

Toronto

April 5, 2014

Montréal

Ottawa

Calgary

New York

Mahmud Jamal
Direct Dial: 416.862.6764
mjamal@osler.com
Our Matter Number: 1151718

Ms Elliot Spears
General Counsel
The Law Society of Upper Canada
Osgoode Hall, 130 Queen Street West
Toronto, ON M5R 2G5

Dear Ms Spears:

The *Charter* and the Law Society's accreditation decision

Question

You asked me to address how the *Canadian Charter of Rights and Freedoms* (the "*Charter*") applies to the Law Society of Upper Canada (the "*Society*") when it decides whether to accredit a law school. This question arises in the context of the application of Trinity Western University ("*TWU*") to the Society to accredit TWU's proposed School of Law.

In what follows, I have outlined the role of the *Charter* in the Society's decision-making process, focussing on whether and how the *Charter* applies. As you requested, I have refrained from expressing any opinion on whether the Society should accredit TWU's School of Law. That is obviously a matter for Convocation to decide in exercising its decision-making authority under the *Law Society Act*.¹

Summary Response

1. In deciding whether to "accredit" a law school for the purposes of the *Law Society Act*, the Society exercises a statutory discretion that must be exercised in accordance with the framework of the *Law Society Act*. One of the Society's functions is to "ensure" that "all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide" (*Law Society Act*, s. 4.1(a)). This is an aspect of the Society's duties related to the licensing of individual applicants for admission to the Society. The power to accredit a law school derives from By-Law 4 under the *Law Society Act*, which establishes the qualifications for licensing of individual applicants.

¹ R.S.O. 1990, c. L.8, as amended.

2. The Act provides that, in exercising any of its functions, duties, or powers under the Act, the Society must have regard to five principles: (1) the Society's duty to maintain and advance the cause of justice and the rule of law; (2) its duty to facilitate access to justice for the people of Ontario; (3) its duty to protect the public interest; (4) its duty to act in a timely, open, and efficient manner; and (5) the requirement that standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized (*Law Society Act*, s. 4.2).
3. In exercising this statutory discretion, the Society must consider the *Charter* and must reach a decision that is consistent with the *Charter*. All administrative decision-makers must consider the *Charter* when they exercise discretion granted under statutory authority.
4. When a decision-maker exercises discretion granted under statute, it must balance any applicable *Charter* values with its statutory objectives. This involves a two-step process:
 - a. At the first step, the decision-maker should first consider the statutory objectives. In the present context, this means that the Society must consider the objectives of s. 4.1(a) with respect to licensing, the Licensing By-Law, and application of the five principles set out in s. 4.2 of the *Law Society Act*.
 - b. At the second stage, the decision-maker should ask how the *Charter* values at issue will best be protected in view of the statutory objectives. The decision-maker must balance the severity of any interference of the *Charter* protection with the statutory objectives. In the present context, this means that the Society must ask what *Charter* values would be implicated by its accreditation decision, and balance any such *Charter* values in a proportional manner with its statutory objectives. It must ensure that its accreditation decision interferes with any relevant *Charter* values no more than is necessary given its statutory objectives.
5. The Society's accreditation decision involves the following competing *Charter* values:
 - a. On the one hand, the decision to accredit TWU's proposed School of Law could involve giving the Society's *imprimatur* to the clause in TWU's Community Covenant that requires students, faculty, and staff to agree to voluntary abstinence from sexual intimacy that "violates the sacredness of marriage between a man and a woman." This could be seen as

discriminating against persons on the basis of sexual orientation or marital status, as it prohibits same-sex sexual intimacy and sexual intimacy between unmarried couples. This implicates the *Charter* value of equality, explicitly recognized in s. 15 of the *Charter*.

- b. On the other hand, the decision not to accredit TWU's proposed School of Law could involve the Society refusing to recognize the sincerely held religious beliefs of TWU's students, faculty, and staff, prohibiting them from associating with each other for the study of law in an educational community reflecting their religious beliefs, and discriminating against them on the basis of their religion. This implicates the *Charter* values of freedom of religion, freedom of association, and equality, explicitly recognized in ss. 2(a), 2(d), and 15 of the *Charter*, respectively.
6. The Supreme Court's decision in *Trinity Western* (2001) provides guidance on how to reconcile these competing *Charter* values. The Supreme Court ruled that a hierarchical approach to rights must be avoided. Neither freedom of religion nor the guarantee against discrimination based on sexual orientation (or marital status) is absolute. The Society should ask whether, as in *Trinity Western*, this is a case where the proper place to draw the line is by distinguishing between belief and conduct – that is, that absent concrete evidence that training lawyers at TWU would foster discrimination, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.
 7. The *Trinity Western* decision remains relevant to the Society's balancing of the *Charter* values of equality and freedom of religion. Changes in the law in the last decade relating to the standard of review and the law of equality do not alter the need to avoid a hierarchical approach to rights and to achieve a balance that fully respects the importance of both sets of rights. Nor, in my view, has the evidentiary standard articulated in *Trinity Western* changed materially since 2001.
 8. If the Society decides to adopt the Supreme Court's approach in *Trinity Western* to balancing the *Charter* values of equality and freedom of religion, the pivotal question it should ask is whether there is "concrete evidence" that accrediting the TWU School of Law would result in actual discrimination or a real risk of discrimination if TWU's graduates were to join the legal profession.

Background

(a) *Factual background*

TWU is a private Christian university located in Langley, British Columbia. Established in 1962, it currently offers 42 undergraduate and 16 graduate degree programs. It

describes itself as “Canada’s largest independent Christian liberal arts institution, with a comprehensive total enrolment of 3,600 students and over 22,000 alumni in more than 80 countries around the world.”² It states that many of its students are enrolled in professional programs, including “Business (M.B.A., B.B.A., B.A. – Business), Leadership (M.A. – Leadership), Nursing (M.Sc.N., B.Sc.N.) and Education (B.A. – Education).”³

TWU requires its faculty, students, and staff to abide by a five-page long “Community Covenant Agreement” said to reflect TWU’s “mission, core values, curriculum and community life [...] formed by a firm commitment to the person and work of Jesus Christ as declared in the Bible.” The Community Covenant Agreement is said to be directed at shaping “an educational community in which members pursue truth and excellence with grace and diligence, treat people and ideas with charity and respect, think critically and constructively about complex issues, and willingly respond to the world’s most profound needs and greatest opportunities.” It requires TWU community members *inter alia* to “voluntarily abstain” from “sexual intimacy that violates the sacredness of marriage between a man and a woman.” It also requires TWU community members *inter alia* to voluntarily abstain from “communication that is destructive to TWU community life”, including “prejudice”, “harassment or any form of verbal or physical intimidation,” as well as “the use of materials that are degrading, dehumanizing, exploitive, hateful, or gratuitously violent.”⁴

TWU has asked the Society to accredit its proposed School of Law in order for its graduates to qualify to obtain a licence to practice law in Ontario under the *Law Society Act*. The relevant statutory requirements are set out in greater detail below.

On December 16, 2013, the Federation of Law Societies of Canada (the “Federation”) announced that its Common Law Approval Committee (the “Approval Committee”) had granted TWU preliminary approval of its proposed law school program.⁵ The Approval

² “About TWU”, online: <https://www.twu.ca/about/history.html>.

³ Trinity Western University School of Law Proposal, June 15, 2012, p. 6, Appendix D to Federation of Law Societies of Canada, Canadian Common Law Approval Committee, Report on Trinity Western University’s Proposed School of Law Program, December 2013, online: <http://www.flsc.ca/en/twu-common-law-program/>.

⁴ Trinity Western University, Community Covenant Agreement, Appendix E to Federation of Law Societies of Canada, Canadian Common Law Approval Committee, Report on Trinity Western University’s Proposed School of Law Program, December 2013.

⁵ News Release, Federation of Law Societies of Canada Grants Preliminary Approval of Trinity Western University’s Proposed Law Program, December 16, 2013, online: <http://www.flsc.ca/en/federation-news/#70>.

Committee’s mandate is to review existing and proposed common law programs of law schools to assess whether their graduates would meet the Federation’s “national requirement.” The national requirement describes the necessary knowledge and skills competencies of applicants to the bar admission programs of the common law provinces, as well as the law school academic program and learning resources required of accredited law schools.⁶

Also in December 2013, the Special Advisory Committee on Trinity Western’s Proposed School of Law (the “Special Advisory Committee”) issued its Final Report.⁷ The Federation had established the Special Advisory Committee to advise the Federation on factors other than the national requirement in determining whether future graduates of TWU’s proposed School of Law should be eligible to enroll in the admission program of any of Canada’s law societies.⁸ These other factors included the following:

- “Whether approving TWU’s proposed law school would be contrary to the public interest”;⁹
- “Whether TWU’s Christian worldview and intention to teach from this perspective makes it incapable of effectively teaching legal ethics, constitutional and human rights law”;¹⁰
- “Whether TWU respects academic freedom”;¹¹
- “Whether approving TWU’s proposed law school would result in LGBT students having fewer opportunities and choices than others”;¹² and
- “The ABA’s standards on discrimination on the basis of sexual orientation.”¹³

⁶ Federation of Law Societies of Canada, National Requirement, Appendix B to Federation of Law Societies of Canada, Canadian Common Law Approval Committee, Report on Trinity Western University’s Proposed School of Law Program, December 2013.

⁷ Special Advisory Committee on Trinity Western’s Proposed School of Law, Final Report, December 2013.

⁸ *Id.*, p. 3.

⁹ *Id.*, pp. 10-11.

¹⁰ *Id.*, pp. 11-12.

¹¹ *Id.*, pp. 13-15.

¹² *Id.*, p. 15.

While the Special Advisory Committee’s Final Report acknowledged that “it is the individual law societies that must decide on the eligibility of each individual applicant to their bar admission programs”, it concluded that “in light of applicable law none of the issues, either individually or collectively raise a public interest bar to approval of TWU’s proposed law school or to admission of its future graduates to the bar admission programs of Canadian law societies.”¹⁴ The Special Advisory Committee concluded that, provided TWU’s proposed School of Law meets the national requirement, “there will be no public interest reason to exclude future graduates of the program from law society bar admission programs.”¹⁵

(b) *The statutory framework for the Society’s accreditation decision*

In order to address how the *Charter* applies to the Society’s decision to accredit a law school, it is essential to first outline the statutory framework for that decision under the *Law Society Act* and the applicable by-laws. In essence, that framework is as follows:

- One of the Society’s functions is to “ensure” that “all persons who practise law in Ontario or provide legal services in Ontario meet standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide” (*Law Society Act*, s. 4.1(a)).
- If a person applying for a licence meets the qualifications and other requirements in the *Law Society Act* and the by-laws, the Society “shall issue a licence” to the applicant (*Law Society Act*, s. 27(3)).
- The Society, through Convocation, may make by-laws prescribing “the qualifications and other requirements for the various classes of licence and governing applications for a licence” (*Law Society Act*, s. 62(0.1)4.1).
- Under By-Law 4, Licensing, Convocation has established that one of the requirements for a Class L1 licence (an unrestricted licence to practise as a barrister and solicitor in Ontario) is “[a] bachelor of laws or juris doctor degree from a law school in Canada that was, at the time the applicant graduated from the law school, an accredited law school” (By-Law 4, s. 9(1)1i).

¹³ *Id.*, pp. 15-18. There are apparently more than 50 religiously affiliated law schools in the U.S., most of which are ABA-approved schools. Some of these schools require students, faculty, and staff to comply with codes of conduct prohibiting same-sex sexual conduct.

¹⁴ *Id.*, pp. 18-19.

¹⁵ *Id.*, p. 19.

- An “accredited law school” is defined as “a law school in Canada that is accredited by the Society” (By-Law 4, s. 7).
- In deciding whether to “accredit” a law school for the purposes of s. 7 of By-Law 4, the Society has a statutory discretion that must be exercised in accordance with the *Law Society Act*. Section 4.2 of the Act provides that “[i]n carrying out its functions, duties and powers under this Act, the Society shall have regard to the following principles”:
 - “1. The Society has a duty to maintain and advance the cause of justice and the rule of law.
 2. The Society has a duty to act so as to facilitate access to justice for the people of Ontario.
 3. The Society has a duty to protect the public interest.
 4. The Society has a duty to act in a timely, open and efficient manner.
 5. Standards of learning, professional competence and professional conduct for licensees and restrictions on who may provide particular legal services should be proportionate to the significance of the regulatory objectives sought to be realized.”

Thus, in exercising its statutory discretion as to whether to accredit the TWU School of Law, the Society must have regard to the above five principles. The question you have asked is whether and, if so, how the *Charter* figures in this decision.

The Role of the *Charter* in the Society’s Accreditation Decision

(a) *Does the Charter apply?*

The *Charter* may apply to an organization such as the Society as part of the apparatus of government or as a delegate of statutory authority.¹⁶ Even though the Society is insufficiently linked to or controlled by government to be considered part of its apparatus (given the independence of the bar), the *Charter* applies to the Society when it exercises

¹⁶ *Charter*, s. 32; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038, pp. 1077-9; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, pp. 584-5; P. Hogg, *Constitutional Law of Canada* (5th ed., 2007), pp. 37-13 to 37-20.

its statutory discretion to set the requirements for licensing under the *Law Society Act*.¹⁷ The Society must in these instances reach a decision that is consistent with the *Charter*.

It follows that the Society must consider the *Charter* when exercising its statutory discretion under s. 7 of By-Law 4 as to whether to accredit the TWU School of Law. This conclusion is supported by the Supreme Court of Canada's recent decision in *Doré v. Barreau du Québec*.¹⁸ In *Doré*, the Court had to decide whether the Disciplinary Council of the Barreau du Québec had failed to respect a lawyer's freedom of expression under s. 2(b) of the *Charter* when it decided to reprimand him for writing an inflammatory letter to a judge after a court hearing. In addressing this issue, the Court took the opportunity to clarify "how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions."¹⁹

The Court held that administrative decision-makers must consider the *Charter* when they exercise discretion granted under statutory authority. The Court stated that "administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values."²⁰ The Court embraced what it called a "richer conception of administrative law, under which discretion is exercised 'in light of constitutional guarantees and the values they reflect'", such that "administrative decisions are *always* required to consider fundamental values." The Court stated that "administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise."²¹

The *Doré* decision is of course particularly apt because it involved an exercise of discretion by a provincial law society, namely, a disciplinary panel of the Barreau du Québec.

Thus, just as the Barreau in *Doré* had to consider *Charter* values in deciding whether to discipline a lawyer, the Society must consider *Charter* values in deciding whether to accredit TWU's proposed School of Law.

¹⁷ *Black v. Law Society of Alberta*, [1989] 1 S.C.R. 591. See also *Re Klein and Law Society of Upper Canada* (1985), 16 D.L.R. (4th) 489, pp. 528-529 (Ont. Div. Ct.); *Histed v. Law Society of Manitoba*, 2007 MBCA 150, ¶43, leave to appeal to S.C.C. refused [2008] S.C.C.A. No. 67; *Law Society of Manitoba v. Pollock*, 2007 MBQB 51, ¶40, aff'd 2008 MBCA 61.

¹⁸ *Doré v. Barreau du Québec*, [2012] 1 S.C.R. 395, Abella J. for the Court.

¹⁹ *Id.*, ¶3.

²⁰ *Id.*, ¶24.

²¹ *Id.*, ¶35, emphasis in original.

(b) *How does the Charter apply to a discretionary administrative decision?*

Doré also provides guidance on *how* the *Charter* applies when a decision-maker exercises discretion granted under statutory authority. The Court stated that, fundamentally, a statutory decision-maker must “balance[] the *Charter* values with the statutory objectives.”²² This involves a two-step process:

- At the first stage, “the decision-maker should first consider the statutory objectives.”²³
- At the second stage, “the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives.” This “requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.”²⁴

The Court explained that this decision-making process is fundamentally about ensuring “balance and proportionality.”²⁵ That is, the decision-maker must strike “an appropriate balance between rights and objectives” to ensure that “the rights at issue are not unreasonably limited.”²⁶ Put differently, the decision-maker must ensure that any decision “interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives.”²⁷

Applying this framework to the facts in *Doré*, the Court held that “the discipline committee’s decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with ‘objectivity, moderation and dignity’ with the lawyer’s expressive rights.”²⁸

(c) *How does the Charter apply to the Society’s accreditation decision?*

Doré indicates that the Society’s accreditation decision must begin with its statutory functions, which relate to setting standards of learning, professional competence, and

²² *Id.*, ¶55.

²³ *Id.*

²⁴ *Id.*, ¶56.

²⁵ *Id.*, ¶5.

²⁶ *Id.*, ¶6.

²⁷ *Id.*, ¶7.

²⁸ *Id.*, ¶8; see also ¶¶67, 71.

professional conduct pursuant to s. 4.1(a) of the *Law Society Act*, which in turn must be furthered having regard to the five principles set out in s. 4.2 of the Act. The Society must then ask what *Charter* values would be implicated by its accreditation decision, and balance any such *Charter* values in a proportional manner with the Society's statutory functions. It must ensure that its accreditation decision interferes with any relevant *Charter* values no more than is necessary given its statutory functions.

I understand that you are being advised separately on the range of statutory public interest factors that you may consider under s. 4.2 of the *Law Society Act* in deciding whether to accredit a law school. There will inevitably be overlap between these statutory factors and the relevant *Charter* values.

In the present context, the Society's accreditation decision is complicated by the fact that there are potentially competing *Charter* values pulling in opposite directions, some of which would appear to include the following:

- On the one hand, the decision to accredit TWU's proposed School of Law could involve giving the Society's *imprimatur* to the clause in TWU's Community Covenant that requires voluntary abstinence from: (1) same-sex sexual intimacy, which could be seen as discriminating against persons on the basis of sexual orientation; and (2) sexual intimacy between unmarried couples, which could be seen as discriminating on the basis of marital status. As prospective students must sign the Community Covenant annually as a condition of admission, TWU might be said to have institutionalized an exclusionary barrier for students whose sexual identities do not conform to the Covenant. In addition, those students who apply despite the abstinence clause face continuing disadvantage while attending TWU, as they are less free than others to express their sexual identities. This implicates the *Charter* value of equality, explicitly recognized in s. 15 of the *Charter*.
- On the other hand, the decision not to accredit TWU's proposed School of Law could involve the Society refusing to recognize the sincerely held religious beliefs of TWU's students, faculty, and staff, prohibiting them from associating with each other for the study of law in an educational community reflecting their religious beliefs, and discriminating against them on the basis of religion. This implicates the *Charter* values of freedom of religion, freedom of association, and equality, explicitly recognized in ss. 2(a), 2(d), and 15 of the *Charter*, respectively.

What process should the Society follow in addressing these potentially competing *Charter* values? The Supreme Court of Canada addressed this question in an analogous context in its 2001 decision in *Trinity Western University v. British Columbia College of*

Teachers.²⁹ It bears noting that while *Trinity Western* was decided in 2001, in 2012 the Supreme Court in *Doré* cited *Trinity Western* as an example of how the Court had “recently” reviewed whether an administrative decision-maker had taken “sufficient account of *Charter* values.”³⁰

In *Trinity Western*, the Supreme Court had to decide whether the British Columbia College of Teachers (the “BCCT”) had erred in refusing to certify TWU’s teacher education program in order for its graduates to qualify to teach in the public school system. At the time, TWU had an earlier version of its Community Standards Covenant, known then as the “Community Standards” document, which required students, faculty, and staff to refrain from “homosexual behaviour.”³¹ Based on this document, the BCCT concluded that approving TWU’s teacher education program would not be in the public interest because of TWU’s discriminatory practices.³²

The Supreme Court accepted that, in addressing TWU’s application, the BCCT had jurisdiction to consider any discriminatory practices of TWU.³³ It noted that while TWU’s Community Standards document would deter homosexual students from applying for admission, to find this document alone to be discriminatory would be inconsistent with the *Charter* guarantee of freedom of religion. As the Court explained: “To state that the voluntary adoption of a code of conduct based on a person’s own religious beliefs, in a private institution, is sufficient to engage s. 15 would be inconsistent with freedom of conscience and religion, which co-exist with the right to equality.”³⁴

The Court found that while the BCCT was entitled to consider the equality guarantee and the right to be free from discrimination on the basis of sexual orientation under both the *Charter* and B.C. human rights legislation, it also had to consider the freedom of religion and the right to be free from discrimination on the basis of religious belief.³⁵ The BCCT therefore had to consider that “British Columbia’s human rights legislation

²⁹ *Trinity Western University v. British Columbia College of Teachers*, [2001] 1 S.C.R. 772. Iacobucci and Bastarache JJ. jointly delivered reasons for the majority.

³⁰ *Doré*, above, note 18, ¶32.

³¹ *Trinity Western University*, above, note 29, ¶4.

³² *Id.*, ¶5.

³³ *Id.*, ¶14.

³⁴ *Id.*, ¶25.

³⁵ *Id.*, ¶¶27-28.

accommodates religious freedoms by allowing religious institutions to discriminate in their admissions policies on the basis of religion.”³⁶

The fundamental issue, the Court stated, was “how to reconcile the religious freedoms of individuals wishing to attend TWU with the equality concerns of students in B.C.’s public school system, concerns that may be shared with their parents and society generally.”³⁷ The Court stated that this reconciliation “should be resolved through the proper delineation of the rights and values involved”; that is, by defining the scope of the rights involved so as to avoid a conflict, because “[n]either freedom of religion nor the guarantee against discrimination based on sexual orientation is absolute.”³⁸ The Court stated that “the *Charter* must be read as a whole, so that one right is not privileged at the expense of another.”³⁹ “A hierarchical approach to rights [...] must be avoided.”⁴⁰

Given the need to avoid a hierarchical approach to rights, the Court stated that the BCCT was required to “weigh the various rights involved in its assessment of the alleged discriminatory practices of TWU” and to consider the impact of any decision refusing to certify TWU “on the right to freedom of religion of the members of TWU.”⁴¹ It acknowledged that while the Community Standards document “creates unfavourable differential treatment since it would probably prevent homosexual students and faculty from applying, one must consider the true nature of the undertaking and the context in which this occurs.”⁴² The Court found that the following contextual factors should have been weighed in the balance:

- The place of private institutions in our society, the fact that many Canadian universities have traditions of religious affiliations, and the fact that religious public education rights are enshrined in s. 93 of the *Constitution Act, 1867*.⁴³
- The B.C. *Human Rights Code* “specifically provides for exceptions [from the *Code*] in the case of religious institutions, and the [B.C.] legislature gave

³⁶ *Id.*, ¶28.

³⁷ *Id.*

³⁸ *Id.*, ¶29.

³⁹ *Id.*, ¶31.

⁴⁰ *Id.*, citing *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835, p. 877.

⁴¹ *Id.*, ¶33.

⁴² *Id.*, ¶34.

⁴³ *Id.*, ¶34.

recognition to TWU as an institution affiliated to a particular Church whose views were well known to it.”⁴⁴ The Court noted that “it can reasonably be inferred that the B.C. legislature did not consider that training with a Christian philosophy was in itself against the public interest since it passed five bills in favour of TWU between 1969 and 1985.”⁴⁵

- The decision of the BCCT to refuse to certify TWU “places a burden on members of a particular religious group and in effect, is preventing them from expressing freely their religious beliefs and associating to put them into practice.”⁴⁶
- The TWU Community Standards document is “not sufficient to support the conclusion that the BCCT should anticipate intolerant behaviour in the public schools.”⁴⁷ “[T]here is nothing in the TWU Community Standards that indicates that graduates of TWU will not treat homosexuals fairly and respectfully.” “[T]here is no evidence before this Court of discriminatory conduct by any graduate.”⁴⁸
- “Students attending TWU are free to adopt personal rules of conduct based on their religious beliefs provided they do not interfere with the rights of others. Their freedom of religion is not accommodated if the consequence of its exercise is the denial of the right of full participation in society. Clearly, the restriction on freedom of religion must be justified by evidence that the exercise of this freedom of religion will, in the circumstances of this case, have a detrimental impact on the school system.”⁴⁹

The Court concluded that “the proper place to draw the line in cases like the one at bar is generally between belief and conduct.” Thus, “[a]bsent concrete evidence that training teachers at TWU fosters discrimination in the public schools of B.C., the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected.”⁵⁰ The Court added that “[a]cting on those beliefs, however, is a very different matter.” It

⁴⁴ *Id.*, ¶32.

⁴⁵ *Id.*, ¶35.

⁴⁶ *Id.*, ¶32.

⁴⁷ *Id.*, ¶33.

⁴⁸ *Id.*, ¶35.

⁴⁹ *Id.*

⁵⁰ *Id.*, ¶36.

noted that a teacher who engages in discriminatory conduct would be disciplined by the BCCT.⁵¹ On this basis, the Court concluded that the BCCT should have accredited TWU's teacher training program.

The *Trinity Western* decision suggests that, in considering any potentially competing *Charter* values at the second stage of the *Doré* framework for exercising discretionary statutory authority, the Society may wish to ask the following questions:

- What are the relevant *Charter* values implicated by any decision to accredit or not to accredit the TWU's School of Law?
- Recognizing that no *Charter* right is absolute, is it possible to reconcile the religious freedom of individuals wishing to attend TWU with the equality concerns of others in the legal system, concerns that may be shared in society generally? Is it possible to define the scope of the rights involved so as to avoid a conflict?
- Is this a case, like the earlier *Trinity Western* case, where the proper place to draw the line is by distinguishing between belief and conduct? That is, that absent concrete evidence that training lawyers at TWU would foster discrimination in the legal profession, the freedom of individuals to adhere to certain religious beliefs while at TWU should be respected?

If the Society decides to adopt the Supreme Court's approach in *Trinity Western* to balancing the *Charter* values of equality and freedom of religion, the pivotal question it should ask is whether there is "concrete evidence" that accrediting the TWU School of Law would result in actual discrimination or a real risk of discrimination if TWU's graduates were to join the legal profession.

(d) *Does Trinity Western remain relevant to balancing the Charter values of equality and freedom of religion?*

While it will be for the Society to decide whether to accredit the TWU School of Law in the exercise of its statutory discretion under the *Law Society Act*, I would like to address two points bearing on whether the *Trinity Western* ruling continues to be relevant to the balancing of the *Charter* values of equality and freedom of religion.

First, it has been suggested that the *Trinity Western* decision is perhaps less relevant today to any accreditation decision of the Society because the legal context has changed since that case was decided in 2001. Two relevant changes to the legal context are said to

⁵¹ *Id.*, ¶37.

be the evolution of the Supreme Court’s standard of review jurisprudence, and the fact that, today, “decision makers are expected to be much more protective of gay and lesbian equality than were the decision makers of ten, fifteen, or twenty years ago.”⁵²

I do not view either development as affecting the framework for the legal analysis that the Society must apply. The evolution of the standard of review jurisprudence may affect the deference any reviewing court might give to the Society’s decision, but it would not affect the legal process that the Society must undertake in making its decision. That legal process has been set out definitively by the Supreme Court in *Doré*.

Moreover, while it is undoubtedly true that in the years since 2001 equality and anti-discrimination law has evolved, the premise of the Supreme Court’s analysis in *Trinity Western* remains unchanged: the need to avoid taking a hierarchical approach to rights and to achieve a balance that “fully respects the importance of both sets of rights.”⁵³ That approach is deeply entrenched in the Court’s *Charter* jurisprudence and continues to apply today.⁵⁴ It is not displaced merely because one fundamental right (equality) is now more robustly or more widely protected than it was before. The framework applied by the Court in *Trinity Western* presupposed that the Court was balancing two *fundamental* rights: equality and freedom of religion. As the Court emphasized, “the *Charter* must be read as a whole, so that one right is not privileged at the expense of another.”⁵⁵ That remains true today.

Second, one might ask whether the evidentiary standard established by the Supreme Court in *Trinity Western* has changed since that case was decided. The Court in *Trinity Western* required “concrete evidence” that training teachers at TWU would foster discrimination in schools.⁵⁶ By contrast, more recently in *Whatcott* the Supreme Court held that hate speech can be restricted even absent proof of actual harm if it gives rise to a “reasonable apprehension of harm.” The Court acknowledged that “[a] court is entitled to

⁵² See Elaine Craig, “The Case for the Federation of Law Societies Rejecting Trinity Western University’s Proposed Law Degree Program” (2013) 25 Canadian Journal of Women and the Law, pp. 148-170, at pp. 166-169.

⁵³ *Trinity Western University*, above, note 29, ¶31, citing *Dagenais*, above, note 40, p. 877.

⁵⁴ See, for example, *Saskatchewan (Human Rights Commission) v. Whatcott*, [2013] 1 S.C.R. 467, ¶161 (“When reconciling *Charter* rights and values, freedom of religion and the right to equality accorded all residents of Saskatchewan must co-exist”).

⁵⁵ *Trinity Western University*, above, note 29, ¶31.

⁵⁶ *Id.*, ¶36; see also ¶¶32, 35.

use common sense and experience in recognizing that certain activities, hate speech among them, inflict societal harms.”⁵⁷

The question thus arises as to whether *Whatcott* reduced the evidentiary standard articulated in *Trinity Western*. In my view, it did not. On closer examination, these formulations do not involve different standards. Even in *Trinity Western*, the Court distinguished between a mere “perception” of discrimination (which would not have been sufficient for the BCCT to deny accreditation) and “evidence of actual discrimination or *of a real risk of discrimination*.”⁵⁸ The Court stated that BCCT could have denied TWU accreditation only on the basis of “specific evidence”, which could have included “reports on student teachers, or opinions of school principals and superintendents” or “discipline files involving TWU graduates and other teachers affiliated with a Christian school of that nature.”⁵⁹ The Court highlighted that “[a]ny concerns should go to *risk*, not *general perceptions*.”⁶⁰ In other words, the Court seemed to find that a real risk of harm would suffice to find that the *Charter* values of freedom of religion and equality cannot be reconciled; however, to qualify as “real” such a risk must be based on more than “perceptions” or involve ascribing what the Court called “stereotypical attributes” to TWU graduates.⁶¹

As a result, in my view the Court’s framework in *Trinity Western* continues to be relevant to the question of how to reconcile the *Charter* values of equality and freedom of religion in the present context.

* * *

I hope this letter answers your question. Please let me know if you have any other questions.

Yours very truly,



Mahmud Jamal

⁵⁷ *Whatcott*, above, note 54, ¶132.

⁵⁸ *Trinity Western*, above, note 29, ¶19 (emphasis added).

⁵⁹ *Id.*, ¶38.

⁶⁰ *Id.* (emphasis added).

⁶¹ *Id.*, ¶19.