arguments fondamentaux avancés par les partisans de l'approbation. Premièrement, elle répond à l'allégation que l'Université ne fait aucune discrimination à l'égard de la communauté LGBTQ. Deuxièmement, elle réfute la prétention que le Community Covenant est une décision volontaire de ne pas s'adonner à des actes sexuels avec des personnes du même sexe. Troisièmement, elle rejette la prétention que l'Université est accueillante pour les étudiants gays et lesbiennes. Quatrièmement, elle conteste la distinction que font les partisans de l'Université entre un code de conduite qui interdit les actes sexuels entre personnes du même sexe et une politique qui exclut gays et lesbiennes. Cinquièmement, elle réfute la prétention, largement acceptée par les conseillers du Barreau de la C.-B., que l'arrêt de la Cour suprême du Canada dans BCCT dispose de la question à laquelle font face les barreaux aujourd'hui. Sixièmement, elle réfute l'allégation que l'opposition à l'accréditation publique de l'Université peut être assimilée à l'opposition à une vue chrétienne du monde ou au caractère souhaitable d'une université confessionnelle. Dans la dernière partie de l'article, l'auteure avance que la décision dans certaines provinces de ne pas reconnaître le diplôme en droit de l'Université Trinity Western est raisonnable et sera respecté par les tribunaux qui l'étudieront.

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Introduction

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Introduction

In his thoughtful exploration of the British Columbia legal profession's historical record of discrimination on the basis of race, sex, political belief, and ethnic origin, Wesley Pue writes of the twentieth century: "Only the crudest, earliest, and most obvious of these [discriminatory] obstacles involved a formal policy of exclusion...."¹ The Law Society of British Columbia is not known for its history of inclusivity. When it—along with the Faculty of Law at the University of British Columbia (UBC)—excluded Kew Dock Yip from admission, it denied access to the practice of law to a man who became a Canadian hero.² In legal circles Kew Dock Yip was perhaps most well known for his role in bringing about the repeal of the federal government's *Chinese Exclusion Act*.³ Mr. Yip, the first lawyer in Canada of Chinese descent, is among Osgoode Hall Law School's most

1. W Wesley Pue, *Law School: The Story of Legal Education in British Columbia* (Vancouver: University of British Columbia Faculty of Law, 1995) at Ch 9.

2. Bill Gladstone, "Obits: Kew Dock Yip (1906–2001) & Irving Himel (1915–2001)" (25 October 2011), online: Bill Gladstone <<http://www.billgladstone.ca/?p=3696>>.

3. The *Chinese Immigration Act 1923* excluded almost all-Chinese immigrants from landing in Canada. It was not repealed until 1947. University of British Columbia, *The Chinese Experience in British Columbia: 1850–1950* (nd), online: UBC <<http://www.library.ubc.ca/chineseinbc/exclusion.html>>.

celebrated graduates.⁴ He spent his legal career practicing in Toronto, where for many years he was the only Chinese-speaking lawyer in town.⁵ Despite his later connection to Toronto, Kew Dock Yip was born and raised in Vancouver.⁶ Mr. Yip was an Osgoode Hall alumnus because in 1942, when he was seeking admission to law school, the Faculty of Law at UBC did not accept students of Chinese descent on the basis that the Law Society of British Columbia expressly excluded Chinese Canadians.⁷

On 11 April 2014, the Law Society of British Columbia accredited a law degree program from a university with a formal policy of exclusion on the basis of sexual orientation.⁸ Later that month, the Law Society of Upper Canada and the Nova Scotia Barristers' Society refused to approve that same program because of concerns regarding the institution's discriminatory admissions policy.⁹ During law society deliberations in Ontario on the issue of accreditation of this proposed law school, Bencher Avvy Yao-Yao Go invoked Kew Dock Yip's legacy.¹⁰

The law degree approved by the LSBC is to be offered by Trinity Western University (TWU). TWU imposes admissions and hiring policies, through its mandatory Community Covenant, that exclude members of

4. Law Society of Upper Canada [LSUC], *Diversifying The Bar: Lawyers Make History* (May 2011), online: LSUC <<http://www.lsuc.on.ca/PDC/Archives/Diversifying-the-Bar/Diversifying-the-bar-Bios-by-Call-from-1941/>>. In honour of his 47 years of exemplary service to his community, Mr. Yip was awarded the Law Society of Upper Canada medal in 1998.

5. Constance Backhouse, *Colour Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 1999).

6. Road to Justice, *Kew Dock Yip*, online: Road to Justice <<http://www.roadtojustice.ca/first-lawyers/kew-dock-yip/>>.

7. *Ibid.* Mr. Yip was initially refused the right to write the bar exams in Ontario but persevered and joined the Law Society of Upper Canada in 1945.

8. Law Society of British Columbia [LSBC], "Bencher Meeting Consideration of TWU" (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/page.cfm?cid=3891&t=Bencher-meeting-consideration-of-TWU,-April-11,-2014>>.

9. LSUC, "Trinity Western University Accreditation," (April 2014), online: LSUC <<http://www.lsuc.on.ca/twu/#statement>>; Nova Scotia Barristers' Society [NSBS], "Council votes for Option C in Trinity Western University Law School Decision," (April 2014), online: NSBS <<http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>>. The LSUC refused to accredit Trinity Western University's proposed law degree program. The NSBS offered TWU approval conditional on removing the discriminatory policy. Throughout this article the terms approval and accreditation are used interchangeably. The rules of each law society are different. Some, such as those in Nova Scotia, refer to approval of proposed law degree programs. Others, such as Ontario's by-laws, refer to the LSUC's authority to accredit law degree programs.

10. See oral submissions of LSUC Bencher Avvy Yao-Yao Go: Law Society of Upper Canada, "Convocation: Public Session," (10 April 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf>> at page 90.

the LGBTQ community.¹¹ All student and staff applicants to TWU are required to sign a code of conduct pledging not to engage in same-sex intimacy.¹² As the Supreme Court of Canada concluded in *Trinity Western v. British Columbia College of Teachers*, TWU's mandatory Community Covenant perpetuates "unfavourable differential treatment" on the basis of sexual orientation and gay and lesbian individuals could only attend or work at the university at "considerable personal cost."¹³ Despite its policy, TWU has been granted authority to confer law degrees by the government of British Columbia.¹⁴ TWU has also sought to have its law school approved by each of the individual law societies in Canada. This would allow TWU's law graduates to gain admission to the bar in each of the provinces through the same process as students from other Canadian law schools.

The Federation of Law Societies of Canada (Federation), an umbrella organization that performs administrative functions for the law societies across Canada, is charged with reviewing proposed new law degree programs and making recommendations to the law societies regarding accreditation.¹⁵ In response to concerns about TWU's proposed law

11. Trinity Western University [TWU], *Community Covenant Agreement: Our Pledge to One Another* (nd), online: TWU <<http://twu.ca/studenthandbook/twu-community-covenant-agreement.pdf>> [*Covenant Agreement*]. For a discussion of TWU's Community Covenant see Section 1. Pue's observation that the discriminatory obstacles to the legal profession were layered and insidious and that only the earliest and crudest of these involved policies of formal discrimination is noteworthy. Some commentators have criticized opponents of accreditation of TWU (myself included) on the basis that inequality and discrimination is to be found in every Canadian law school and it is ill advised to single out TWU. See, e.g., Carissima Mathen & Michael Plaxton, "Legal Education, Religious and Secular: TWU and Beyond" (2014) Ottawa Faculty of Law Working Paper Series WP 2014-06, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2428207>. While this observation about the systemic and substantive inequality that pervades legal education in Canada is a critical one, its role in the debate regarding TWU is questionable. TWU, unlike every fully accredited law school in this country, has an institutional policy of formal discrimination. Unfortunately, the argument advanced by critics such as Mathen and Plaxton obfuscates the distinction between substantive inequality and its most obvious and crude progenitor—formal discrimination. This is certainly not to suggest that formal discrimination is worse, but it is more obvious.

12. 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." *Covenant Agreement*, *supra* note 11 at 3.

13. *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31 at 34, 25, [2001] 1 SCR 772 [BCC7].

14. See 18 December 2013 announcement of Advanced Education Minister: Government of British Columbia, "Statement on Trinity Western University's Proposed Law Degree" (18 December 2013), online: Government of BC Newsroom <<http://www.newsroom.gov.bc.ca/2013/12/statement-on-trinity-western-universitys-proposed-law-degree.html>>. This decision is now the subject of a legal challenge in *Petition of Loke v. Minister of Advanced Education*, British Columbia Supreme Court (2014), online: Ruby Shiller Chan Hasan Barristers <<http://www.rubyskiller.com/court-documents/Loke%20v.%20Minister%20-%20Petition.pdf>>.

15. See Federation of Law Societies of Canada [FLSC], "About Us," online: FLSC <<http://www.flsc.ca/en/about-us/>>.

school, and prior to making its recommendation to the law societies, the Federation established a Special Advisory Committee (SAC) to examine and provide the Federation with advice about TWU's requirement that all students, staff and faculty of TWU agree to abide by the Community Covenant as a condition of admission, study and employment. The SAC issued a final report to the Federation in December 2013 advising that in its estimation there would be no public interest reasons for the law societies to exclude future graduates of the program if the Federation's Approval Committee were to conclude that TWU's proposal complies with the National Requirement.¹⁶ The Federation recommended to the law societies that TWU be accredited. Some law societies, such as Saskatchewan and Alberta, have simply accepted the Federation's recommendation.¹⁷ British Columbia, as noted above, engaged in its own debate, in which it decided to accept the Federation's recommendation. In an extraordinary response, lawyers in British Columbia compelled their benchers to hold a special general meeting of the membership at which a significant majority of attendees voted in favour of a resolution directing the law society to reverse its decision.¹⁸ Other law societies, for example, those in Nova Scotia and Ontario, have refused to approve TWU's program and still others, such as Newfoundland and Labrador and Manitoba, have yet to decide. TWU has

16. Federation of Law Societies of Canada, *Special Advisory Committee on Trinity Western's Proposed School of Law: Final Report* (December 2013), online: FLSC <http://www.flsc.ca/_documents/SpecialAdvisoryReportFinal.pdf> [*SAC Report*]; Federation of Law Societies of Canada, *Canadian Common Law Program Approval Committee: Report On Trinity Western University's Proposed School Of Law Program* (December 2013), online: FLSC <http://www.flsc.ca/_documents/ApprovalCommitteeFINAL.pdf> [*FLSC Final Report*]. Given that the SAC was a subcommittee of the Federation and that the Federation appears to have adopted the SAC position as its own, the reasoning, conclusions and recommendations drawn by the SAC should be attributed to the Federation as a whole. In this article the SAC and Federation will be used interchangeably.

17. See Law Society of Alberta [LSAB], *Bulletin* (14 January 2014), online: LSAB <http://www.lawsociety.ab.ca/docs/default-source/default-document-library/2014/ebulletins/bulletin_2014_01jan_14.htm?sfvrsn=2>.

18. The vote was 3,210 in favour, 968 opposed. See Law Society of British Columbia, "Resolution Adopted at Law Society's Special General Meeting" (10 June 2014), online: LSBC <<http://www.lawsociety.bc.ca/page.cfm?cid=3926&t=Resolution-adopted-at-Law-Society's-special-general-meeting>> [LSBC Resolution]. As a result of the resolution, on 26 September 2014 the LSBC reconsidered its decision to approve TWU. At that meeting a motion was passed to conduct a binding referendum allowing all members of the LSBC to vote on whether to implement a resolution declaring that the proposed TWU law school is not an approved faculty of law for the purpose of the LSBC's admission program. See "Law Society to hold member referendum on accreditation of TWU," online: The Law Society of British Columbia <<http://www.lawsociety.bc.ca/page.cfm?cid=3975&t=Law-Society-to-hold-member-referendum-on-accreditation-of-TWU>>. A similar set of events has occurred in New Brunswick in response to the Law Society of New Brunswick's decision to approve TWU. On 13 September 2014 at a Special General Meeting, members of the LSNB passed a resolution directing their Council not to approve TWU. The Council of the LSNB has indicated that it will consider whether to adopt the resolution. See "Law Society Deals With TWU Issue," online: Law Society of New Brunswick <http://lawsociety-barreau.nb.ca/uploads/SGM_PR.pdf>.

initiated legal proceedings to challenge the decisions in Ontario and Nova Scotia.¹⁹

The decision to grant or refuse public accreditation of TWU's proposed law degree has produced significant controversy both within and beyond the legal profession.²⁰ Both proponents and opponents of approval have offered legal and policy based arguments in favour of their positions.²¹ In "The Case for the Federation of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" I advanced an analysis that opposed approval by Canada's law societies of TWU's proposal.²² Since that article was published the debate has progressed and become more focussed: the Federation, the LSBC and the LSUC have obtained legal opinions²³; at least four law societies have engaged in public consultation processes involving voluminous written and oral submissions²⁴; and the

19. See Trinity Western University, "Trinity Western University takes legal action to defend religious freedom" (6 May 2014), online: TWU <<http://www.twu.ca/news/2014/028-twu-takes-legal-action.html>>.

20. See, e.g., submissions to: the Law Society of British Columbia, "TWU Submissions" (nd), online: LSBC Submissions <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-submissions.pdf>> [LSUC Submissions]; Law Society of Upper Canada, "Trinity Western University Accreditation" (April 2014), online: LSUC <<http://www.lsuc.on.ca/twu/#statement>> [LSUC Submissions]; Nova Scotia Barristers' Society, "TWU submissions" (nd), online: NSBS <<http://nsbs.org/twu-submissions>> [NSBS Submissions]. For media coverage see, e.g., Stephane Erikson, "Trinity Western Law School Has No Right To Judge Its Gay Students," *The Globe and Mail* (21 February 2014), online: The Globe and Mail <<http://www.theglobeandmail.com/news/national/education/by-what-authority-does-trinity-western-judge-its-students/article16861242/>>; John G Stackhouse, "Have Some Faith In Christian Law School," *The Globe and Mail* (3 February 2014), online: The Globe and Mail <<http://www.theglobeandmail.com/globe-debate/have-some-faith-in-christian-law-school/article16661053/>>.

21. *Ibid.*

22. Elaine Craig, "The Case for Rejecting TWU Law School of Law Societies Rejecting Trinity Western University's Proposed Law Degree Program" (2013) 25:1 CJWL 148, online: SSRN <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2202408> [The Case for Rejecting TWU's Proposed Law School].

23. See, e.g., Legal Opinion of John Laskin in *SAC Report*, *supra* note 16 at Appendix C; Legal Opinion of Geoffrey Gomery in LSBC, "TWU Material" (8 May 2013), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-material.pdf>> at page 9 [Gomery Opinion]; Legal Opinion of Mohammed Jamal to Elliot Spears in LSUC (5 April 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/IssuesCanadianCharterRightsFreedoms.pdf>> [Jamal Opinion]; Legal Opinion of Andrew Pinto to Elliot Spears in LSUC (7 April 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/IssuesOntarioHumanRightsCode.pdf>> [Pinto Opinion].

24. See LSBC Submissions, *supra* note 20; LSUC Submissions, *supra* note 20; NSBS Submissions, *supra* note 20 and submissions to the Law Society of New Brunswick [LSNB], "TWU Submissions" (as of 30 April 2014), online: LSNB <http://www.lawsociety-barreau.nb.ca/files/TWU/Submissions_FINAL.pdf>.

first round of law society decisions has been made.²⁵ The Federation, as well as many of those who made submissions to the law societies in Ontario, Nova Scotia and British Columbia, engaged explicitly with the arguments I developed in that article.²⁶ Several of the legal opinions obtained by the law societies in Ontario and British Columbia responded specifically to my arguments.²⁷ The purpose of this essay is threefold: first, to offer a reply to those proponents of granting law society accreditation to TWU's proposed program that addressed the arguments I advanced in "The Case for Rejecting TWU's Proposed Law School"; second, to respond to the main arguments that TWU and others have advanced since I published "The Case for Rejecting TWU's Proposed Law School"; and third, to demonstrate that the decisions of the LSUC and the NSBS were reasonable, proportionate and just and should be upheld by reviewing courts.

The remainder of this article is divided into seven sections, each intended to respond to an argument that has been advanced in favour of law society accreditation of TWU's law school. The first section responds to the claim that TWU does not actually discriminate against the LGBTQ community. The second speaks to the assertion that the Community Covenant represents a voluntary choice not to engage in same-sex sexual intimacy. This section also addresses attempts to trivialize the impact of the Community Covenant. Following this is a rejection, in section three, of TWU's contention that it welcomes gay and lesbian students. Section four challenges the distinction TWU supporters draw between a code of conduct that prohibits same-sex intimacy and a policy that excludes gays and lesbians. Section five rejects the proposition that the Supreme Court of Canada's decision in *BCCT* is dispositive of the issue faced by law societies today. Increased legal recognition of the equality interests of sexual minorities will inform what constitutes a reasonable and proportionate balance between equality and freedom of religion. Section six rejects the claim that opposition to public accreditation of TWU can be equated with opposition to a Christian worldview or the desirability of a faith-based

25. FLSC *Final Report*, *supra* note 16; LSUC Submissions, *supra* note 20; Nova Scotia Barristers' Society, "Council Votes For Option C In Trinity Western University Law School Decision" (April 2014), online: NSBS <<http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>>; Law Society of British Columbia, "Bencher Meeting Consideration of TWU" (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/page.cfm?cid=3891&t=Bencher-meeting-consideration-of-TWU,-April-11,-2014>>.

26. See, e.g., *SAC Report*, *supra* note 16.

27. See for example the Laskin Opinion in *SAC Report*, *supra* note 16; Gomery Opinion, *supra* note 23; Jamal Opinion, *supra* note 23.

university. Lastly, section seven argues that the decisions of the LSUC and the NSBS were reasonable and will be respected by reviewing courts.

I. *TWU discriminates on the basis of sexual orientation (and sex and marital status)*²⁸⁾

Trinity Western University requires its students and staff to sign a contract committing themselves not to engage in same-sex sexual intimacy because it is—in the words the university has chosen—“vile” and “shameful.”²⁹ Despite this policy, representatives of TWU have stated that they do not discriminate on the basis of sexual orientation and the Federation appears to have accepted this assertion.³⁰ TWU has asserted a commitment to principles of equality and non-discrimination with respect to gays and lesbians.³¹ In addition to being contrary to the prohibition in its Community Covenant, these assertions are inconsistent with both TWU’s non-discrimination policy and with its current and historic response to the issue of discrimination on the basis of sexual orientation.

First, as I noted in “The Case for Rejecting TWU’s Proposed Law School,” sexual orientation is conspicuously absent from the lengthy list of grounds upon which TWU declares itself not to discriminate.³² Sexual orientation is the only prohibited ground of discrimination under British Columbia’s human rights legislation, other than religion, that is not

28. The focus of this article is on discrimination on the basis of sexual orientation. However, TWU’s Covenant also discriminates on the basis of sex (by prohibiting abortion) and marital status (by prohibiting sexual intimacy between unmarried heterosexuals). See Letter from Janine Benedet, Director, Centre for Feminist Legal Studies, UBC, to Timothy McGee, Executive Director, Law Society of British Columbia (24 February 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-submissions.pdf>> (arguing that the TWU Covenant shames women who seek abortion). See also the Legal Opinion of Andrew Pinto, *supra* note 23 (noting that the Community Covenant appears to discriminate on the basis of sexual orientation, sex, and marital status).

29. As noted, TWU will not hire you nor will it admit you as a student unless you sign a covenant promising not to engage in “sexual intimacy that violates the sacredness of marriage between a man and a woman.” *Covenant Agreement*, *supra* note 11. In support of this covenant TWU cites 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.

30. Letter from Robert Kuhn, President of TWU, to Rene Gallant, President of the NSBS (23 April 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-04-23_Kuhn_TWU.pdf>; Robert G Kuhn, “TWU Has Played By The Rules” *National Magazine* (28 January 2014), online: The Canadian Bar Association <<http://www.nationalmagazine.ca/Articles/January-2014/TWU-has-played-by-the-rules.aspx>>. *SAC Report*, *supra* note 16.

31. Letter from TWU President Raymond to Federation of Law Societies of Canada (17 May 2013) in *SAC Report*, *supra* note 16 at Appendix A.

32. TWU, “Employment Opportunities,” online: TWU <<https://twu.ca/divisions/hr/join/>> [Employment Opportunities].

protected by TWU's anti-discrimination policy.³³ This absence should not be overlooked.

Second, TWU's response both in the 1990s when the British Columbia College of Teachers raised concerns with the Covenant, and again in the current context, is not consistent with a commitment to equality for gays and lesbians.³⁴ In both instances TWU's response was to argue vociferously that the teaching profession and the legal profession should not be permitted to *even consider* whether TWU's policy raises public interest concerns regarding discrimination against gays and lesbians.³⁵ The Supreme Court of Canada rightly rejected TWU's view on this issue.³⁶ Taking the position that those charged with stewarding the profession of public school teachers or licensing and regulating lawyers should not be allowed to *even consider* issues of discrimination in fulfilling their responsibilities does not reveal a commitment to non-discrimination. The institutional autonomy of a university that seeks to provide accredited professional programs is simply not as extensive as would be the institutional autonomy of a church. Before accrediting, professional regulators must be permitted to consider institutional policies that discriminate. The most recent example of TWU's resistance to equality protections for gays and lesbians can be found in its vocal (and unsuccessful) opposition to the 2014 anti-discrimination resolution passed by the membership of the Canadian Bar Association.³⁷

Many of the arguments urging the Federation and individual law societies in Canada not to approve TWU's program stem from the proposition that it is not in the public interest to approve an institution that

33. Elaine Craig, "The Case for Rejecting TWU's Proposed Law School," *supra* note 22 at 162. This is not to suggest that TWU does not discriminate on grounds such as marital status or sex. Rather it is to note the significance of adopting a non-discrimination policy with an extensive list of prohibited grounds that does not include sexual orientation.

34. *SAC Report*, *supra* note 16. See *BCCT*, *supra* note 13.

35. See Letter from TWU President Raymond to Federation of Law Societies of Canada (24 April 2013) in *SAC Report*, *supra* note 16 at Appendix A; Letter from TWU President Bob Kuhn to NSBS (7 January 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-07_Kuhn_TWU.pdf>.

36. *BCCT*, *supra* note 13.

37. Open Letter from Bob Kuhn, TWU President, to the Canadian Bar Association, BC Branch (18 February 2014), online: Trinity Western University <<http://www.twu.ca/academics/school-of-law/news/2014/075-open-letter-cba-bc.html>>.

discriminates on the basis of sexual orientation.³⁸ As was recently noted by the Advocates' Society:

The Covenant's institutionalization of discrimination at TWU manifests itself in two distinct ways: restricting admission to straight applicants and/or policing and controlling intimate behavior of those who are admitted....It should be apparent to all that the Covenant creates a significant personal cost to individuals.³⁹

This significant cost was not apparent to the Federation. Rather, the Federation's SAC Report concluded that TWU's Covenant does not restrict admission to heterosexuals and is not contrary to human rights values.⁴⁰

It is true that in *BCCT* the Supreme Court of Canada accepted, without deciding, that section 15 of the *Charter of Rights and Freedoms* did not apply to TWU in that case.⁴¹ The Court also accepted that an exemption under British Columbia's human rights legislation permits religious organizations to prefer religious adherents.⁴² The Court did not make a finding of non-discrimination. Nor did it find that the exemption under British Columbia's laws allows TWU to exclude based on sexual orientation.⁴³ However, the Court did conclude that TWU's policy perpetuates "unfavourable differential treatment" on the basis of sexual orientation and that gay and lesbian students could only attend TWU at "considerable personal cost."⁴⁴ These are the very phrases that the Supreme Court of Canada has used to identify and define discrimination on the basis of sexual orientation in other decisions.⁴⁵

In an effort to minimize the impact of the Covenant, some supporters of TWU have implied that significance should be attributed to the distinction in wording between the version of the code of conduct at issue in *BCCT* and the version that is currently used.⁴⁶ The previous version has been characterized as more forcefully worded—presumably intended to imply

38. See, e.g., Elaine Craig, "The Case for Rejecting TWU's Proposed Law School," *supra* note 22; Letter from the Advocates' Society to Thomas Conway, Treasurer, Law Society of Upper Canada (29 March 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/TWUTheAdvocates'SocietyMarch28.pdf>>; Letter from the Association of Chinese Canadian Lawyers of Ontario to Jim Varro, Director of Policy, LSUC (20 March 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/TWUAssociationofChineseCanadianLawyersofOntarioMarch20.pdf>>.

39. Letter from the Advocates' Society, *ibid* at page 5.

40. *SAC Report*, *supra* note 16.

41. *BCCT*, *supra* note 13 at para 25.

42. *Ibid* at para 35.

43. *Ibid*.

44. *Ibid* at paras 34, 25.

45. See, e.g., *Egan v Canada*, [1995] 2 SCR 513 at 528, 124 DLR (4th) 609. See also *M v H* [1999] 2 SCR 3 at para 64 [*M&H*].

46. Gomery Opinion, *supra* note 23. See also the *SAC Report*, *supra* note 16.

that it was more problematic.⁴⁷ Not only is the practical effect of today's Covenant the same as that of its previous incarnation—a prohibition on same-sex sexual intimacy—but the suggestion that it is less forceful in its condemnation of gay sex is not convincing. The previous version identified homosexuality as biblically condemned.⁴⁸ The current version prohibits same-sex intimacy and cites in support of this prohibition biblical passages that characterize same-sex intimacy as “vile” and “shameful.”⁴⁹

The Federation misconstrued the Court's conclusions in *BCCT*. The Federation's SAC Report makes no mention of the Court's conclusion that TWU's policy perpetuates unfavourable differential treatment on the basis of sexual orientation. The SAC report does not include reference to the Court's finding that it would only be at considerable personal cost that a gay or lesbian student could attend TWU. Instead, the Federation, through its adoption of the SAC Report, asserts that there is nothing to suggest that TWU's covenant limits access to the university by LGBT individuals.⁵⁰ The Federation did not recognize the considerable personal cost and the unfavourable differential treatment imposed on LGBT individuals as a limit on admission to TWU's proposed law school. Rather than recognizing this limit, and the considerable dignity interest that underpins it, the Federation significantly understates the Covenant's impact on LGBT individuals by concluding that gay and lesbians students would merely “feel unwelcome” at TWU.⁵¹

The Federation's incomplete treatment of the Court's findings in *BCCT* gives the misperception that the Court in *BCCT* held that TWU's policies do not discriminate. This is an inaccurate characterization of the Court's reasoning. A proper interpretation of the reasoning in *BCCT* reveals that the Court did in fact find that TWU discriminates on the basis of sexual orientation.

II. *TWU's prohibition on same-sex intimacy is neither silly nor voluntary*

Many of those who have argued in favour of approving TWU's proposed law degree have denigrated or trivialized the Community Covenant. For example, TWU's Covenant has been referred to by proponents of

47. Gomery Opinion, *supra* note 23, SAC Report, *supra* note 16 at 39.

48. *BCCT*, *supra* note 13.

49. *Covenant Agreement*, *supra* note 11, citing *The Bible: New International Version*, online: Bible Gateway <<http://www.biblegateway.com/passage/?search=Romans+1%3A26-27>> at Romans 1:26 and 1:27.

50. SAC Report, *supra* note 16 at para 53.

51. *Ibid* at para 36.

accreditation and approval as “a silly project.”⁵² Supporters of approval have submitted that TWU has “very stupid and very silly beliefs.”⁵³ Two interrelated points should be made in response to submissions of this nature.

First, it contributes nothing to what is an important and hotly contested issue to disparage the sincerely held religious beliefs of members of the TWU community. The debate over accreditation is not well served by characterizing TWU’s beliefs as stupid and silly (or by describing the Covenant as disgusting, as others both in favour and opposed to approval have done⁵⁴). Of significance to the issue of approval is the impact on sexual minorities perpetuated by a public institution that accredits or approves a university with a formal policy that prohibits same-sex sexual intimacy. The faith-based community at TWU espouses, through its Community Covenant, a profound, deeply held belief that sexual activity between two men or two women is wrong.⁵⁵ TWU argues that this prohibition on same-sex sexual intimacy is fundamental to TWU’s community.⁵⁶ Whether this belief is stupid is not relevant to the decisions of the law societies. It is the actions taken by the university in furtherance of this deeply held belief that raise concerns regarding accreditation of its proposed law degree.

This leads to the second point. There is nothing silly about the potential impact on the LGBTQ community and on individual sexual minorities perpetuated by the public sanctioning of a university that explicitly and formally discriminates on the basis of sexual orientation. To dismiss this conviction as silly (presumably done in an effort to minimize its potential impact on sexual minorities or to distance oneself from its homophobic message), while at the same time asserting the profound and fundamental importance of this religious belief for TWU, seems insincere.

52. Letter from Kevin Kindred to the Nova Scotia Barristers’ Society (28 January 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-01-28_Kindred_TWU.pdf>.

53. Letter from Gavin Giles, QC, to the Nova Scotia Barristers’ Society (22 April 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-04-22_GilesTWUSubmissionToCouncil.pdf>.

54. See LSBC submissions, *supra* note 20; LSUC, *supra* note 20; NSBS Submissions, *supra* note 20.

55. *Covenant Agreement*, *supra* note 11.

56. Contradictorily, TWU follows this assertion with a complaint that too much attention has been paid to this one aspect of the Community Covenant. See Trinity Western University, “Reply Submissions to LSUC” (22 April 2014), online: LUSC at paras 141, 146 <<http://www.lsuc.on.ca/uploadedFiles/TWUsubmission-replytoLSUC.pdf>>.

Lastly, the Covenant is not optional. Indeed, any suggestion that TWU's Community Covenant is voluntary and non-binding—that “[p]rospective members are [merely] invited to ‘sincerely embrace’ [it]”⁵⁷—is without foundation. TWU's Community Covenant is not a guideline or invitation to abstain from same-sex intimacy. It is a covenant—a formal arrangement that all staff and students must sign in order to work at, or attend, this university. TWU describes it as a “contractual agreement” that all members of the university must enter into before joining the “TWU community.”⁵⁸ The assertion that TWU should be accredited because the Covenant is voluntary is another way of saying that gays and lesbians who cannot or will not sign the Covenant can go elsewhere. The argument that gays and lesbians can simply go elsewhere to become lawyers is problematic. As TWU noted in its effort to demonstrate to the BC government that there is a need for more law schools in the province: “Canada has the lowest number of law schools per capita of any Commonwealth country.... [Applications] currently vastly outnumber the spaces available.”⁵⁹ Law school seats are a finite public good. Some LGBTQ students may not have the option to attend another Canadian law school. Moreover, as a matter of equality, meaningful access to a legal education in Canada should not differ depending on a student's sexual orientation.

57. Faisal Bhabha, “Let TWU Have Its Law School” *Slaw* (24 January 2014), online: *Slaw* <<http://www.slaw.ca/2014/01/24/let-twu-have-its-law-school/>>. For other submissions characterizing the Covenant as voluntary see Letter from the British Columbia Civil Liberties Association to Tim McGee, Executive Director, Law Society of British Columbia (2 March 2014), online: BCCLA <<http://bccla.org/wp-content/uploads/2014/03/20140302-Submission-Law-Society-re-TWU.pdf>> at Transcript page 2; Oral submissions by LSBC Bencher Martin Finch, QC, Law Society of British Columbia, “Bencher Meeting” (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf>> at 28:15: “The subject covenant is a voluntary one that is undertaken by TWU students. Participation in the TWU academic community is a matter choice.” See also Dwight Newman, “On the Trinity Western University Controversy: An Argument for a Christian Law School in Canada” (2013) 22:3 *Constitutional Forum* 1 at 7, where he characterizes the Community Covenant as a “perspective” or “discussion” asserting: “the public gatekeeper role of the legal profession cannot properly be used to exclude from the legal profession those who have dared to discuss different perspectives on the law[.]” This is a misleading characterization of the Covenant both in terms of its impact and the text itself. The question is whether the “public gatekeeper” to the legal profession should refuse to approve a law school with a policy that excludes gays and lesbians.

58. *Community Covenant*, *supra* note 11.

59. Trinity Western Office of the Provost, “Program Proposal: Juris Doctor” 29 April 2012 as cited by Letter from Kathleen Lahey to Policy Secretariate, online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/TWULAhey,KathleenMarch28.pdf>>. The Court in *BCCT* placed emphasis on the proposition that gays and lesbians could study elsewhere if they were unwilling to sign the Covenant. Section 5, below, argues that today this reasoning is likely to be rejected by the Supreme Court of Canada given contemporary legal and social norms.

III. *TWU does not welcome sexual minorities*

Representatives of TWU have repeatedly claimed that gay and lesbian students are welcome at their institution.⁶⁰ This suggestion defies logic. Not only are prospective students required to sign a covenant promising not to engage in same-sex sexual intimacy under any circumstances, but they are also required to police each other for any breaches of this promise.⁶¹ The Covenant makes every member of the TWU community complicit in its discrimination on the basis of sexual orientation. The failure on the part of this institution to grasp the violation of dignity—the impact of requiring a gay or lesbian student to sign this agreement—speaks volumes about the institutional environment in which this proposed law school is to operate.

TWU has asserted that there is nothing offensive or inimical to Canadian society contained in the Covenant.⁶² This failure to apprehend the profound shift in Canadian societal values in the last several decades also raises concerns regarding the institutional environment in which law students at TWU will be educated.⁶³ TWU prohibits gay sex. Perhaps such a prohibition would not have been offensive to a Canadian society that criminalized anal and oral sex between men,⁶⁴ that designated convicted “homosexuals” as dangerous offenders sanctioned with indefinite preventative detention,⁶⁵ or that spied on, interrogated, and expunged from public service thousands of individuals suspected of homosexuality in the 1950s and 1960s.⁶⁶ In Canadian society today an institutional prohibition on gay sex is offensive. Far more importantly, approval by a public

60. See, e.g., Letter from Bob Kuhn, President of TWU, to Rene Gallant, NSBS President (23 April 2014), online: NSBS <<http://nsbs.org/twu-submissions>>; Allison Jones, “Ontario law society votes against accrediting graduates of BC university with ‘abhorrent’ gay sex ban” *Canadian Press* (24 April 2014), online: National Post <<http://news.nationalpost.com/2014/04/24/b-c-christian-university-that-bans-gay-sex-asking-ontario-lawyers-to-accredit-new-law-school/>>.

61. *Community Covenant*, *supra* note 11.

62. See, e.g., Letter from Vice-Provost Kevin Sawatsky, TWU, to the Federation of Law Societies of Canada (17 May 2013) in SAC Report, *supra* note 16 at 14; See also oral submissions of Bob Kuhn to the NSBS: Nova Scotia Barristers’ Society, “TWU Hearing” (4 March 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-03-04_NSBSTrinityWesternU.pdf> at page 25.

63. Dianne Pothier describes this failure in the following way: “TWU can argue that, in accordance with their religious beliefs, they are entitled to give offense because sexual intimacy outside marriage between a man and a woman is immoral according to their interpretation of the bible. But to claim no offense accepts no accountability for the position they take, and shows a fundamental lack of understanding of equality principles by failing to come even remotely close to appreciating the perspective of those excluded.” Dianne Pothier, “An Argument Against Accreditation of Trinity Western University’s Proposed Law School” (2014) 23:1 Constitutional Forum 1 at 2.

64. *Criminal Code*, SC 1953-54, c 51, s 149.

65. See *R v Klippert*, [1967] SCR 822, 65 DLR (2d) 698.

66. See Gary Kinsman & Patrizia Gentile, *The Canadian War on Queers: National Security as Sexual Regulation* (Vancouver: UBC Press, 2010) at 3.

regulator of an institutionalized prohibition on same-sex sexual intimacy is inimical to a Canadian society that has taken significant legal strides to overcome its appalling and tragic historical legal treatment of sexual minorities.⁶⁷

TWU has also asserted that there is no evidence that Christians at TWU hide homophobia or hostility to gays and lesbians in Christian values.⁶⁸ As a matter of common sense, a ban on gay and lesbian sex does seem indicative of hostility towards gays and lesbians. However, setting that aside, there is some other evidence of homophobia at TWU. In addition to the affidavit of a former TWU student who experienced the university as oppressively intolerant of her sexuality,⁶⁹ consider the comments of TWU's Director of Residence in 2013⁷⁰ asserting the need to "help... a person with same-sex attraction [to] disassociate with a 'gay' identity...."⁷¹ He asserts that "we should not be content with someone remaining... in a life long place of identifying themselves as 'gay.'"⁷² He describes his efforts to help gay men realize that their same-sex attraction is "a struggle rather than an inherent part" of them.⁷³ He states that *in his role* as Director of Residence of TWU his hope is to challenge a student's perspective that he must be resigned to the fact that he is gay.⁷⁴ According to the Director of Residence

67. See, e.g., *Criminal Law Amendment Act*, SC 1968-89, c 38 (repealing sodomy provision); *Reference re Same-Sex Marriage*, 2004 SCC 79, [2004] 3 SCR 698 (affirming that federal legislation recognizing same-sex marriage is constitutionally valid, both in relation to the division of powers and the *Charter*); *R v Tran*, 2010 SCC 58, 326 DLR (4th) 1 (rejecting the homosexual panic defence); *Egan v Canada*, *supra* note 45 (recognizing sexual orientation as a prohibited ground of discrimination).

68. See Letter from John Sawatsky to the Federation of Law Societies of Canada (17 May 2013) in *SAC Report*, *supra* note 16 at 13.

69. See, e.g., the *Affidavit of Jill Bishop*, filed in *Loke v Minister of Advanced Education of British Columbia*, British Columbia Supreme Court (9 April 2014), online: Ruby Shiller Chan Hassan Barristers <<http://www.rubyshiller.com/court-documents/Loke%20v.%20Minister%20-%20Affidavit%20of%20Jill%20Bishop.pdf>> (stating that some of her professors condemned homosexuality, none of them condoned it, and that because of her sexual orientation she found the "TWU environment very oppressive.") Obviously, the evidence of one former student is not conclusive. However, it is not accurate for TWU to assert that there is no evidence of homophobia at TWU.

70. Trinity Western University, *Community Life*, online: TWU <<http://twu.ca/life/community/staff.html>> (archive on file with author).

71. The Director of Residence made these comments in a public discussion board on the Evangelical Free Church of Canada (EFCC) website. Evangelical Free Church of Canada [EFCC], "Gay and Christian" (9 April 2013), online: EFCC <<http://www.efccm.ca/wordpress/gay-and-christian/>> (archive on file with author) [EFCC]. TWU was founded by the EFCC and considers itself "an arm" of the Church. See Trinity Western University, "About TWU" (nd), online: TWU <<http://twu.ca/about/>>.

72. EFCC, *ibid*.

73. *Ibid*.

74. *Ibid*.

at TWU, a failure on his part to address this “unhealthy identity” would be negligent.⁷⁵

Following a 2009 report from the American Psychological Association indicating evidence of the harms caused by therapies aimed at changing an individual’s same-sex sexual orientation,⁷⁶ the state of California enacted a law prohibiting mental health providers from engaging in “sexual orientation change efforts” with patients under the age of 18.⁷⁷ The types of harms identified in the APA Report include depression, increased suicidality and anxiety.⁷⁸ The APA also noted recent studies concluding that individuals subject to religious efforts to change their sexual orientation reported experiencing similar harms.⁷⁹ In Canada and the United States, LGBTQ youth are significantly more likely than their straight counterparts to suffer depression and attempt suicide.⁸⁰ The Director of Residence of TWU, presumably a position with significant student contact, asserts that while acting in that capacity he would be negligent if he did not try to change the “unhealthy” sexual orientation of his gay students.⁸¹ He bases this perspective on his Christian values.⁸²

A school that prohibits same-sex sexual intimacy under any circumstances and employs in a student services capacity a Director of Residence publicly committed to using that role to convert students that are “struggling with a gay identity” can hardly be characterized as welcoming to members of the LGBTQ community. As noted in the previous section, even the Federation concluded that gay and lesbian students would not feel welcome at TWU.⁸³ Unfortunately, the Federation also stated that to its

75. *Ibid.* TWU would likely respond that efforts aimed at reorienting the unhealthy sexual identity of its gay students is done politely and with Christian love. Politeness is not a defence to discrimination and anti-gay actions do not become less homophobic because they are grounded in religious belief.

76. American Psychological Association [APA], *Report of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), online: APA <<http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>> [APA Report].

77. US, SB 1172, *Sexual Orientation Change Efforts*, 2011–2012, Reg Sess, Cal, 2012. In *Pickup v Brown* (2013) the 9th US Circuit Court of Appeal rejected a constitutional challenge to the law. *Pickup v Brown*, 728 F (3d) 1042 (9th Cir 2013).

78. *APA Report*, *supra* note 76.

79. *Ibid.*

80. See, e.g., Egale, Canada Human Rights Trust, “Canada’s LGBTQ Youth At Greater Risk of Suicide Than Straight Youth” (27 September 2013), online: Egale <<http://egale.ca/all/press-release-ymps-recommendations/>>; Centers for Disease Control and Prevention, “Lesbian, Gay, Bisexual, and Transgender Health” (nd), online: CDC <<http://www.cdc.gov/lgbthealth/youth.htm>>; Rainbow Health Ontario, “LGBT Youth Suicide Fact Sheet” (nd), online: Rainbow Health Ontario <http://www.rainbowhealthontario.ca/admin/contentEngine/contentDocuments/LGBT_Youth_Suicide_.pdf>.

81. EFCC, *supra* note 71.

82. *Ibid.*

83. *SAC Report*, *supra* note 16 at para 36.

knowledge TWU does not limit or ban LGBT individuals.⁸⁴ This assertion by the Federation was unexplained. Its report reveals no independent research by the Federation to explore whether limits or bans are, in fact, imposed on LGBT individuals. Presumably, the Federation's reasoning relies on drawing a distinction between prohibiting same-sex sexual activity (which it says would make LGBT students feel "unwelcome") and explicitly prohibiting LGBTQ students.⁸⁵

IV. *A code of conduct that prohibits same-sex sexual intimacy excludes gays and lesbians*

In *Whatcott v. Saskatchewan* the Supreme Court of Canada specifically rejected the argument that there is any legal significance to the distinction TWU draws between prohibiting same-sex sexual intimacy and prohibiting gays and lesbians.⁸⁶ In rejecting the argument that a legally significant distinction can be drawn between discriminating against homosexual behavior and discriminating against homosexuals, the Court stated:

Courts have thus recognized that there is a strong connection between sexual orientation and sexual conduct. Where the conduct targeted by speech is a crucial aspect of the identity of a vulnerable group, attacks on this conduct stand as a proxy for attacks on the group itself.⁸⁷

The Court in *Whatcott* uses the example of TWU's covenant to make this point. In fact, in rejecting the distinction between same-sex sexual activity and same-sex identity, the Court draws its authority from L'Heureux-Dubé J.'s dissenting decision in *BCCT*. In *BCCT*, L'Heureux-Dubé J. concluded that TWU's covenant was discriminatory and that it was acceptable for the College of Teachers to refuse accreditation of the TWU program as a result. The unanimous Court in *Whatcott* states with approval:

L'Heureux-Dubé J. in *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772, in dissent (though not on this point), emphasized this linkage, at para. 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. ... The status/conduct or identity/practice

84. *Ibid* at para 36.

85. *Ibid* at para 36.

86. *Whatcott v Saskatchewan*, 2013 SCC 11, [2013] 1 SCR 467 [*Whatcott*].

87. *Ibid* at para 124.

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)...[I]t is [not] 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.⁸⁸

Despite its discussion of, and reliance on, *Whatcott*, the Federation’s SAC Report makes no reference to the Court’s explicit approval of L’Heureux-Dubé J.’s conclusion that the discriminatory effect of TWU’s Covenant is not ameliorated simply because its prohibition is aimed at sexual conduct rather than sexual identity.⁸⁹ Not only is the Federation’s SAC Report silent on this important aspect of *Whatcott*, but even more problematically it invokes exactly the love the sinner, hate the sin reasoning rejected by the Court in *Whatcott*.⁹⁰

According to the Supreme Court of Canada, a policy that requires students to promise not to engage in same-sex intimacy is an attack on the “human dignity and personhood” of gays and lesbians.⁹¹ In submissions to the LSUC, TWU argued that this interpretation of *Whatcott* is too broad and that *Whatcott*’s rejection of the act/identity distinction should not apply to an assessment of TWU’s Community Covenant.⁹² This assertion is without merit.⁹³ The Supreme Court of Canada in *Whatcott* specifically used TWU’s argument about its Community Covenant as an example of the affront to human dignity perpetuated by reliance on this fallacious distinction. The Federation, and those member law societies that have decided to adopt the Federation’s recommendation, should have done better than to embrace the formalistic and impoverished view of equality so recently rejected by the Supreme Court of Canada in *Whatcott*.⁹⁴

88. *Ibid* at para 123.

89. *SAC Report*, *supra* note 16 at 27.

90. *Ibid*.

91. *Whatcott*, *supra* note 86 at para 123.

92. Reply Submission of TWU to LSUC: Law Society of Upper Canada (22 April 2014), online: LSUC at paras 71, 126 <<http://www.lsuc.on.ca/twu/#twusubmission>>.

93. It is true that the Court notes that sexual orientation and sexual behavior can be differentiated for certain purposes (*Whatcott*, *supra* note 86 at 122), but to suggest that the Court was referring to distinctions like the one drawn in support of TWU’s Covenant is implausible. TWU’s Covenant is precisely the example the Court selected to exemplify this problematic argument, and in doing so it quoted at length from L’Heureux-Dubé J.’s strongly worded decision on this issue.

94. *Whatcott*, *supra* note 86 at 122.

V. *The majority decision in BCCT is not dispositive*

In 2001 the Supreme Court of Canada refused to uphold a decision by the British Columbia College of Teachers denying an application by TWU for a fully accredited teacher education program.⁹⁵ The College declined an application to fully accredit TWU on the basis that it was not in the public interest to approve a teacher program from an institution that discriminated against gays and lesbians. The College was concerned that TWU graduates who entered public schools in British Columbia might discriminate on the basis of sexual orientation. The Court found that: (1) homosexuals could go to teacher's college elsewhere, (2) the College had provided no evidence that TWU graduates would discriminate, and (3) there was no basis to infer that the College's purpose of requiring TWU students to complete a fifth year at a separate university was aimed at addressing issues of equality and discrimination.⁹⁶ As a result, the Court concluded that the College had not properly balanced freedom of religion and equality.⁹⁷ Many proponents of approval of TWU's proposed law degree have argued that the Court's decision in *BCCT* should be dispositive of the decision faced by law societies today.⁹⁸ However, changing legal and social conceptions of equality, different justifications for denying accreditation to TWU's law school, and a distinguishable factual context suggest that the decision in *BCCT* is not determinative.

Social and legal conceptions of equality on the basis of sexual orientation have progressed over the past 14 years

Many of the Benchers of the Law Society of British Columbia made submissions during that body's deliberations on whether to approve TWU's proposed law degree that followed an almost formulaic pattern.⁹⁹ They opened their submissions with a strongly worded condemnation of TWU's discriminatory practices followed by an assertion, in reference to the Supreme Court of Canada's decision in *BCCT*, that the law is the law and they are bound to follow the law.¹⁰⁰

In his closing comments before the Law Society of British Columbia, Bencher and constitutional lawyer, Joe Arvay told the LSBC (which has

95. *BCCT*, *supra* note 13.

96. *Ibid.*

97. *Ibid.*

98. See Laskin Opinion, in SAC Report, *supra* note 16; Gomery Opinion, *supra* note 23; Jamal Opinion, *supra* note 23.

99. Law Society of British Columbia, *Bencher Meeting Transcript* (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf>>.

100. *Ibid.* See, e.g., the oral submissions of David Mossop, QC (20:12); Miriam Kresivo, QC (at 22:4); Dean Lawton (at 24:2); Elizabeth Rowbotham (at 29:25); and David Crossin, QC (at 36:23).

now been compelled by its own membership to reverse its decision to approve TWU).¹⁰¹

I am...troubled by the very many comments to the effect that the Community Covenant is repugnant, it's hurtful, it's discriminatory, it's hypocritical, it's heartless, but we're bound by the law...I don't recognize a law that is so divorced from justice....We are the law-making body charged with making the decision at hand. So long as that decision is a reasonable one and [one] that reflects both the objects of our statute and the *Charter* values we are bound to embrace, it will be a law that the Supreme Court of Canada respects. The law is never frozen in time. It is always evolving....I urge you...to reconsider your decision and make sure that the law that you are applying is a just law.¹⁰²

In "The Case for Rejecting TWU's Proposed Law School" I argued that the legal analysis engaged in today to reconcile *Charter* rights would differ from that of the *BCCT* decision in 2001.¹⁰³ This is not because the Court has rejected the internal balancing approach to resolving tensions between *Charter* rights and values employed in *BCCT*. This is what some proponents of approval have suggested was my argument in support of the assertion that the Court's approach in 2014 will have shifted from the approach taken in 2001.¹⁰⁴ Rather, my argument is that the context in which this balancing would be done has changed. Legal recognition of the equality interests of sexual minorities is more thorough today than it was in 2001.¹⁰⁵ Equal protection for gays and lesbians has been achieved

101. LSBC Resolution, *supra* note 18.

102. See oral submissions of Joe Arvay: Law Society of British Columbia, "Bencher Meeting Transcript" (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf>> at pages 46-47. See also the oral submissions of Bencher Sharon Matthews, *ibid* at page 32.

103. Elaine Craig, "The Case for Rejecting TWU Law School," *supra* note 22. Others have since made the same argument. See, e.g., the submissions of the Advocates' Society (Letter from the Advocates' Society to Thomas Conway, Treasurer of the Law Society of Upper Canada) (29 March 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/TWUTheAdvocates'SocietyMarch28.pdf>>; The Sexual Orientation and Gender Conference [SOGIC] of the Canadian Bar Association (Letter from SOGIC to the Federation of Law Societies of Canada (18 March 2013), online: FLSC <http://www.flsc.ca/_documents/TWUCdnBarAssnMarch182013.pdf>); and Benchers of the law societies in both British Columbia and Ontario (See oral submissions of Joe Arvay, *supra* note 102; oral submissions of John Campion, "Bencher Meeting Transcript" (24 April 2014), online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/ConvocationTranscriptApr102014TWU.pdf>> page 144).

104. See *SAC Report*, *supra* note 16 at paras 27-29; Gomery Opinion, *supra* note 23; Laskin Opinion in *SAC Report*, *supra* note 16.

105. See, e.g., *Canada (Attorney General) v Hislop*, 2007 SCC 10, 278 DLR (4th) 385 [*Hislop*]; *R v Tran*, *supra* note 67; *Halpern v Canada (Attorney General)* (2003), 65 OR (3d) 161 [*Halpern*]; *Reference re Same-Sex Marriage*, *supra* note 67; *Whatcott*, *supra* note 86.

gradually as social, legal and political norms have shifted to become more accepting of sexual minorities.¹⁰⁶

Proponents of approval have argued that “it is doubtful...that this evolution of social values would lead to a different outcome today from that in *BCCT*.”¹⁰⁷ This argument does not address the important claim that, as a result of evolving social values, *legal* recognition of equality on the basis of sexual orientation has increased since 2001 and that this increased legal recognition of what constitutes equality for gays and lesbians shifts the balancing process. While the values of freedom of religion continue to be recognized today, as they were in 2001,¹⁰⁸ recognition (both social *and* legal) of the value of equality for gays and lesbians has increased since 2001. An increased legal understanding of what constitutes equality on the basis of sexual orientation is likely to produce different conclusions regarding what constitutes a reasonable balance between equality for gays and lesbians and freedom of religion.

Consider the following example. In 1993 the Ontario Court of Appeal rejected the claim that excluding same-sex couples from legal marriage constituted a violation of section 15 of the *Charter*.¹⁰⁹ They did so in part on the basis that including same-sex couples in the institution of marriage did not comport with the traditional Christian understanding of marriage as the union of one man and one woman as defined in *Hyde v. Hyde*.¹¹⁰ The majority of the Ontario Court of Appeal concluded that the claimants were seeking to use section 15 of the *Charter* to change this Christian definition of marriage and that the *Charter* could not have that effect.¹¹¹

Ten years later the Ontario Court of Appeal recognized that

[t]he definition of marriage in Canada, for all of the nation’s 136 years, has been based on the classic formulation of Lord Penzance in *Hyde*

106. *Hislop, ibid*; Elaine Craig, “The Case for Rejecting TWU’s Proposed Law School,” *supra* note 22.

107. Laskin Opinion in *SAC Report*, *supra* note 16.

108. In the past several years the Court has refined its constitutional recognition of freedom of religion. In *Alberta v Hutterian Brethren of Wilson Colony*, [2009] 2 SCR 567 [*Hutterian Brethren*] the majority recognized that in a multi-cultural, diverse Canadian society law makers and regulators will unavoidably place limits/costs on religious adherents when pursuing the public good.

109. *Layland v Ontario (Minister of Consumer & Commercial Relations)* (1993), 14 OR (3d) 658 [*Layland*].

110. In arriving at its conclusion to uphold the common-law definition of marriage first articulated in *Hyde v Hyde and Woodmansee* (1886), LR 1 P & D 130, the Ontario Court of Appeal quoted at para 5 with approval: “The position or status of ‘husband’ and ‘wife’ is a recognized one throughout Christendom: the laws of all Christian nations throw about that status a variety of legal incidents during the lives of the parties, and induce definite rights upon their offspring. What, then, is the nature of this institution as understood in Christendom.”

111. *Layland*, *supra* note 109 at para 20.

v. Hyde...The central question in this appeal is whether the exclusion of same-sex couples from this common law definition of marriage breaches...the...*Charter*.¹¹²

The majority declared that the “one man and one woman” Christian definition of marriage violated section 15 of the *Charter* by excluding same-sex couples.¹¹³ What happened in the intervening period between these two Ontario Court of Appeal decisions? The Supreme Court of Canada recognized increased protection for the equality interests of gays and lesbians under section 15 of the *Charter* in two landmark cases, *Egan v. Canada*¹¹⁴ and *M. v. H.*¹¹⁵

It is certainly true, as suggested by some proponents of approval of TWU, that in *Whatcott* the “Supreme Court has ‘reaffirmed its commitment to an analytical approach that balances equality rights against other rights protected under the *Charter*, giving appropriate weight to each.’”¹¹⁶ But consider that between 1993 and 2003, in balancing the equality interests motivating the pursuit of same-sex marriage with religious and social beliefs about the Christian definition of marriage, the “appropriate weight” attributed to equality for gays and lesbians increased. As a result, the same Court, within a ten-year span, arrived at very different conclusions on the same question.¹¹⁷ The point is that the “appropriate weight” attributed to the values or interests to be balanced will fundamentally inform the outcome of the balancing analysis. It matters what you put on each end of the teeter-totter.

112. *Halpern*, *supra* note 105 at 1.

113. *Ibid.*

114. *Egan v Canada*, *supra* note 45 (recognizing that sexual orientation is a prohibited ground of discrimination under section 15.) Note that in *Layland* the Ontario Court of Appeal also recognized that section 15 protected sexual orientation. Therefore, the distinction between *Layland* and *Halpern* cannot be explained by arguing that in 1993, pre-*Egan*, the Ontario Court of Appeal simply did not recognize sexual orientation as a prohibited ground of discrimination.

115. *M&H*, *supra* note 45 (recognizing that excluding same-sex couples from the benefits offered to heterosexual common-law couples promoted the view that they were less worthy and contributed to their social erasure).

116. Gomery Opinion, *supra* note 23. See also the submissions to the LSBC from the UBC Faculty of Law student working group on freedom of religion: Law Society of British Columbia, “TWU Submissions” (2 March 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-submissions.pdf>> at page 58.

117. This is not to concede that a Court today in reviewing a law society decision not to approve TWU’s law degree program would be adjudicating on the same issue. In fact, as noted in section 5, there are compelling arguments to suggest that the issue facing law societies today can be distinguished from the issue confronting the Court in *BCCT*. See Pothier, *supra* note 63.

Contrary to the suggestions of some proponents of approval,¹¹⁸ *Whatcott* does not contradict, or even speak to, this point. In fact, *Whatcott* offers an additional example of the way in which the Supreme Court of Canada has increased the degree of protection against discrimination on the basis of sexual orientation recognized under the *Charter*. More to the point, it offers this example precisely in the context of TWU's Community Covenant. As noted above, *Whatcott*'s reliance on L'Heureux-Dubé J.'s dissent in *BCCT* established that when balancing freedom of religion with the impact on equality interests perpetuated by TWU's covenant, the fact that the Covenant bans gay sex rather than gay individuals is not relevant.¹¹⁹ This is a shift from the majority's approach in *BCCT*. In characterizing the implications of TWU's covenant, the majority in *BCCT*, unlike L'Heureux-Dubé J., appear to have placed some significance on the distinction between condemning sexual practices and condemning sexual minorities.¹²⁰ In *Whatcott* the Court clearly adopted L'Heureux-Dubé J.'s approach on this issue. Why? Likely because in the intervening years between these two cases the Court developed a more informed and richer understanding of the dignity interests compromised by a code of conduct that prohibits same-sex sexual intimacy.

Decisions regarding approval of TWU's program for public purposes must balance freedom of religion and equality for gays and lesbians based on 2014 legal norms and social values, not those of nearly 15 years ago. Legal recognition of the equality interests of sexual minorities in Canada has expanded significantly. In 2001 the Court in *BCCT* concluded that an appropriate balance was struck because gays and lesbians could go elsewhere to become teachers (an argument that some proponents of

118. Laskin Opinion in *SAC Report*, *supra* note 16; Law Society of British Columbia, "TWU Material" (8 May 2013), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-material.pdf>> at page 9.

119. *Whatcott*, *supra* note 86.

120. *BCCT*, *supra* note 13 at 22:

[The Court of Appeal] pointed out that the TWU documents make no reference to homosexuals or to sexual orientation, but only to practices that the particular student is asked to give up himself, or herself, while at TWU. These practices include drunkenness, profanity, harassment, dishonesty, abortion, the occult and sexual sins of a heterosexual and homosexual nature. There is no evidence before this Court that anyone has been denied admission because of refusal to sign the document or was expelled because of non-adherence to it.

While it is not clear from this paragraph how much significance the majority in *BCCT* placed on the act/identity distinction, it does read as if the distinction was given some weight and the majority certainly does not reject the distinction as did Justice L'Heureux-Dubé in *BCCT* and the unanimous court in *Whatcott*.

approval also make today regarding prospective gay law students).¹²¹ In 2014 it is likely not sufficiently cognizant of gay and lesbian equality simply to say “TWU is not for everybody”¹²² and in the interests of religious liberty the gays can go elsewhere to become lawyers.

The basis for denying accreditation to TWU’s law school is different than in BCCT

Some proponents of approval have asserted that the grounds I suggested for refusing TWU’s application should be rejected because “Professor Craig provides no evidence to support the contention that” TWU law graduates would discriminate against gays and lesbians.¹²³ According to them, *BCCT* established that it would be unreasonable for a professional regulator to refuse approval of a professional program at TWU without concrete evidence that TWU graduates would discriminate on the basis of sexual orientation.¹²⁴

The grounds for rejecting TWU that I advanced in “The Case for Rejecting TWU’s Proposed Law School” were not based on the assumption or suggestion that hypothetical TWU law graduates would discriminate.¹²⁵ In *BCCT* the College of Teachers justified its refusal to accredit TWU because of a concern that its graduates would engage in discriminatory conduct as public school teachers.¹²⁶ The College did not offer any evidence to support that concern. Whether reviewed on a standard of correctness or reasonableness the College’s decision would probably have been overturned. However, for proponents of approval to argue that, as a result of the reasoning in *BCCT*, any decision to refuse institutional approval to TWU must be backed by empirical evidence of discrimination by TWU graduates is an example of the tail wagging the dog. It does not appear that the decision to refuse accreditation was based

121. See Laskin Opinion in *SAC Report*, *supra* note 16. See also Newman, *supra* note 57 at 6. The argument that gays and lesbians are not forced to attend TWU employs the same problematic reasoning that has been soundly rejected with respect to other prohibited grounds of discrimination. In 1940, in the name of freedom of commerce, and because the tavern was a private business, the Supreme Court of Canada found that it was not contrary to good morals or public order for a bar owner to refuse to serve African Canadians (*Christie v York*, [1940] SCR 139). Imagine someone making that claim in 2014.

122. *BCCT*, *supra* note 13 at 25.

123. *SAC Report*, *supra* note 16; Laskin Opinion in *SAC Report*, *supra* note 16; Gomery Opinion, *supra* note 23; Jamal Opinion, *supra* note 23.

124. Laskin Opinion, *supra* note 16; Gomery Opinion, *supra* note 23.

125. Elaine Craig, “The Case for Rejecting TWU’s Proposed Law School,” *supra* note 22.

126. *BCCT*, *supra* note 13.

on a concern that TWU law graduates would discriminate.¹²⁷ Evidence of discrimination on the basis of sexual orientation likely would be required if it were. However, it does not make sense to assess the NSBS and LSUC decisions based on whether there was evidence to support a concern that does not appear to have formed the basis of their decisions.

BCCT can be distinguished on its facts

The context of TWU's application for certification of its teacher training program was quite different than the context of its request for accreditation of a TWU law school. In "An Argument Against Accreditation of the Trinity Western University's Proposed Law School" Dianne Pothier identifies three important factors that distinguish *BCCT* from the decision of law societies on whether to accredit TWU's proposed law degree.¹²⁸ First, unlike with respect to its law degree, TWU had a history of prior approval of its teacher training program.¹²⁹ When TWU made its application for certification of its teacher training program it already had approval from the College for an education degree in which the first four years occurred at TWU followed by a fifth year at Simon Fraser. The application was simply to move the fifth year from Simon Fraser to TWU. Second, in *BCCT* the majority emphasized that there was no evidence to suggest that the College's requirement that TWU students complete a fifth year at Simon Fraser was related to concerns regarding the Community Covenant. Unlike the Simon Fraser program, which did not include an anti-discrimination component, law schools are required to teach legal principles of equality.¹³⁰ Refusal to accredit based on a concern regarding the institutional capacity to deliver a human rights and equality curriculum was not considered in *BCCT*. Third, lawyers are involved in the interpretation and administration of equality and anti-discrimination provisions under human rights legislation and the constitution.¹³¹ This extra level of responsibility, borne uniquely by

127. Neither the LSUC nor the NSBS provided written reasons for their decisions. However, neither the transcripts of the Ontario debates (<<http://www.lsuc.on.ca/twu/>>) the Memorandum drafted by the Executive Committee of the NSBS (<http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2014-04-16_TWUMemoCouncil.pdf>), nor the press releases issued by either Society (available at <<http://www.lsuc.on.ca/twu/>> and <<http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>>) indicate that their reasons not to approve related to a concern that TWU law graduates would discriminate. Indeed, many of the Ontario Benchers specified very clearly that their concern was with offering approval at an institutional level.

128. Pothier, *supra* note 63.

129. *Ibid* at 5.

130. *Ibid*; *BCCT*, *supra* note 13.

131. Pothier, *supra* note 63.

lawyers, distinguishes *BCCT* from the issues at stake in the decision to accredit a TWU law school.¹³²

VI. *Opposition to TWU's law school should not be dismissed as anti-Christian*

Some supporters of approval of TWU's law degree have mischaracterized concerns regarding this specific institution's policies as arguments opposed to the notion of teaching from a Christian worldview. The Federation's SAC Report, for example, depicted the opposition to TWU as, in part, based on an assertion that "TWU's Christian worldview and intention to teach from this perspective makes it incapable of effectively teaching legal ethics, constitutional and human rights law."¹³³ The Federation also implied that challenges to TWU's institutional capacity to teach legal ethics and human rights and equality law amounted to a claim about the ethics and competence of all Christian lawyers and judges.¹³⁴

The deficiencies with TWU's proposed program do not flow from its Christian worldview or intention to teach from that perspective. Presumably, many ethical members of the profession share with TWU a Christian worldview. Faith-based universities are not, simply by virtue of their Christian mandate, incapable of teaching critical thinking skills or equality and human rights. Many worthy and highly esteemed educational institutions, such as St Francis Xavier, Trinity College at the University of Toronto, and Notre Dame in the United States, have a faith-based tradition. The distinction, and it is an important one, is that these institutions do not impose formal policies that discriminate on the basis of sexual orientation or mandate a statement of faith that is inconsistent with creating an institutional environment consistent with some aspects of the requirements that the law societies have arrived at in accrediting Canadian common law degrees.

In "The Case for Rejecting TWU's Proposed Law School" I argued that the specific institutional policies of this particular university, as articulated in its Community Covenant and Statement of Faith, are inconsistent with some of the criteria for approval identified by law societies in Canada. The Federation itself recognized concerns regarding TWU's capacity to teach ethics and public law, given the Community Covenant:

132. *Ibid* at 5.

133. *SAC Report*, *supra* note 16 at page 11.

134. The Federation's *SAC report*, *ibid*, in concluding that the argument that TWU's Christian worldview means that students will fail to acquire the necessary critical thinking skills is without merit, notes that many current members of the profession and the judiciary share this Christian worldview and that there is no evidence that they are unable to think critically or act ethically.

[T]he members of the Approval Committee see a tension between the proposed teaching of these required competencies and elements of the Community Covenant. In particular, the Approval Committee is concerned that some of the underlying beliefs reflected in the Community Covenant, which members of faculty are required to embrace as a condition of employment, may constrain the appropriate teaching and thus the required understanding of equality rights and the ethical obligation not to discriminate against any person....¹³⁵

A Christian worldview may be entirely consistent with critical thinking or instruction on human rights and equality. However, the specific institutional policies of this particular university, as articulated in its Community Covenant and Statement of Faith, are inconsistent with the ethical duty not to discriminate.¹³⁶ Concepts of equality and non-discrimination cannot properly be taught in a learning environment created by an institution with policies that are explicitly discriminatory and that mandate discriminatory beliefs.¹³⁷

Consider the affidavit evidence of one former TWU student (submitted in support of an ongoing constitutional challenge to the decision of the British Columbia government to accredit TWU's proposed law degree):

The Community Covenant is a part of the TWU culture and reflects that culture....The effect of this was that people did not give opinions in class discussions that did not align with those values. Another effect was that professors carefully avoided expressing opinions that did not align with the Covenant and TWU's values....Some professors would condemn homosexual activity, and none would condone....In discussion groups, gay and lesbian issues came up frequently, but people were very unlikely to raise opinions that were contrary to the covenant's disavowal of sex outside of marriage and relationships between same-sex couples.¹³⁸

It obscures the institutionalized deficiencies in TWU's proposed program to cast arguments opposed to approval as an attack on all Christian based educational instruction.

In a similar vein, proponents of approval have based some of their arguments on the potential contribution of a Christian law school.¹³⁹ The

135. FLSC *Final Report*, *supra* note 16 at paras 50 & 52. It should be noted that "the Approval Committee concluded that the issue of whether students will acquire the necessary competencies in both Ethics and Professionalism, and Public Law is, at this stage, a *concern*, rather than a *deficiency*."

136. See Craig, "The Case for Rejecting TWU's Proposed Law School," *supra* note 22.

137. *Ibid.*

138. *Affidavit of Jill Bishop*, *supra* note 69 at paras 16, 17, 19.

139. See, e.g., Newman, *supra* note 57 (responding to the arguments I advanced in "The Case for Rejecting TWU's Proposed Law School," *supra* note 22); Laskin Opinion in *SAC Report*, *supra* note 16; Letter from Walter W Kubitz, QC, to the Federation of Law Societies of Canada (30 January 2013), online: FLSC <http://www.flsc.ca/_documents/TWUKubitzJan302012.pdf>.

claim is that a Christian law school would offer a unique contribution to legal education in Canada that is not currently available. It rests in part on an affirmation of the worth of Christian educational institutions and scholarship.¹⁴⁰ This assertion, in as much as it was offered to respond to my argument, is misdirected. Opposition to approval of TWU on the basis that its Community Covenant discriminates, and that its mandatory Statement of Faith does not facilitate open engagement with some issues, does not impugn, or even speak to, the important scholarly contributions made by religiously based law schools or the desirability of offering an accredited non-secular legal education in Canada.¹⁴¹

VII. *The decisions of the LSUC and the NSBS not to approve TWU were reasonable*

On 24 April 2014 the Law Society of Upper Canada decided not to approve TWU's proposed law degree for purposes of entry to the legal profession in Ontario.¹⁴² On 25 April 2014 the Nova Scotia Barristers' Society decided not to approve TWU's proposed law school unless the institution exempts law students from signing the Community Covenant or amends the Community Covenant for law students in a way that removes its discriminatory aspects.¹⁴³ In both Ontario and Nova Scotia these decisions were arrived at through lengthy, transparent processes that involved public consultation, oral and written submissions by TWU, members of the profession, public, and legal academy, and open debate among the voting and non-voting members of each governing body.¹⁴⁴

140. See, e.g., Newman, *supra* note 57 at 2: "Although it has gone largely undiscussed..., there is in fact a significant scholarly literature in the United States on the contribution offered by religious law schools." He offers examples such as Christian legal scholarship that explores the origins of the concept of rule of law.

141. For example, Newman, *ibid* at 2, emphasizes that Cardozo Law School (which is based in a Jewish University) is well respected. He then concedes: "although Cardozo itself is certainly open to a diverse group of students." He does not return to this very important distinction between Cardozo and TWU—Cardozo's code of conduct does not exclude certain groups (Benjamin N Cardozo School of Law, "Student Affirmation: Disciplinary Code, Rules And Procedures"), online: Cardozo Law <http://www.cardozo.yu.edu/sites/default/files/2014_Student_Affirmation.pdf>. TWU's Community Covenant excludes certain groups.

142. Law Society of Upper Canada, "Treasurer's Statement Regarding Vote On TWU Law School" (nd), online: LSUC <<http://www.lsuc.on.ca/newsarchives.aspx?id=2147485737&cid=2147498273>>.

143. See Nova Scotia Barristers' Society, "Council Votes for Option C in Trinity Western University Law School Decision" (April 2014), online: NSBS <<http://nsbs.org/news/2014/04/council-votes-option-c-trinity-western-university-law-school-decision>>.

144. Law Society of Upper Canada, "TWU Accreditation" (nd), online: LSUC <<http://www.lsuc.on.ca/twu>> and Nova Scotia Barristers' Society, "TWU Public Input" (nd), online: NSBS <<http://nsbs.org/twu-public-input>>.

As noted in the introduction, TWU has commenced legal proceedings in each province.¹⁴⁵ In its 2012 decision in *Doré v. Barreau du Québec* the Supreme Court of Canada affirmed that decisions like the ones made by the LSUC and the NSBS should receive deference by reviewing courts.¹⁴⁶ Not only were these expert decision-makers applying their home statutes (a decision-making function that will be reviewed on a standard of reasonableness),¹⁴⁷ but in exercising their discretion in this capacity they were required to consider and balance competing *Charter* values (which the Court in *Doré* confirmed will also receive deference). On review, the central question that will be asked of the NSBS and the LSUC is whether these law societies, in advancing the public mandate stipulated under their enabling statutes, properly balanced the competing values at stake. Did they secure a proportionate balance between their statutory objectives and these competing *Charter* values?¹⁴⁸ Again, this question is to be pursued by a reviewing court in a manner reflective of deference—that is to say, on a standard of reasonableness.¹⁴⁹

In deciding whether to approve TWU's proposed law degree, the LSUC and the NSBS were required to balance freedom of religion *and* equality. Several factors suggest that the decisions of the LSUC and the NSBS were reasonable in light of their statutory obligations to regulate in the public interest in their respective provinces.

First, it is reasonable for a law society to conclude that in the context of delivering an accredited legal education, the right to act on a belief in the sinfulness of same-sex intimacy is narrower than the right to believe that same-sex intimacy is sinful. The constitutional guarantee of freedom of religion offers a spectrum of protections.¹⁵⁰ In its application to the government of British Columbia for authority to confer law degrees, TWU emphasized the secular nature of its proposed law school.¹⁵¹ TWU's own description of its proposed law degree program emphasizes the secular

145. See Trinity Western University, "Trinity Western Takes Legal Action to Defend Religious Freedom" (2014), online TWU <<http://www.twu.ca/news/2014/028-twu-takes-legal-action.html>>.

146. 2012 SCC 12, [2012] 1 SCR 395 [Doré].

147. See, e.g., *Dunsmuir v New Brunswick*, 2008 SCC 9 at 54, [2008] 1 SCR 190.

148. *Doré*, *supra* note 146.

149. I am grateful to my colleague Sheila Wildeman for helpful discussions on this point. See also Letter from Sheila Wildeman to Rene Gallant, President, NSBS (10 February 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-10_Wildeman_TWU.pdf> (discussing these administrative law principles).

150. *Hutterian Brethren*, *supra* note 108 at 95; *Syndicat Northcrest v Amselem*, 2004 SCC 47, [2004] 2 SCR 551.

151. For a discussion of the secular nature of TWU's program see Letter from Kathleen Lahey to Policy Secretariat, online: LSUC <<http://www.lsuc.on.ca/uploadedFiles/TWULahey,KathleenMarch28.pdf>> 28 March 2014.

nature of the activity at issue—providing an accredited legal education.¹⁵² The limit imposed by the NSBS and LSUC decisions pertains to conduct (imposition of a mandatory code of conduct) rather than belief, and places a limit on an activity (provision of a fully accredited law degree program) that TWU itself has framed in secular terms.

The question faced by the LSUC and the NSBS was not: Do we approve of TWU's beliefs? The NSBS and the LSUC determined that they were unable to offer institutional approval to TWU because of the institution's discriminatory practices.¹⁵³ The NSBS voted to approve TWU conditional on it removing the discriminatory aspects of the Covenant. The NSBS also made it clear that its decision not to grant conditional approval was with respect to the institution. It does not create an absolute bar to the practice of law in Nova Scotia for future TWU law graduates. The issue facing the NSBS and the LSUC related specifically to the public approval or accreditation of an institution that excludes same-sex minorities. As was emphasized by Nova Scotia Council members and Ontario Benchers, TWU and its graduates are free to believe and preach whatever they choose regarding the immorality of same-sex intimacy.¹⁵⁴ In terms of practices, they are free to pursue the study of law. They are free to educate lawyers who can gain entry to the legal profession through channels other than attendance at an accredited institution.¹⁵⁵ They are certainly free to abstain from engaging in practices involving same-sex sexual intimacy. Freedom of religion should protect these practices. However, freedom of religion is not absolute. Some limits on religious rights are reasonable—particularly those that impose costs on religious practitioners rather than compel certain beliefs or deny meaningful choice: “The *Charter* guarantees freedom of

152. *Ibid.*

153. TWU argues that these law societies have not been asked to accredit its law degree but only its graduates. This argument is not compelling. The regulations and bylaws in both Ontario and Nova Scotia clearly contemplate approval at an institutional level. See By-Law 4, s 7 made pursuant to s 62(0.1) of the *Law Society Act*, RSO 1990, C L.8; Regulations made pursuant to *Legal Profession Act*, SNS 2004, c 28 s 3.1.

154. See Nova Scotia Barristers' Society “Memorandum from Executive Committee to NSBS Council” (16 April 2014), online: NSBS <http://nsbs.org/sites/default/files/ftp/CouncilMaterials/2014-04-16_TWUMemoCouncil.pdf> at page 17 [Memo to NSBS]: “TWU is allowed to believe, practice, promote and value its religious beliefs—but by requiring prospective students to execute a contract that contains discriminatory statements and by threatening discipline in the event of violation of the contract, TWU exceeds the bounds of protected religious freedom.” This memorandum was prepared by the Executive Committee of the NSBS for the Council of the NSBS. It identified three options for the Council without endorsing any of them. Option A involved a vote to approve. Option B involved a vote not to approve. Option C, which was adopted by the Council, involved approval conditional on TWU removing the discriminatory aspects of the Community Covenant. See also the oral submissions of Bencher John Campion, *supra* note 103.

155. See Memo to NSBS, *ibid.*

religion, but does not indemnify practitioners against all costs incident to the practice of religion.”¹⁵⁶ Imposing costs “on the religious practitioner in terms of money, tradition or inconvenience” does not preclude choice as to religious belief or practice.¹⁵⁷ In a diverse and multi-cultural society such costs will often be reasonable, particularly, as in this case, where the cost relates to an “inability to access conditional benefits or privileges conferred by law....”¹⁵⁸ Conferral of an accredited law degree is a privilege. In Ontario and Nova Scotia, the cost to a religious organization of delivering a legal education through an institution with discriminatory policies is lack of law society accreditation for the institution. This is not a serious infringement on religious freedom.¹⁵⁹ The NSBS and LSUC decisions represent a measured and proportionate balance between freedom of religion and protection of equality.

Second, it is reasonable for a law society to question whether fundamental aspects of an accredited Canadian legal education, such as an understanding of equality rights and the ethical obligation not to discriminate, can be adequately taught in a setting of institutionalized discrimination.¹⁶⁰ In making its decision the LSUC had before it a report from the Approval Committee of the Federation indicating concerns that “the underlying beliefs reflected in the Community Covenant...may constrain the appropriate teaching and thus the required understanding of equality rights and the ethical obligation not to discriminate against any person.”¹⁶¹ As noted in the previous section, unlike the teacher training program at issue in *BCCT*, law schools are required to teach legal principles of equality under the Constitution and human rights legislation. TWU did not offer the Federation or the LSUC any explanation as to how it would address these concerns.¹⁶² The Federation’s Approval Committee, in making its recommendation, chose to rely on bare assurances from

156. *Hutterian Brethren*, *supra* note 108 at para 95.

157. *Ibid* at paras 94, 95.

158. *Ibid* at para 95.

159. *Ibid* at 94, 95.

160. See Craig, “The Case for Rejecting TWU’s Proposed Law School,” *supra* note 22.

161. FLSC *Final Report*, *supra* note 16 at paras 50 & 52. This was a report written subsequent to the Approval Committee receiving the report of the SAC. The NSBS also had the Approval Committee’s report. Given the explanation of Option C in the Memorandum from the Executive to NSBS Council, *supra* note 154, the concern about this tension may not have factored into the NSBS decision. The opening paragraph of the Option C description states: ‘Council accepts the Report of the Federation Approval Committee that, subject to the concerns and comments noted, the TWU program will meet the national requirement.’

162. See Pothier, *supra* note 63 at 3: “In its submissions...TWU said only that key cases on sexual orientation equality would be taught, and standard texts relied upon....The real question is not what will be taught, but how it will be taught.”

TWU that it would address these concerns. However, it was certainly open to, and reasonable of, the LSUC not to accept these simple assertions from TWU. In the face of admissions and hiring policies that explicitly discriminate, and a report from the committee charged with reviewing the program expressing concerns regarding the school's ability to properly teach equality and human rights in such a context, it is reasonable for a professional regulator to refuse to accredit without more than bare assurances of how these concerns would be addressed.

Third, in exercising their statutory mandates to regulate in the public interest it is necessary for the NSBS and the LSUC to consider whether TWU's hiring and admissions policies are inconsistent with human rights legislation in Nova Scotia and Ontario.¹⁶³ In *BCCT* the Court suggested that TWU's policies would be exempt under British Columbia's human rights legislation.¹⁶⁴ The Court in *BCCT* only addressed the British Columbia human rights regime and in fact only did so indirectly. It did not actually consider the potential discriminatory impact of the code of conduct on TWU students or staff.¹⁶⁵ In "The Case for Rejecting TWU's Proposed Law School" I argued that the majority of provinces do not have religious exemption clauses identical to the one found in the British Columbia legislation and that it was incumbent upon regulators of the legal profession to consider whether TWU's policies would be unlawful in their province.¹⁶⁶ Nova Scotia's *Human Rights Act* does not create an exception for the student admissions policies of religiously based university programs.¹⁶⁷ It was reasonable for the NSBS to premise approval

163. In *Tranchemontagne v Ontario (Directors, Disability Support Program)*, 2006 SCC 14, [2006] 1 SCR 513 [*Tranchemontagne*], the Supreme Court of Canada decided that administrative tribunals are required to interpret and apply human rights legislation because it is fundamental, quasi-constitutional law. While it is true that *Tranchemontagne* concerned an adjudicative decision-maker and direct application of the human rights legislation, it is equally desirable that discretionary administrative decision-makers such as the law societies make decisions that are consistent with fundamental, quasi-constitutional laws. In other words, even if they are not legally required to apply human rights legislation, it is certainly reasonable for them to make decisions in light of, and consistent with, the values and principles adopted by these fundamental laws.

164. *BCCT*, *supra* note 13 at 25. Whether section 41 of the British Columbia *Human Rights Code* applies to every aspect of TWU was not before the Court in *BCCT*.

165. *Ibid.*

166. *Supra* note 22 at 156.

167. RSNS 1989, c 214. Under Nova Scotia's *Act* the religious exemption is limited to employment relationships. It cannot be applied to exempt religiously based discriminatory student admissions policies. In addition, TWU could not reasonably argue that abstinence from same-sex sexual intimacy is a bona fide qualification for attending law school. See also the Nova Scotia Human Rights Commission legal opinion to the NSBS concluding that the TWU Covenant would violate human rights legislation in Nova Scotia: Letter from the Nova Scotia Human Rights Commission to the NSBS (10 February 2014), online: NSBS at para 21 <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-02-10_NSHC_TWU.pdf>.

of TWU's law degree on the condition that it remove from its Community Covenant those aspects that are inconsistent with Nova Scotia's human rights legislation.¹⁶⁸ A decision of this nature reflects a just, reasonable and proportionate balance between freedom of religion and equality.

TWU has contested the applicability of Nova Scotia's human rights legislation, arguing that reliance on Nova Scotia's *Human Rights Act* is precluded by principles of extra-territoriality.¹⁶⁹ There are significant flaws with TWU's reasoning on this point. The primary authority that TWU relies on for its assertion is an Ontario Human Rights Tribunal decision that supports a conclusion opposite to TWU's position. In *Cohen v. Law School Admission Council* the Tribunal concluded that it did not have jurisdiction regarding a complaint arising from a decision by Dalhousie University not to admit the complainant to Dalhousie's law school.¹⁷⁰ The claim stemmed from an allegation that the Law School Admission Council denied accommodation of his disability with respect to the writing of the Law School Admission Test in Ontario. The complainant alleged that Dalhousie University discriminated against him by denying him entry based on his LSAT score even though the university knew he had not been accommodated. The Tribunal concluded that the claimant's allegation against Dalhousie lacked a sufficient connection to Ontario. Although the alleged failure to accommodate occurred in Ontario, the decision not to admit Cohen occurred in Nova Scotia. The Ontario legislation could not be applied to Dalhousie University's admissions decision. The applicable legislation was Nova Scotia's *Human Rights Act*. *Cohen* is a (non-binding) authority for the proposition that Nova Scotia's *Human Rights Act* applies to a decision-maker in Nova Scotia with respect to discriminatory acts occurring in another province by someone else, upon which the Nova Scotia decision-maker relies. *Cohen* is similar to the circumstances surrounding the NSBS decision and supports the NSBS's reliance on, or consideration of, Nova Scotia's human rights legislation. The other non-binding authorities relied on by TWU simply illustrate the uncontroversial fact that provincial statutes cannot apply to matters that have no connection to the enacting province.¹⁷¹ They do not support TWU's position. Simply

168. See Memo to NSBS, *supra* note 154.

169. Letter from Bob Kuhn, President of TWU, to Rene Gallant, President of the NSBS (23 April 2014), online: <http://nsbs.org/sites/default/files/ftp/TWU_Submissions/2014-04-23_Kuhn_TWU.pdf>.

170. (2014) HRTO 537.

171. For example, TWU relies on *Hughes v 507417 Ontario Inc*, 2010 HRTO 1791, [2010] OHRTD No 1794, in which the Ontario Human Rights Tribunal held that it did not have jurisdiction over a matter in which the employer was outside of Ontario, the employee lived and worked outside of Ontario, and the alleged incidents of discrimination occurred outside of Ontario.

put, a decision of the Nova Scotia law society on whether to accredit a law degree program for purposes of admission to the legal profession in Nova Scotia is a matter connected to the province of Nova Scotia. “The alleged discrimination may be occurring in British Columbia, but it becomes a concern for the Law Society here in...[Nova Scotia or Ontario] because the accreditation is taking place in this province.”¹⁷²

Moreover, TWU’s argument fails on its own logic. It is true that according to the principle of extra-territoriality Nova Scotia’s *Human Rights Act* is not applicable to the actions of TWU in British Columbia, but neither is British Columbia’s human rights legislation, and more specifically its exemption purportedly rendering TWU’s discrimination lawful in British Columbia, applicable to a decision of the NSBS in Nova Scotia. What is applicable to the decision of the NSBS is Nova Scotia’s *Human Rights Act*, and under this legislation it would appear that TWU’s policy is unlawful. The fact that the Covenant would constitute unlawful discrimination if TWU were situated in Nova Scotia should be considered by the NSBS in its deliberations as to whether approval of the TWU law degree is in the public interest of Nova Scotia. Human rights legislation is quasi-constitutional.¹⁷³ It “must be recognized as being the law of the people...”¹⁷⁴ As a matter of democratic principle the NSBS should not be bound by a statutory exemption that may make TWU’s policy lawful discrimination in British Columbia, but that was not adopted by the people’s elected lawmakers in Nova Scotia. Administrative decision-makers should exercise their discretion in a manner consistent with the values and principles reflected in the human rights legislation to which they are bound.¹⁷⁵ Again, it is reasonable for the NSBS not to accredit an extra-provincial institution in Nova Scotia for Nova Scotia purposes based on a conclusion that its policies are contrary to the human rights values adopted in Nova Scotia. Similarly, it would be reasonable for the LSUC not to approve a proposed law degree from an institution if the

172. Pinto Opinion, *supra* note 23 at 3 and 4.

173. *Tranchemontagne*, *supra* note 163 at 33.

174. *Ibid.*

175. For an analysis demonstrating that the exemptions under Nova Scotia’s human rights legislation would not apply to a TWU law school, see Letter from the Nova Scotia Human Rights Commission to the NSBS, *supra* note 167.

LSUC concluded that the institution's policies conflict with the values and principles reflected in Ontario's human rights legislation.¹⁷⁶

Lastly on this point, the failure of Nova Scotia (or Ontario) to provide religious organizations with the same exemption purportedly offered in British Columbia is not an unjustifiable violation of section 2 of the *Charter*.¹⁷⁷ Nova Scotia does accommodate religious organizations by including an exemption under its human rights legislation for some forms of religiously motivated discrimination in employment practices.¹⁷⁸ The exemption does not apply to student admissions policies. Even if this narrower exemption found under Nova Scotia's *Human Rights Act* was found to be a *prima facie* violation of section 2 of the *Charter*, it would almost certainly be upheld as a reasonable, well-tailored, and minimally impairing infringement under section 1 of the *Charter*.¹⁷⁹

Fourth, it is reasonable for a law society to conclude that public accreditation by the legal profession of an institution that excludes sexual minorities will further stigmatize a historically disadvantaged minority and have a significant adverse effect on the social status of gays and lesbians.¹⁸⁰ It is reasonable to conclude that it is in the public interest to place a limit on religiously based discriminatory *actions* in an effort to avoid this adverse effect on the social status of sexual minorities. This argument was not advanced in *BCCT*.¹⁸¹ The Supreme Court of Canada in *Whatcott*, albeit in the context of considering the constitutionality of prohibitions on hate speech against sexual minorities, concluded that in

176. In making its decision, the LSUC had before it a legal opinion (Pinto opinion, *supra* note 23) highlighting a leading human rights case in Ontario in which an Evangelical Christian organization that operated group homes in Ontario was not entitled to impose upon a lesbian support worker a religiously based code of conduct that prohibited same-sex intimacy. According to the Divisional Court in *Ontario (Human Rights Commission) v Christian Horizons*, 2010 ONSC 2105, 319 DLR (4th) 477, the organization could not avail itself of the exemption offered under the Code because a ban on same-sex relationships was not sufficiently connected to the employee's duties.

177. TWU raises this argument in its submissions to LSUC: Reply Submission of TWU to LSUC: Law Society of Upper Canada, "TWU Submissions" (22 April 2014), online: LSUC <<http://www.lsuc.on.ca/twu/#twusubmission>>.

178. *Human Rights Act*, *supra* note 167.

179. A fully developed *Charter* analysis is beyond the scope of this article. Some of the factors that indicate that a *prima facie* violation would be upheld under section 1 include the following: The infringement on religious freedom relates to a limit on (discriminatory) actions not beliefs. It is narrowly tailored so as to allow religious organizations to discriminate in some contexts—such as employment. There are other avenues through which TWU graduates could become members of the NSBS. In conducting a justification analysis under section 1, a court would consider both the limit on religious freedom and the harmful effect on others. A broader exemption would have a significant adverse effect on others.

180. Systemic discrimination of this nature was considered by the NSBS: "the systemic discrimination of the institution is what must be addressed and rejected." Memo to the NSBS, *supra* note 154 at page 18.

181. *BCCT*, *supra* note 13.

assessing the reasonableness of a limit on section 2 of the *Charter*, proof of actual harm may not be either possible or required.¹⁸² The reasoning in *Whatcott* demonstrates the Court's recognition of the inherent difficulty of proving the harmful effects on sexual minorities of some discriminatory practices. In other words, *Whatcott* reveals the Court's willingness to take into account the evidentiary challenges of proving systemic discrimination when balancing competing *Charter* values.¹⁸³ The Court held that the discriminatory effects of hate speech are common knowledge and that it was reasonable for the legislature to assume that hate speech against sexual minorities will diminish their social standing, stigmatize sexual minority identities and perpetuate harm to the dignity and equality interests of sexual minorities.¹⁸⁴ This is not to equate the hate speech engaged in by the respondent in *Whatcott* with TWU's exclusionary policy.¹⁸⁵ Rather, it is to note that the Court in *Whatcott* concluded that it is reasonable for decision-makers to draw common sense inferences about the relationship between stigma and systemic discrimination. The impugned conduct does not need to rise to the level of harm to social status at issue in *Whatcott* in order to

182. *Whatcott*, *supra* note 86 at HN: "The difficulty of establishing causality and the seriousness of the harm to vulnerable groups justifies the imposition of preventive measures that do not require proof of actual harm. The discriminatory effects of hate speech are part of the everyday knowledge and experience of Canadians. As such, the legislature is entitled to a reasonable apprehension of societal harm as a result of hate speech."

183. The Court had previously recognized the evidentiary challenges to proving the systemic discrimination perpetuated by hate speech (see *R v Keegstra*, [1990] 3 SCR 697). *Whatcott* is the first time they recognized this in the context of equality for sexual minorities.

184. *Whatcott*, *supra* note 86.

185. TWU has argued that "[t]he attempt of opponents to link TWU with the behaviour of Mr. Whatcott is offensive." According to TWU's written submissions to the LSUC expressing hate towards any person is "directly contrary to TWU's religious values..." TWU, *Reply Submissions to LSUC* (22 April 2014), online: LUSC <<http://www.lsuc.on.ca/uploadedFiles/TWUsubmission-replytoLSUC.pdf>> at para 72. TWU's indignation at being linked to *Whatcott*, and its assertion that the type of expression engaged in by Bill Whatcott is contrary to religious belief at TWU, are surprising. TWU was founded by the Evangelical Free Churches of Canada and America. Today, TWU describes itself as "an arm" of the church. See TWU, "About TWU: Fact Sheet," online: TWU <<https://twu.ca/about/fact-sheet.html>>. The EFFC intervened in *Whatcott* in order to support Bill Whatcott's right to engage in hateful expression. See EFFC, "Factum of the Intervener," online: <<http://www.evangelicalfellowship.ca/whatcott>>. The EFFC, of which TWU is an arm, argued that evangelical Christians sincerely believe that they are compelled to share the tenets of their faith with the community even when their beliefs are offensive (note that the Court in *Whatcott* found, at para 57, that the speech the EFCC was defending went well beyond offensive). The EFCC did not condone the words chosen by Bill Whatcott. However, not only did the church argue for his right to use them in order to convey his homophobic messages, it argued that for evangelical Christians conveying beliefs that may be offensive to the public is part of their religion. Also of note, in its submissions to the LSUC, TWU stated that in *Whatcott*, in the context of hate speech, the Court rightly rejected the distinction between targeting behaviour and targeting sexual identity. This is certainly not what the EFCC, of which TWU is an arm, argued in *Whatcott*. Indeed, the EFFC factum, *ibid*, beginning at para 30, contains an entire section defending the distinction they draw between sexual act and sexual identity.

rely on *Whatcott's* conclusion that the difficulty of establishing causality in the context of systemic discrimination justifies placing some limits on religious and expressive freedom even in the absence of specific proof. Moreover, it may be that the social status of sexual minorities is actually placed in greater jeopardy by the public accreditation of a law school that excludes gays and lesbians than by the homophobic ranting of one individual. The expressive effect of accreditation by the legal profession is much more difficult to recognize and ignore than is the anti-gay religious expression of one man.

The question that should be posed post-*Whatcott* is the following: is it a matter of common knowledge that accreditation by a state authorized public actor of a law school that excludes gays and lesbians would affect the “social status and acceptance in the eyes of the majority” of this vulnerable group?¹⁸⁶ It is reasonable for law societies to consider the impact on the public interest effected by offering law society *imprimatur* to an institution that discriminates on the basis of sexual orientation.¹⁸⁷ Consider an analogy to an institution with a religiously based behavioural code that prohibits sexual intimacy except that between one man and one woman of the same race. Even without concrete evidence of harm, it would be reasonable for a law society to conclude that public accreditation of such an institution would further stigmatize racialized groups in Canada.¹⁸⁸ On the same basis, it is reasonable for the LSUC and the NSBS to conclude that accrediting an institution that prohibits same-sex sexual intimacy would stigmatize and lower the social status of gays and lesbians in Ontario and Nova Scotia. *Whatcott* supports this reasoning.

Conclusion

TWU has a Community Covenant that only permits gays and lesbians to attend at considerable personal cost to their dignity and sense of self-worth.¹⁸⁹ TWU has a non-discrimination policy that covers race, colour, national or ethnic origin, age, sex, marital or family status, pardoned convictions, and physical or mental disabilities but does not cover sexual orientation.¹⁹⁰ In assessing this university's commitment to equality for

186. *Whatcott*, *supra* note 86 at 80.

187. See Jamal Opinion, *supra* note 23.

188. The Association of Chinese Canadian Lawyers of Ontario draws this same analogy: “This covenant tells prospective students that if they are queer, they can only attend TWU if they deny their sexual identity—or lie about their sexual behaviour at the risk of expulsion if they get caught. This is no more acceptable than a covenant that excluded students of Chinese descent.” Letter from the Association of Chinese Canadian Lawyers of Ontario to Jim Varra, Director of Policy, LSUC, *supra* note 38 at 2.

189. *BCCT*, *supra* note 13.

190. “Employment Opportunities,” *supra* note 32.

sexual minorities, these institutional actions should be given considerably more weight than that given to the university's bare assertions proclaiming a commitment to the principle of non-discrimination on the basis of sexual orientation.¹⁹¹

Law societies in British Columbia, Alberta and Saskatchewan should consider whether they would have approved TWU's law degree if its policy prohibited sexual intimacy except that which occurs within the sanctity of marriage between a man and woman of the same race. Similarly, would the Federation have recommended giving a stamp of approval to a law school that prohibits inter-racial couples?

The analogy is direct and apt.¹⁹² Bob Jones University, an American post-secondary institution, did precisely this and did so on the grounds of

191. See Letter from TWU President Raymond to Federation of Law Societies of Canada, *supra* note 31, claiming that TWU respects the equality rights of gays and lesbians.

192. During public deliberations by the Benchers of the LSBC, Lynal Doerksen argued that this comparison is "neither direct nor apt" for three reasons: (1) the belief that interracial marriage is wrong is offensive in and of itself (unlike the belief that same-sex marriage is wrong), (2) the belief that marriage is only meant to be between people of the same race is not a tenet of the majority or any of the world's major religions, and (3) the belief that marriage is between a man and a woman is explicitly condoned in Canadian law under the *Civil Marriage Act*. See Law Society of British Columbia, "Bencher Meeting" (11 April 2014), online: LSBC <<http://www.lawsociety.bc.ca/docs/newsroom/TWU-transcript.pdf>> at 13:20. Doerksen's submissions reveal a misunderstanding of constitutional law and the significance of the preamble to the *Civil Marriage Act*, SC 2005, c 33, as well as unfounded empirical assertions. First, while the belief that same-sex marriage is wrong is clearly not offensive to Doerksen, one might well question whether it is in fact offensive to many people. More importantly, the offensiveness of either of these beliefs is entirely irrelevant to the aptness of the analogy or the decision on whether to approve TWU's proposed law degree. Second, the history of religiously supported anti-miscegenation laws across many parts of the United States prior to the 1967 decision in *Loving v Virginia*, 388 US 1 (1967), combined with a rich academic literature examining these laws (see, e.g., Fay Botham, *Almighty God Created the Races: Christianity, Interracial Marriage, & American Law* (Chapel Hill: University of North Carolina Press, 2009)) belies Doerksen's unsupported claim that opposition to interracial marriage was not founded on the beliefs of Christian religions. Third, he is simply wrong to assert that the *Civil Marriage Act*, *ibid*, condones any particular belief about the definition of marriage. The preamble to the *Civil Marriage Act* affirms the uncontentional point that nothing in that *Act* affects the guarantee of freedom of conscience and religion to hold, declare, and publicly express diverse views on marriage. Section 3.1 of the *Act*, which is superfluous, clarifies once again that the *Charter* protects freedom from discrimination on the basis of religion and freedom of religious belief, including the belief that marriage is the union of one man and one woman. The freedoms enshrined under section 2 of the *Charter* (and highlighted under the *Civil Marriage Act*) are equally protective of the right to hold and express beliefs—religious or otherwise—about interracial marriage and same-sex marriage. *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 at s 2.

For an informed discussion of the ways in which analogies to race have served as useful tools for the recognition of LGBTQ rights see Craig Konnoth, "Created in Its Image: The Race Analogy, Gay Identity, and Gay Litigation in the 1950s–1970s" (2009) 119 *Yale LJ* 316. For a discussion of the challenges with relying on race-based analogies to advance sexual minority rights arguments see Serena Mayeri, *Reasoning from Race: Feminism, Law and the Civil Rights Revolution* (Cambridge, MA: Harvard University Press, 2011).

religious belief.¹⁹³ The United States Internal Revenue Service revoked Bob Jones University's tax-exempt status on the basis that its policy was contrary to public interest—a decision that was upheld by the Supreme Court of the United States.¹⁹⁴ Bob Jones University attempted (unsuccessfully) to justify its prohibition of interracial sex on many of the same grounds that TWU invokes to justify its prohibition on gay sex: that it is a private university, that it has the right to its religious beliefs, and that it permits racialized students to attend—it just requires that they comply with a code of conduct consistent with the university's religious beliefs.¹⁹⁵

Law societies that have accredited TWU will have to accept that they would either also approve a law school with an anti-miscegenation policy or accept that they have made a decision founded on the conclusion that gays and lesbians are not entitled to the same degree of respect, dignity and equality that they would grant to others. There is no principled basis upon which a law society could say yes to a religious covenant that says no gay sex but no to a religious covenant that says no interracial sex.

Former Chief Justice Brian Dickson once observed that “the ethos of the profession is set by the gatekeepers to legal education, namely those involved in the admissions process.”¹⁹⁶ Particularly, in light of the decision to begin regulating legal education in Canada, law societies have become a part of that admissions process.¹⁹⁷ Drawing on a reference to the legal profession of British Columbia's particularly egregious historical record of racism against Chinese Canadians, one Bencher of the LSUC suggested that accrediting TWU's program would be “a huge step backward in the progress of human rights” in Canada.¹⁹⁸ When legal historians write the story of TWU's proposed law degree and the controversy it has produced the sentinels of the profession in Nova Scotia and Ontario will have played a very different role than that played by the gatekeepers to the profession

193. *Bob Jones University v United States*, 461 US 574 (1983).

194. *Ibid.*

195. See, e.g., Bob Jones III interview with Larry King: CNN, “Larry King Live: Dr. Bob Jones III Discusses the Controversy Swirling Around Bob Jones University” (3 March 2000), online: CNN <<http://transcripts.cnn.com/TRANSCRIPTS/0003/03/lkl.00.html>>:

We see what the Bible says about this, so we say, OK, if they're going to blend this world—and inter-racial marriage is a genetic blending, which is a very definite sort of blending—we said as—let's put this policy in here, because we are against the one world church and, way back, 17 years ago when I was on your program, I was saying on programs all across America, we are not going to the Supreme Court fighting for our rule and our—we are fighting for our right to it. There is a religious freedom issue, that's all we ever fought for.”

196. Brian Dickson, “Legal Education” (1986) 64 Can Bar Rev 70.

197. See Craig, “The Case for Rejecting TWU's Proposed Law School,” *supra* note 22 for an explanation on why this is the case.

198. Oral submissions of LSUC Bencher Avvy Yao-Yao Go, *supra* note 10.

in British Columbia, Alberta, and Saskatchewan. Those law societies yet to decide whether to accredit TWU's proposed law degree might reflect upon Kew Dock Yip's magnificent contribution to the legal profession in Canada and consider whether, in his story, they would rather have played the part of British Columbia or Ontario.